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THE
FEDERAL REPORTER.

VOLUME 104.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

NOVEMBER, 1900—JANUARY, 1901.

ST. PAUL:
WEST PUBLISHING CO.
1901.

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FEDERAL REPORTER, VOLUME 104.

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OF THE

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JUDGES OF THE COURTS.

vii

Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....	Little Rock, Ark.
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CASES REPORTED.

	Page		Page
Abbott v. City of Duluth (C. C.).....	833	Boston & A. R. Co. v. Parr (C. C. A.)....	695
Adams, In re (D. C.).....	72	Bowers v. Atlantic, G. & P. Co. (C. C.)...	887
Adams v. Shirk (C. C. A.).....	54	Bowers, Webster v. (C. C.).....	627
Adams, Atoka Coal & Mining Co. v. (C. C. A.).....	471	Boyce, Columbia Wire Co. v. (C. C. A.)....	172
Adams, North American Exploration Co. v. (C. C. A.).....	404	Bracken v. Milner, two cases (C. C.).....	522
Albrecht, In re (D. C.).....	974	Browne, In re (D. C.).....	762
Alexandra, The (D. C.).....	904	Brown v. Wood (C. C. A.).....	203
Allan B. Wrisley Co. v. Iowa Soap Co. (C. C.).....	548	Brown, Metallic Extraction Co. v. (C. C. A.)	345
Allen, Excelsior Wooden-Pipe Co. v. (C. C. A.).....	553	Bruning, Copeland v. (C. C.).....	163
American Loan & Trust Co. v. Louisville, E. & St. L. R. Co. (C. C. A.).....	1004	Bryant, In re (D. C.).....	789
American Palace-Car Co., Hutchinson v. (C. C.).....	182	Budge v. United Smelting & Refining Co. (C. C. A.).....	498
American Sugar Refining Co. v. City of New Orleans (C. C. A.).....	2	Buel v. Farmers' Loan & Trust Co. (C. C. A.).....	839
American Surety Co. of New York v. Ballman (C. C.).....	634	Buel, Steele v. (C. C. A.).....	968
Anaconda Copper-Min Co., Colusa Parrot Mining & Smelting Co. v. (C. C.).....	514	Burka, In re (D. C.).....	326
Anderson v. Munson (D. C.).....	913	California Fruit Cannerns' Ass'n v. Myer (C. C.).....	82
Arndt, In re (D. C.).....	234	Camden & S. R. Co. v. Stetson (C. C. A.)..	651
Arnold v. Shine (C. C. A.).....	1004	Camden & S. R. Co. v. Stetson (C. C. A.)..	1004
Atlantic, G. & P. Co., Bowers v. (C. C.)...	887	Campbell v. Houtain (C. C. A.).....	1004
Atlantic Trust Co., Iowa & I. Coal Co. v. (C. C. A.).....	1005	Campbell v. Stratton (C. C. A.).....	1004
Atlantic Trust Co., Whitebreast Fuel Co. v. (C. C. A.).....	1008	Carson v. Commercial Nat. Bank (C. C. A.)	733
Atoka Coal & Mining Co. v. Adams (C. C. A.).....	471	Cassidy, Balliet v. (C. C.).....	704
Auten v. City Electric St. R. Co. (C. C.)...	395	Celluloid Co., McCafferty v. (C. C. A.)....	305
Avery v. United States (C. C. A.).....	711	Central Trust Co. of New York v. Peoria, D. & E. R. Co. (C. C. A.).....	418
Badische Anilin & Soda Fabrik v. Kalle & Co. (C. C. A.).....	802	Central Trust Co. of New York v. Peoria D. & E. R. Co. (C. C. A.).....	420
Baker, In re (C. C. A.).....	287	Central Trust Co. of New York, Baldwin v. (C. C. A.).....	420
Baldwin v. Central Trust Co. of New York (C. C. A.).....	420	Central Trust Co. of New York, Chamberlin v. (C. C. A.).....	418
Balliet v. Cassidy (C. C.).....	704	Chamberlin v. Central Trust Co. of New York (C. C. A.).....	418
Ballman, American Surety Co. of New York v. (C. C.).....	634	Champlain Const. Co. v. O'Brien (C. C.)..	930
Barber v. Vlasto (D. C.).....	101	Chase v. United States (C. C. A.).....	1004
Barstow v. McClain (C. C.).....	299	Chase Nat. Bank, Gale v. (C. C. A.).....	214
Barth, West v. (C. C. A.).....	1007	Chicago, B. & Q. R. Co., McCarl v. (C. C.)	377
Battle Creek Steam-Pump Co., Union Steam-Pump Co. v. (C. C. A.).....	337	Chicago, B. & Q. R. Co., Walters v. (C. C.)	377
Beadleston v. United States (D. C.).....	295	Chicago Ins. Co., Gilchrist v. (C. C. A.)....	566
Bemis, In re (D. C.).....	672	Chicago-Joplin Lead & Zinc Co., In re (D. C.).....	67
Berwind v. Van Horne (C. C.).....	581	Chicago, M. & St. P. R. Co., Thompson v. (C. C.).....	845
B. F. Sturtevant Co., Volk v. (C. C. A.)...	276	Chicago, M. & St. P. R. Co., Whalen v. (C. C. A.).....	1008
Birkhead, The P. H. (C. C. A.).....	110	Chicago, R. I. & P. R. Co. v. Wood (C. C. A.).....	663
Black, In re (D. C.).....	289	Christensen Engineering Co., Westinghouse Air-Brake Co. v. (C. C. A.).....	622
Black River Nat. Bank, Security Trust Co. v. (C. C. A.).....	1006	Cincinnati, H. & D. R. Co. v. Thiebaud, two cases (C. C. A.).....	1004
Bogy, Daugherty v. (C. C. A.).....	938	Cincinnati, N. O. & T. P. R. Co., Interstate Commerce Commission v. (C. C. A.).....	1005
Boston Safe-Deposit & Trust Co. v. Western Union Tel. Co. (C. C.).....	580	City Electric St. R. Co., Auten v. (C. C.)..	395
		City of Duluth, Abbott v. (C. C.).....	833

	Page		Page
City of Duluth, State Trust Co. of New York v. (C. C.)	632	Farmers' Loan & Trust Co., Buel v. (C. C. A.)	839
City of Helena v. United States (C. C. A.)	113	Farrelly v. Wirt (C. C. A.)	1005
City of New Orleans, American Sugar Refining Co. v. (C. C. A.)	2	Felton v. Girardy (C. C. A.)	127
City of New York, D'Esterre v. (C. C. A.)	605	Felton v. Harbeson (C. C. A.)	737
City of Sioux City, Vickrey v. (C. C.)	164	Felton, Yarnell v. (D. C.)	161
Clapp v. Otoe County, Neb. (C. C. A.)	473	Fidelity & Casualty Co. of New York v. St. Matthews Sav. Bank (C. C. A.)	858
Clifford, United States v. (C. C.)	296	Filer & Stowell Co., Houston v. (C. C. A.)	163
Clintonia, The (D. C.)	92	Finlay, In re (D. C.)	675
Cohen v. Delavina (C. C.)	946	First Nat. Bank v. Wilder (C. C. A.)	187
Cohn, In re (D. C.)	328	Franks v. Robards Tobacco Co. (C. C. A.)	1005
Collector of Port of San Francisco, Wieland v. (C. C. A.)	541	French, Duvivier v. (C. C. A.)	278
Colton, Raymond v. (C. C. A.)	219	Friesland, The (D. C.)	99
Columbia, The (D. C.)	105	Fuller v. Huff (C. C. A.)	141
Columbia Wire Co. v. Boyce (C. C. A.)	172	Fuller, Hoyt v. (C. C. A.)	192
Colusa Parrot Mining & Smelting Co. v. Anaconda Copper-Min. Co. (C. C.)	514	Gale v. Chase Nat. Bank (C. C. A.)	214
Commercial Nat. Bank, Carson v. (C. C. A.)	733	Gasser, In re (C. C. A.)	537
Commission to Five Civilized Tribes, Kimberlin v. (C. C. A.)	653	General Marine Ins. Co. of Dresden, Neall v. (D. C.)	92
Copeland v. Bruning (C. C.)	169	Gilchrist v. Chicago Ins. Co. (C. C. A.)	566
Corbett, In re (D. C.)	872	Gillette, In re (D. C.)	769
Cosmopolitan Incandescent Light Co., Welsbach Light Co. v. (C. C. A.)	83	Girardy, Felton v. (C. C. A.)	127
Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C.)	20	Good Shot v. United States (C. C. A.)	257
Courier Lithographing Co. v. Donaldson Lithographing Co. (C. C. A.)	993	Goodwin, Logan v. (C. C. A.)	490
Crawford v. Hubbell (C. C. A.)	1004	Gorham Mfg. Co. v. Emery-Bird-Thayer Dry-Goods Co. (C. C. A.)	243
Crosby, Ide v. (C. C.)	582	Graves v. Saline County, Ill. (C. C. A.)	61
Damon, In re (D. C.)	775	Gray Eagle Oil Co., Cosmos Exploration Co. v. (C. C.)	20
Daugherty v. Bogy (C. C. A.)	938	Grayson, Mootry v. (C. C. A.)	613
Davis v. Stevens (D. C.)	235	Great Northern R. Co. v. Kasischke (C. C. A.)	440
Davis v. United States, two cases (C. C. A.)	136	Greene, Sigua Iron Co. v. (C. C. A.)	854
Delavina, Cohen v. (C. C.)	946	Gregory, In re (C. C. A.)	1005
Delta & Pine-Land Co., Guarantee Trust & Safe-Deposit Co. v. (C. C. A.)	5	Guarantee Co. of North Dakota v. Hanway (C. C. A.)	369
Dempsey, United States v. (C. C.)	197	Guarantee Trust & Safe-Deposit Co. v. Delta & Pine-Land Co. (C. C. A.)	5
Denison & N. R. Co. v. Ranney-Alton Mercantile Co. (C. C. A.)	595	Hagge v. Kansas City S. R. Co. (C. C.)	391
Dent, Security Trust Co. v. (C. C. A.)	380	Hagop Bogigian Co., In re (C. C.)	75
Dessauer v. Ulfelder (C. C. A.)	1005	Hale v. Tyler (C. C.)	757
D'Esterre v. City of New York (C. C. A.)	605	Haley v. Kilpatrick (C. C. A.)	647
Doe v. Springfield Boiler & Mfg. Co. (C. C. A.)	684	Hamilton County, Ill., Zane v. (C. C. A.)	63
Donaldson Lithographing Co., Courier Lithographing Co. v. (C. C. A.)	993	Hammon v. Nix (C. C. A.)	689
Donnelly Contracting Co., Eirich v. (C. C.)	1	Hammond, United States v. (C. C. A.)	862
Doyle v. Perfect Cigar-Shaper Co. (C. C. A.)	997	Hanway, Guarantee Co. of North Dakota v. (C. C. A.)	369
Durham, In re (D. C.)	231	Harbeson, Felton v. (C. C. A.)	737
Duvivier v. French (C. C. A.)	278	Harder & Hafer Coal Min. Co. of Sullivan County, Ind., v. Schmidt (C. C. A.)	282
East Side R. Co., Maxwell v. (C. C. A.)	409	Haydel v. Mutual Reserve Fund Life Ass'n (C. C. A.)	718
East Side R. Co., Morris & Whitehead v. (C. C. A.)	409	Hebbart, In re (D. C.)	322
Eirich v. Donnelly Contracting Co. (C. C.)	1	Helmer, Lohmann v. (C. C.)	178
Electric Vehicle Co. v. Winton Motor-Carriage Co. (C. C.)	814	Heyman, In re (D. C.)	677
Ellsworth v. Metheny (C. C. A.)	119	Hibbard, Sanger v. (C. C. A.)	455
Elwood Oil Co., Pacific Land & Improvement Co. v. (C. C.)	20	Hicks v. Knost, two cases (C. C. A.)	1005
Emery-Bird-Thayer Dry-Goods Co., Gorham Mfg. Co. v. (C. C. A.)	243	Hilborn, In re (D. C.)	866
Excelsior Wooden-Pipe Co. v. Allen (C. C. A.)	553	Hill v. Northern Pac. R. Co. (C. C.)	754
Falter v. Reinhard (D. C.)	292	Hillside Coal & Iron Co., Plummer v. (C. C. A.)	208
		Hilt, In re (C. C.)	336
		Hilton, In re (D. C.)	981
		Hindman, In re (C. C. A.)	331
		Hirschman, In re (D. C.)	69
		Hodges v. Kimball (C. C. A.)	745
		Hoffmann, William Mann Co. v. (C. C. A.)	245

	Page		Page
Holmes, United States v. (C. C.).....	884	Lockwood, In re (D. C.).....	794
Holt, Ingersoll v. (C. C.).....	682	Logan v. Goodwin (C. C. A.).....	490
Houghteling, Walker v. (C. C. A.).....	513	Lohmann v. Helmer (C. C.).....	178
Houston v. Filer & Stowell Co. (C. C. A.)..	163	Longfellow, The (C. C. C.).....	360
Houtain, Campbell v. (C. C. A.).....	1004	Lord v. Lehigh Val. R. Co. (C. C.).....	929
Hoyt v. Fuller (C. C. A.).....	192	Louisville, E. & St. L. R. Co., American	
Hubbell, Crawford v. (C. C. A.).....	1004	Loan & Trust Co. v. (C. C. A.).....	1004
Huff, Fuller v. (C. C. A.).....	141	Louisville, E. & St. L. R. Co., Louisville	
Hughes County, S. D., v. Livingston (C. C.		Trust Co. v. (C. C. A.).....	1006
A.).....	306	Louisville, E. & St. L. R. Co., New York	
Hunt v. Kile (C. C. A.).....	717	Security & Trust Co. v. (C. C. A.).....	1006
Hutchinson v. American Palace-Car Co. (C.		Louisville Trust Co. v. Louisville, E. & St.	
C.).....	182	L. R. Co. (C. C. A.).....	1006
Hynes, Shapard v. (C. C. A.).....	449	Louisville & N. R. Co. v. Miller (C. C. A.)..	124
		Lum Tow, In re (D. C.).....	678
Ide v. Crosby (C. C.).....	582	McAndrews, King v. (C. C.).....	430
Illinois Cent. R. Co., Tutt v. (C. C. A.)..	741	McBride, Southwestern Coal & Improve-	
Illinois Transfer R. Co., New York Security		ment Co. v. (C. C. A.).....	1007
& Trust Co. v. (C. C. A.).....	710	McCafferty v. Celluloid Co. (C. C. A.).....	305
Ingersoll v. Holt (C. C.).....	682	McCarl v. Chicago, B. & Q. R. Co. (C. C.)..	377
Interstate Commerce Commission v. Cincin-		McClain, Barstow v. (C. C.).....	299
nati, N. O. & T. P. R. Co. (C. C. A.).....	1005	McCoy, United States v. (C. C. A.).....	669
Iowa Soap Co., Allan B. Wrisley Co. v. (C		McGillivray, Minneapolis Brewing Co. v.	
C.).....	548	(C. C.).....	258
Iowa & Illinois Coal Co. v. Atlantic Trust		McGregor v. Vermont Loan & Trust Co. (C.	
Co. (C. C. A.).....	1005	C. A.).....	709
Iselin, In re (C. C. A.).....	1006	McNear, Leblond v. (D. C.).....	826
Jacobi, Ex parte (C. C.).....	681	Malin, Peters v. (C. C.).....	849
Jarman, Knights Templars' & Masons' Life		Manitoba, The, Putnam v., two cases (D.	
Indemnity Co. v. (C. C. A.).....	638	C.).....	145
J. D. Spreckels & Bros. Co., In re (C. C.)..	879	Mann, Tillitt v. (C. C. A.).....	421
Johnson v. Munday (C. C. A.).....	594	Mann Co. v. Hoffmann (C. C. A.).....	245
Johnson v. Trust Co. of America (C. C. A.)	174	Manufacturers' & Merchants' Ins. Co. of	
Jones Special Mach. Co. v. Pentucket Vari-		Pittsburg, Pa., Pellet v. (C. C. A.).....	502
able Stitch Sewing-Mach. Co. (C. C. A.)..	556	Marcus, In re (D. C.).....	331
Jutte & Foley Co., Kelly v. (C. C. A.)....	955	Maxwell v. East Side R. Co. (C. C. A.)....	409
Kalle & Co., Badische Anilin & Soda Fabrik		Merchants' & Miners' Transp. Co., Ross v.	
v. (C. C. A.).....	802	(C. C. A.).....	302
Kansas City S. R. Co., Hagge v. (C. C.)..	391	Mermaid, The (D. C.).....	301
Kasische, Great Northern R. Co. v. (C. C.		Metallic Extraction Co. v. Brown (C. C. A.)	
A.).....	440	345	
Kaufmann, In re (D. C.).....	768	Metheney, Ellsworth v. (C. C. A.).....	119
Kelly v. Jutte & Foley Co. (C. C. A.).....	955	Miller, In re (D. C.).....	764
Keyes v. United Indurated Fibre Co. (C.		Miller, Louisville & N. R. Co. v. (C. C. A.)..	124
C. A.).....	1006	Milner, Bracken v., two cases (C. C.).....	522
Kile, Hunt v. (C. C. A.).....	717	Miner, In re (D. C.).....	520
Kilpatrick, Haley v. (C. C. A.).....	647	Minneapolis Brewing Co. v. McGillivray	
Kimball, Hodges v. (C. C. A.).....	745	(C. C.).....	258
Kimberlin v. Commission to Five Civilized		Missouri, K. & T. R. Co. v. Truskett (C. C.	
Tribes (C. C. A.).....	653	A.).....	728
King v. McAndrews (C. C.).....	430	Missouri, K. & T. R. Co., Stevens v.	
Knights Templars' & Masons' Life Indem-		(C. C.).....	934
nity Co. v. Jarman (C. C. A.).....	638	Montana Min. Co., St. Louis Min. & Mill.	
Knot, Hicks v., two cases (C. C. A.)....	1005	Co. of Montana v. (C. C. A.).....	664
La Bourgogne (D. C.).....	823	Moore, In re (D. C.).....	869
Leblond v. McNear (D. C.).....	826	Moore, Ruckgaber v. (C. C.).....	947
Lee Ping, In re (D. C.).....	678	Moore, United States v. (D. C.).....	78
Lehigh Val. R. Co., Lord v. (C. C.).....	929	Mootry v. Grayson (C. C. A.).....	613
Lewensohn, In re (C. C. A.).....	1006	Morris & Whitehead v. East Side R. Co.	
Linton v. National Life Ins. Co. of Vermont		(C. C. A.).....	409
(C. C. A.).....	584	Munday, Johnson v. (C. C. A.).....	594
Little v. United States (C. C.).....	540	Munson, Anderson v. (D. C.).....	913
Littlefield v. United States (C. C. A.)....	1006	Mutual Reserve Fund Life Ass'n, Haydel v.	
Livingston, Hughes County, S. D., v. (C. C.		(C. C. A.).....	718
A.).....	306	Myer, California Fruit Cannery Ass'n v.	
Livingstone, The (D. C.).....	918	(C. C.).....	82
Lochbaum v. Oregon Ry. & Nav. Co. (C.		Naranja, The (D. C.).....	160
C. A.).....	852	National Chemical & Fertilizer Co. v.	
Locks, In re (D. C.).....	783	Swift & Co. (C. C. A.).....	87
		National Folding Box & Paper Co. v. Rob-	
		ertson (C. C. A.).....	552

	Page		Page
National Life Ins. Co. of Vermont, Linton v. (C. C. A.)	584	Plummer v. Hillside Coal & Iron Co. (C. C. A.)	208
National Rivet & Novelty Co., Ramsdell v. (C. C.)	16	Polk, Western Assur. Co. of Toronto v. (C. C. A.)	649
Neall v. General Marine Ins. Co. of Dresden (D. C.)	92	Postal Tel. Cable Co. of Idaho v. Oregon Short Line R. Co. (C. C.)	623
Nederland Life Ins. Co., Travis v. (C. C. A.)	486	Putnam v. The Manitoba, two cases (D. C.)	145
New York, The (C. C. A.)	561		
New York Security & Trust Co. v. Illinois Transfer R. Co. (C. C. A.)	710	Ramsdell v. National Rivet & Novelty Co. (C. C.)	16
New York Security & Trust Co. v. Louisville, E. & St. L. R. Co. (C. C. A.)	1006	Randall, Ross-Moyer Mfg. Co. v. (C. C. A.)	355
Nix, Hammon v. (C. C. A.)	689	Ranney-Alton Mercantile Co., Denison & N. R. Co. v. (C. C. A.)	595
North American Exploration Co. v. Adams (C. C. A.)	404	Raymond v. Colton (C. C. A.)	219
North American Transportation & Trading Co. v. Smith (C. C. A.)	1006	Reinhard, Falter v. (D. C.)	292
North Carolina Corp. Commission, Southern R. Co. v. (C. C.)	700	Richard, In re (D. C.)	792
Northern Pac. R. Co. v. Soderberg (C. C. A.)	425	Richardson v. Woodward (C. C. A.)	873
Northern Pac. R. Co. v. United States (C. C. A.)	691	Riley, United States v. (D. C.)	275
Northern Pac. R. Co., Hill v. (C. C.)	754	Ripon Knitting Co., Schreiber v. (C. C. A.)	1006
Northern Pac. R. Co., Thompson v. (C. C. A.)	501	Robards Tobacco Co., Franks v. (C. C. A.)	1005
Nugent, Wayne Knitting Mills v. (D. C.)	530	Roberts v. Pacific & A. R. & Nav. Co. (C. C.)	577
Nye v. Western Union Tel. Co. (C. C.)	628	Robertson, National Folding Box & Paper Co. v. (C. C. A.)	552
		Rodgers, Pitt v. (C. C. A.)	387
Oades v. Prohl (D. C.)	998	Rollins, Syracuse Tp., Hamilton County, Kan. v. (C. C. A.)	958
O'Brien, Champlain Const. Co. v. (C. C.)	930	Ross v. Merchants' & Miners' Transp. Co. (C. C. A.)	302
Olson v. Oregon Coal & Navigation Co. (C. C. A.)	574	Ross-Moyer Mfg. Co. v. Randall (C. C. A.)	355
One Steel Lighter, Pettit v. (D. C.)	1002	Ruckgaber v. Moore (C. C.)	947
Oregon Coal & Navigation Co., Olson v. (C. C. A.)	574		
Oregon Ry. & Nav. Co., Lochbaum v. (C. C. A.)	852	St. Georg, The (C. C. A.)	898
Oregon Short Line R. Co., Postal Tel. Cable Co. of Idaho v. (C. C.)	623	St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co. (C. C. A.)	664
Oriental Society, In re (D. C.)	975	St. Louis Pulverizer Co., Williams Patent Crusher & Pulverizer Co. v. (C. C.)	795
Osborn, In re (D. C.)	780	St. Louis & S. F. R. Co., Whittle v. (C. C.)	286
Otoe County, Neb., Clapp v. (C. C. A.)	473	St. Matthews Sav. Bank, Fidelity & Casualty Co. of New York v. (C. C. A.)	858
		Saline County, Ill., Graves v. (C. C. A.)	61
Pacific Land & Improvement Co. v. Elwood Oil Co. (C. C.)	20	Salla v. United States (C. C. A.)	544
Pacific & A. R. & Nav. Co., Roberts v. (C. C.)	577	Salt Lake City v. Smith (C. C. A.)	457
Park Steel Co., Staver Carriage Co. v. (C. C. A.)	200	San Diego Flume Co. v. Souther (C. C. A.)	706
Parr, Boston & A. R. Co. v. (C. C. A.)	695	Saner v. Hibbard (C. C. A.)	455
Paul Book Co., In re (D. C.)	786	Savage v. Worsham, two cases (C. C.)	18
Pellet v. Manufacturers' & Merchants' Ins. Co. of Pittsburg, Pa. (C. C. A.)	502	Schaefer, In re (D. C.)	973
Pentucket Variable Stitch Sewing-Mach. Co., Jones Special Mach. Co. v. (C. C. A.)	556	Scheld, In re (C. C. A.)	870
Peoria, D. & E. R. Co., Central Trust Co. of New York v. (C. C. A.)	418	Schloerb, White v. (C. C. A.)	1008
Peoria, D. & E. R. Co., Central Trust Co. of New York v. (C. C. A.)	420	Schmechel Cloak & Suit Co., In re (D. C.)	64
Perfect Cigar-Shaper Co., Doyle v. (C. C. A.)	997	Schmidt v. West (C. C.)	272
Peter Paul Book Co., In re (D. C.)	786	Schmidt, Harder & Hafer Coal Min. Co. of Sullivan County, Ind., v. (C. C. A.)	282
Peters v. Malin (C. C.)	849	Schreiber v. Ripon Knitting Co. (C. C. A.)	1006
Peters, Small v. (C. C.)	401	Security Trust Co. v. Black River Nat. Bank (C. C. A.)	1006
Pettit v. One Steel Lighter (D. C.)	1002	Security Trust Co. v. Dent (C. C. A.)	380
Prohl, Oades v. (D. C.)	998	Shaffer, In re (D. C.)	982
P. H. Birkhead, The (C. C. A.)	110	Shapard v. Hynes (C. C. A.)	449
Phoenix Mills Co., In re (D. C.)	762	Shine, Arnold v. (C. C. A.)	1004
Pitt v. Rodgers (C. C. A.)	387	Shirk, Adams v. (C. C. A.)	54
Plotke, In re (C. C. A.)	964	Shweitzer, In re (C. C. A.)	1007
		Signa Iron Co. v. Greene (C. C. A.)	854
		Small v. Peters (C. C.)	401
		Smith v. Wells, Fargo & Co. (C. C. A.)	1007
		Smith, North American Transportation & Trading Co. v. (C. C. A.)	1006
		Smith, Salt Lake City v. (C. C. A.)	457
		Smoke, In re (D. C.)	289
		Soderberg, Northern Pac. R. Co. v. (C. C. A.)	425

	Page		Page
Souther, San Diego Flume Co. v. (C. C. A.)	706	United States, Davis v., two cases (C. C. A.)	136
Southern R. Co. v. North Carolina Corp. Commission (C. C.)	700	United States, Good Shot v. (C. C. A.)	257
Southwark, The (D. C.)	103	United States, Little v. (C. C.)	540
Southwestern Coal & Improvement Co. v. McBride (C. C. A.)	1007	United States, Littlefield v. (C. C. A.)	1006
Spooner, In re (C. C.)	334	United States, Northern Pac. R. Co. v. (C. C. A.)	691
Spreckels & Bros. Co., In re (C. C.)	879	United States, Salla v. (C. C. A.)	544
Springfield Boiler & Mfg. Co., Doe v. (C. C. A.)	684	United States, Stubbs v. (C. C. A.)	988
State Trust Co. of New York v. City of Duluth (C. C.)	632	United States, Wagner v. (C. C. A.)	133
Staver Carriage Co. v. Park Steel Co. (C. C. A.)	200	United States, Williams v. (C. C.)	50
Steele v. Buel (C. C. A.)	968	United States Trust Co. v. Village of Mineral Ridge (C. C. A.)	851
Stetson, Camden & S. R. Co. v. (C. C. A.)	651	Van Horne, Berwind v. (C. C.)	581
Stetson, Camden & S. R. Co. v. (C. C. A.)	1004	Vermont Loan & Trust Co., McGregor v. (C. C. A.)	709
Steuer, In re (D. C.)	976	Vickrey v. City of Sioux City (C. C.)	164
Stevens, In re (D. C.)	323	Village of Mineral Ridge, United States Trust Co. v. (C. C. A.)	851
Stevens, In re (D. C.)	325	Vlasto v. Barber (D. C.)	101
Stevens v. Missouri, K. & T. R. Co. (C. C.)	934	Volk v. B. F. Sturtevant Co. (C. C. A.)	276
Stevens, Davis v. (D. C.)	235	Wagner v. United States (C. C. A.)	133
Stimpson Co., Stimpson Computing Scale Co. v. (C. C. A.)	893	Walker v. Houghteling (C. C. A.)	513
Stimpson Computing Scale Co. v. W. F. Stimpson Co. (C. C. A.)	893	Walker Co., Thomson-Houston Electric Co. v. (C. C.)	816
Stratton, Campbell v. (C. C. A.)	1004	Walsh, In re (D. C.)	518
Stubbs v. United States (C. C. A.)	988	Walters v. Chicago, B. & Q. R. Co. (C. C.)	377
Sturtevant Co., Volk v. (C. C. A.)	276	Ward, In re (D. C.)	985
Swift & Co., National Chemical & Fertilizer Co. v. (C. C. A.)	87	Wayne Knitting Mills v. Nugent (D. C.)	530
Syracuse Tp., Hamilton County, Kan., v. Rollins (C. C. A.)	958	Webster v. Bowers (C. C.)	627
Teslow, In re (D. C.)	229	Wells, Fargo & Co., Smith v. (C. C. A.)	1007
Thiebaud, Cincinnati, H. & D. R. Co. v., two cases (C. C. A.)	1004	Welsbach Light Co. v. Cosmopolitan Incandescent Light Co. (C. C. A.)	83
Thompson v. Chicago, M. & St. P. R. Co. (C. C.)	845	West v. Barth (C. C. A.)	1007
Thompson v. Northern Pac. R. Co. (C. C. A.)	501	West, Schmidt v. (C. C.)	272
Thomson-Houston Electric Co. v. Walker Co. (C. C.)	816	Western Assur. Co. of Toronto v. Polk (C. C. A.)	649
Tillitt v. Mann (C. C. A.)	421	Western Union Tel. Co. v. Boston Safe-Deposit & Trust Co. (C. C.)	580
Travis v. Nederland Life Ins. Co. (C. C. A.)	486	Western Union Tel. Co., Nye v. (C. C.)	628
Troth, In re (D. C.)	291	Westinghouse Air-Brake Co. v. Christensen Engineering Co. (C. C. A.)	622
Truskett, Missouri, K. & T. R. Co. v. (C. C. A.)	728	W. F. Stimpson Co., Stimpson Computing Scale Co. v. (C. C. A.)	893
Trust Co. of America, Johnson v. (C. C. A.)	174	Whalen v. Chicago, M. & St. P. R. Co. (C. C. A.)	1008
Tutt v. Illinois Cent. R. Co. (C. C. A.)	741	White v. Schloerb (C. C. A.)	1008
Tyler, In re (D. C.)	778	Whitebreast Fuel Co. v. Atlantic Trust Co. (C. C. A.)	1008
Tyler, Hale v. (C. C.)	757	Whittle v. St. Louis & S. F. R. Co. (C. C.)	286
Ulfelder, Dessauer v. (C. C. A.)	1005	Wieland v. Collector of Port of San Francisco (C. C. A.)	541
Union Steam-Pump Co. v. Battle Creek Steam-Pump Co. (C. C. A.)	337	Wilder, First Nat. Bank v. (C. C. A.)	187
United Indurated Fibre Co., Keyes v. (C. C. A.)	1006	William Mann Co. v. Hoffmann (C. C. A.)	245
United Smelting & Refining Co., Budge v. (C. C. A.)	498	Williams v. United States (C. C.)	50
United States v. Clifford (C. C.)	296	Williams Patent Crusher & Pulverizer Co. v. St. Louis Pulverizer Co. (C. C.)	795
United States v. Dempsey (C. C.)	197	Winton Motor-Carriage Co., Electric Vehicle Co. v. (C. C.)	814
United States v. Hammond (C. C. A.)	862	Wirt, Farrelly v. (C. C. A.)	1005
United States v. Holmes (C. C.)	884	Wood v. Brown (C. C. A.)	203
United States v. McCoy (C. C. A.)	669	Wood, Chicago, R. I. & P. R. Co. v. (C. C. A.)	663
United States v. Moore (D. C.)	78	Woodward, Richardson v. (C. C. A.)	873
United States v. Riley (D. C.)	275	Worsham, Savage v., two cases (C. C.)	18
United States, Avery v. (C. C. A.)	711	Wrisley Co. v. Iowa Soap Co. (C. C.)	548
United States, Beadleston v. (D. C.)	295	Yarnell v. Felton (C. C.)	161
United States, Chase v. (C. C. A.)	1004	Zane v. Hamilton County, Ill. (C. C. A.)	63
United States, City of Helena v. (C. C. A.)	113		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

EIRICH v. DONNELLY CONTRACTING CO.

(Circuit Court, N. D. Ohio, E. D. October 5, 1900.)

No. 5,951.

**JURISDICTION OF FEDERAL COURTS—DISTRICT IN WHICH SUIT MUST BE BROUGHT
—CORPORATIONS.**

A corporation of New York having its office in Buffalo, which does not maintain, and has never maintained, any office or place of business in the state of Ohio, is not "found" in that district, within the meaning of the federal statutes, so as to be subject to suit there, merely because one of its officers is temporarily in Ohio, superintending work being done by the corporation in a harbor, under a contract with the United States; and service of process upon such officer confers no jurisdiction on the courts of the state or district over the corporation.¹

On Motion to Quash and Set Aside the Service of Summons.

Smith & Blake, for plaintiff.

Hoyt, Dustin & Kelley, for defendant.

RICKS, District Judge. Plaintiff sues the defendant for injuries inflicted upon the plaintiff's decedent while engaged in the building of a breakwater in the harbor of Cleveland. A service, which, it is alleged, is defective, was made upon the defendant company by the sheriff of Cuyahoga county. In due time a petition for removal, with bond, was filed in the court of common pleas for Cuyahoga county, and the case was removed to this court. The defendant now comes with a motion to set aside the service of process, both on the ground that the proper officer of the defendant company was not served, and that the defendant company was not liable to be sued in this county. The most important question to determine is whether the defendant corporation was amenable to process of the courts of Cuyahoga county, because, if it was, the defendant might be reached by alias summons, or by proper proceedings looking to the correction of an im-

¹ Jurisdiction over corporations, *St. Louis, I. M. & S. Ry. Co. v. Newcom*, 6 C. C. A. 174.

proper return by the sheriff of the county. Counsel for both parties have filed briefs. In the view I take of the case, it is not necessary to review all of the authorities cited. It appears from the pleadings and affidavits filed that the defendant corporation has its principal office and place of doing business in the city of Buffalo, in the state of New York. It appears positively from the sworn testimony of Mr. Skinner, upon whom it is claimed process was served in this county, that the defendant corporation has no office in the state of Ohio, was not doing business in the state of Ohio at the time of the alleged service, had not been amenable to such service before the time stated, and that he was here temporarily to look after the work being done on the breakwater. He came solely for that purpose, and for no other. He admits that, temporarily, he had a room at the American House, where he lodged; but he declares in his affidavit that he was sent here, not to seek any other business in the state of Ohio, and not to make his corporation a citizen of Ohio, but solely for the purpose of temporarily supervising the work on the breakwater. He alleges further, in his affidavit, that his company does a large business under contracts made with the government of the United States; that this work is done in many of the states of the Union, but the only place in which they have an office, within the meaning of the statute, is in the city of Buffalo, as aforesaid. I am of the opinion, from the facts briefly stated, and from the affidavits filed, that the defendant corporation was not "found" in the Northern district of Ohio, within the meaning of the several acts of congress.

Counsel for the plaintiff insists that it would be a great hardship upon him to be compelled to follow the defendant to the state in which its office and place of business are situated, and there bring suit to recover damages; but the defendant has rights which the court must also consider. It has the right to be sued in the county and state where it lives and does business, or where it is "found," within the meaning of the acts of congress. As before stated, the defendant not being a citizen of Ohio, it is not amenable to process in this county, and is, therefore, entitled to be protected from the burden of defending a suit in a court without jurisdiction. The motion to quash and set aside the service of summons is therefore sustained.

AMERICAN SUGAR REFINING CO. v. CITY OF NEW ORLEANS.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1900.)

No. 920.

CIRCUIT COURTS OF APPEALS—JURISDICTION—CASES INVOLVING FEDERAL QUESTION.

Where the controlling question in a case involves the construction and application of the constitution of the United States, the circuit court of appeals should decline to take jurisdiction, although the question was not raised by the plaintiff's pleading, and the jurisdiction of the circuit court was not dependent upon it.

McCormick, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Charles Carroll and J. W. Carroll, for plaintiff in error.

Samuel L. Gilmore and C. H. La Villebeuvre, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This cause, as presented and decided in the circuit court, is one in which the constitution and laws of the state of Louisiana are claimed to be in contravention of the constitution of the United States; and therefore, by the fifth section of the act of March 3, 1891 (26 Stat. 826), jurisdiction is conferred upon the supreme court to review by direct appeal the final judgment of the circuit court therein rendered. *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. As presented on this writ of error, the controlling question involves the construction and application of the constitution of the United States, and we are of opinion that we should dismiss this writ of error on the authority of *Carter v. Roberts*, 20 Sup. Ct. 713, *Adv. S. U. S.* 713, 44 L. Ed. 861, and *Railroad Co. v. Thiebaud*, 20 Sup. Ct. 822, *Adv. S. U. S.* 822, 44 L. Ed. 911 (both recently decided by the supreme court of the United States), and *City of Macon v. Georgia Packing Co.*, 60 Fed. 781, 9 C. C. A. 262, *Railroad Co. v. Adams*, 93 Fed. 852, 35 C. C. A. 635, and *City of Dawson v. Columbia Avenue Saving Fund, Safe-Deposit, Title & Trust Co.* (heretofore decided in this court) 42 C. C. A. 258, 102 Fed. 200. The writ of error herein is dismissed, with costs, but without prejudice to any right the parties may have to sue out a writ of error from the supreme court of the United States.

McCORMICK, Circuit Judge (dissenting). The city of New Orleans, through its treasurer, proceeded in the civil district court of the parish of Orleans to recover of the American Sugar Refining Company the sum of \$6,250 claimed to be due for license for conducting the business of refining sugar in the city of New Orleans for the year 1899. The case was, on petition of the defendant company (the plaintiff in error), removed from the state court to the United States circuit court. The original proceeding in the state court was instituted by rule, as authorized by law; but on motion to reform pleading in the United States circuit court the city withdrew its application for an injunction and its claim for a lien, and filed on the law side of the court an ordinary petition for a moneyed demand. The petition for removal from the state court to the United States court recites that the controversy is between citizens of different states; that the American Sugar Refining Company, at the time of the commencement of the suit, was, and still is, a citizen of the state of New Jersey, and that the plaintiff, the city of New Orleans, was then, and still is, a citizen of the state of Louisiana. In the state court the plaintiff's pleading raised no federal question, and the defendant therein was compelled to ground its motion for removal on the diverse citizenship of the parties. On that ground the circuit court took jurisdiction. In that court the de-

fendant, by its pleadings, presented the federal questions involved in the case, of which the court then acquired jurisdiction. There were other issues involved. There may have been no dispute or real question in reference to these other issues. The circuit court gave judgment for the city of New Orleans, and the American Sugar Refining Company sued out this writ of error.

With the utmost deference to the opinion of the majority of the court, I submit that this case is not within the authority of *City of Macon v. Georgia Packing Co.*, 60 Fed. 781, 9 C. C. A. 262, in which case this court said:

"As the parties are all citizens of the same state and district, the jurisdiction of the court below rests entirely upon the case as one arising under the constitution of the United States."

For the same reason it appears to me that the instant case is not within the authority of *Railroad Co. v. Adams*, 93 Fed. 852, 35 C. C. A. 635, in which cases it is said:

"In one of these cases—the last one stated—the jurisdiction of the circuit court is dependent alone on the sufficiency of the bill in presenting these federal constitutional questions; and, if the court arranges the parties in the other two cases according to their respective interests, they would probably also be dependent on the subject-matter of the suits for jurisdictional averments."

In *Carter v. Roberts*, 20 Sup. Ct. 713, Adv. S. U. S. 713, 44 L. Ed. 861, it was held that in all of the cases which are controlled by the construction or application of the constitution of the United States a direct appeal lies to the supreme court, and that, if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction; or, where such construction or application is involved, they may certify the constitutional question, and afterwards proceed to judgment, or may decide the whole case in the first instance. The plaintiff in the circuit court did not rest its right to recover on any construction or application of the constitution of the United States. Its case was founded on an ordinance of the city resting for its support on the statute and constitution of the state of Louisiana. The defendant, by its pleas, could not, by admitting the claims of the plaintiff in the circuit court, except so far as they were affected by the constitution of the United States, and urging its claim to the protection of the United States constitution, oust the jurisdiction of this court to pass upon the case as made by the plaintiff. It therefore appears to me that the most that can be claimed under the authority of *Carter v. Roberts* is that the circuit court of appeals may decline to take jurisdiction, or it may certify the constitutional question, and afterwards proceed to judgment, or it may decide the whole case in the first instance. Granting, arguendo, that the authority of the case of *Carter v. Roberts* goes to that extent, and can be relied upon to justify this court in declining to take jurisdiction, it appears to me that it is equal authority for the proposition that this court may decide the whole case in the first instance; and, if it may, I respectfully submit that in this case it should. The plaintiff in error has invoked the jurisdiction of this court by suing out the writ. The defendant in error does not question it. I therefore am unable to concur in the

judgment of the majority. I also think my position is supported by the cases of *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, 39 L. Ed. 87; *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764; *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; and *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852.

GUARANTEE TRUST & SAFE-DEPOSIT CO. v. DELTA & PINE-LAND
CO. et al.

(Circuit Court of Appeals, Fifth Circuit. May 30, 1900.)

No. 913.

1. QUIETING TITLE—TITLE OF COMPLAINANT TO SUPPORT SUIT.

Although one out of possession may be authorized, under a state statute, to bring an action in a federal court to quiet title or remove a cloud, it is essential to his right to relief that he established the legal title in himself.

2. COURTS—JURISDICTION TO CONVEY REAL ESTATE—LANDS IN ANOTHER STATE.

While a federal court of equity may compel a conveyance of lands in another state by a decree in personam against a party who holds the title, it has no jurisdiction to itself transfer the title to such lands by a sale and conveyance made through its master or commissioner.

3. EQUITY—LACHES—SUIT TO REMOVE CLOUD ON TITLE.

Where the defendants, in a suit in a federal court to quiet the title to unoccupied lands and for the cancellation of certain conveyances as clouds upon complainant's title, claim through conveyances based upon sales for taxes, some of which were executed 25 years before the commencement of the suit, and the latest 9 years before, the court will refuse relief to the complainant on the ground of laches, without regard to the state statute of limitations, and although fraud is charged, where no adequate excuse is shown for the delay.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

The court adopts, with some changes and modifications, the statement of the case prepared by counsel for the Delta & Pine-Land Company.

The Guarantee Trust & Safe-Deposit Company filed the bill in equity in this case on March 4, 1898, in the United States circuit court for the Western division of the Southern district of Mississippi, against the Delta & Pine-Land Company, the Yazoo & Mississippi Valley Railroad Company, the Delta Development Company, and others. This proceeding involves the question of the titles to the lands in controversy, consisting of many large tracts of wild and unoccupied timber lands situated in several counties of the state of Mississippi. The appellant claims that its title to all the lands in controversy is paramount, and insists that the claims of title made by the appellees, respectively, are simply clouds upon its title, and should be canceled and annulled. The appellees claim different tracts of lands in severalty, but their titles are all derived through a common source. To this bill the appellees, the Delta & Pine-Land Company, the Yazoo & Mississippi Valley Railroad Company, and the Delta Development Company, filed general demurrers. The original bill was then amended, and the demurrers were applied to the bill as amended. The circuit court sustained the demurrers, and, the complainant declining to further amend its bill, the original and the amended bills were dismissed, from which decree the present appeal was taken.

The Appellant's Claim of Title.

It appears from the statements of the bill that these lands were donated to the state of Mississippi by the act of congress of September 28, 1850.

Between the years 1854 and 1860 they were sold and conveyed by the state to J. C. Griffing, Jacob Thompson, and others. On November 23, 1859, the Memphis, Holly Springs & Mobile Railroad Company was incorporated by the state of Mississippi. The company was only authorized to own land necessary for the use of the road, except that it might hold lands conveyed to it by way of security for or in satisfaction of debts, or by donation, for a period not exceeding five years after the completion of the road. By the nineteenth section of its charter, the property of the company was exempted from taxation until the completion of its road, provided the work of construction was commenced within two years, and completed within ten years, from the date of the passage of the act. By section twenty-one of said act, the work of construction was to be commenced within three, and completed within twelve, years from the passage of the act. Similar statutes incorporating said company were passed by the states of Tennessee and Alabama. On February 20, 1867, the act of September 28, 1859, was revived by the legislature of the state of Mississippi, and the name of the company changed to the Memphis, Holly Springs, Okolona & Selma Railroad Company. This act authorized the company to acquire and own lands within five miles of its road, provided they were acquired by subscriptions for stock. On December 31, 1868, the Selma, Marion & Memphis Railroad Company was incorporated by the state of Alabama, and within three years began the construction of its road. On July 21, 1871, the Mississippi legislature passed an act changing the name of the Memphis, Holly Springs, Okolona & Selma Railroad Company to the Selma, Marion & Memphis Railroad Company, and authorized the company to receive lands located anywhere in the state in subscription to its stock. The Alabama, Tennessee, and Mississippi companies were afterwards consolidated under the name of the Selma, Marion & Memphis Railroad Company. In the year 1871 the lands in controversy were sold and conveyed by Griffing, Thompson, and others to the Selma, Marion & Memphis Railroad Company in subscription to stock. Prior to the transfer of the lands to the railroad company by Griffing, Thompson, and associates, they had been sold for the nonpayment of state and county taxes, and bought by the state in the years 1860, 1861, 1862, 1864, 1866, and 1868. On March 16, 1872, the Mississippi legislature passed an act providing that the auditor of the state should convey, for two cents per acre, all the lands which had been acquired by the said railroad company from Griffing, Thompson, and others, and which were then held by the state under sales for taxes, upon the condition that 25 miles of the road was completed. And it provided, further, that, where the lands were held or claimed by any of the levee boards, the levee boards should arrange for the payment in levee bonds of any levee taxes that were due on the lands. On March 18, 1873, the auditor of the state conveyed these lands to the Selma, Marion & Memphis Railroad Company, finding that said railroad company had acquired said lands from the original owners, and had constructed 25 miles of its road. On March 18, 1871, the three railroad companies having consolidated as stated, the consolidated company, to wit, the Selma, Marion & Memphis Railroad Company, executed a mortgage on its railroad franchises and equipment and also on these detached lands, to secure a bonded debt of \$4,400,000. On December 18, 1874, Luke P. Blackburn, one of the holders of the mortgage bonds, for himself and the other mortgage creditors, filed a bill to foreclose this mortgage in the United States circuit court for the Western district of Tennessee. On June 3, 1879, a decree was made in said proceeding, under which, on June 1, 1880, the railroad proper and its equipment, with all the franchises of the railroad company, was sold, and purchased by J. J. Busby and other persons associated with him, who soon afterwards organized themselves, under the Mississippi statute of March 16, 1877, as the Memphis, Selma & Brunswick Railroad Company. A decree was afterwards made on July 24, 1883, by the United States circuit court at Memphis, in the foreclosure proceeding, for the sale of these lands, and at said sale, made in front of the federal building in the city of Memphis, by the proper officers of the court, the Memphis, Selma & Brunswick Railroad Company became the purchaser, to which a deed therefor was properly executed and delivered, and the sale and the deed executed thereunder were duly ratified

and confirmed by the court. On February 10, 1884, Jacob Thompson and others filed a bill in equity in the United States court at Oxford, Miss., against the Memphis, Selma & Brunswick Railroad Company, and under this proceeding these lands were sold and purchased by Martin Kelly, O. H. P. Piper, W. P. Dunivant, and others. These purchasers then conveyed the lands to the Memphis, Birmingham & Atlantic Railroad Company. The Memphis, Selma & Brunswick Railroad Company afterwards conveyed the lands to the appellant, in discharge of an indebtedness amounting to more than \$600,000, and also procured a quitclaim deed to be made to the appellant by the Memphis, Birmingham & Atlantic Railroad Company. It is thus seen that the appellant claims title to the lands in controversy through the Selma, Marion & Memphis Railroad Company, and through the Memphis, Selma & Brunswick Railroad Company, the purchaser at the sale made under the decree of the United States circuit court for the Western district of Tennessee.

The Titles of the Appellees.

The averments of the bill in respect to the claim of title of the appellees are not clear and specific, but the following facts relating to their titles may be gathered from the statements of the amended bill: In paragraph 8 of the amended bill it is stated that the larger part of these lands had been sold at tax sales and purchased by the state in the years 1860, 1861, 1862, 1864, 1866, and 1868. And it is also stated in this paragraph that a small portion of the lands had been sold at levee tax sales to the levee boards. This is explained more fully in the fourteenth paragraph of the amended bill, which states, in effect, that the defendants claim as their source of title that all the lands were sold at liquidating levee tax sales, made at different times from the year 1858 to the year 1873, and were struck off to the board of levee commissioners. These titles were subsequently acquired by purchase from the liquidating levee commissioners, severally, by E. C. Gordon and the Memphis & Vicksburg Railroad Company, at a sale made under a decree rendered by the chancery court of Hinds county in the suit of Green against Gibbs et al. The lands purchased by E. C. Gordon were afterwards bought by the Delta & Pine-Land Company, and those purchased by the Memphis & Vicksburg Railroad Company were subsequently acquired by the Yazoo & Mississippi Valley Railroad Company. The other defendants in the case purchased the lands claimed by them, respectively, from the Delta & Pine-Land Company and the Yazoo & Mississippi Valley Railroad Company. The lands were sold by Gibbs and Hemmingway, liquidating levee commissioners, under the decree of the chancery court of Hinds county, Miss., in the above-mentioned equity suit brought by Joshua Green and others against said commissioners. The purpose of the proceeding, which was begun prior to the year 1884, was to enforce the payment of the liquidating levee bonds issued under the act of February 13, 1867, by a sale of these lands then held in trust by the liquidating levee commissioners for the security of the bonds under the terms of said act. The lands were sold in 1875 for the general state and county taxes of the year 1874, under the act of March 1, 1875, commonly known as the "Abatement Act," and were bought in by the state. All the lands were again sold at tax sales in the year 1883 for the general current state and county taxes of the year 1882, and were purchased by the state. On March 14, 1884, an act was passed by the legislature of the state giving the purchasers from the liquidating levee commissioners under the decree in the case of Green against Gibbs and Hemmingway, liquidating levee commissioners, an exclusive option to purchase said lands from the state within 12 months from the date of the passage of the act, upon payment of the taxes due on the lands. Under this statute the lands were sold and conveyed by the state to the vendors of the defendants. On March 2, 1888, an act was passed by the legislature of Mississippi for the benefit of the purchasers under the decree in the case of Green against Gibbs and Hemmingway, providing, among other things, that the auditor should execute deeds from the state to said purchasers from the liquidating levy commissioners, upon payment of the taxes which accrued subsequent to their said purchase, which should convey the title to the lands, and have the effect of releasing all taxes which accrued prior to the purchase under said decree, and that any

error or miscalculation of the auditor should not have the effect of invalidating the title, but that the land should be liable for any such deficiency in the amount stated. The deed of the auditor of the state was made prima facie evidence of the validity of the title to the land conveyed. After July 1, 1888, deeds were made by the auditor to the appellees under the provisions of this act.

T. D. Young, for appellant.

Edward Mayes, Frank Johnston, and T. A. McWillie, for appellees.

Before PARDEE and SHELBY, Circuit Judges, and MAXEY, District Judge.

MAXEY, District Judge (after stating the facts as above). The questions submitted for our determination arise upon the ruling of the circuit court in sustaining the demurrers interposed by the appellees to the original and amended bills of complaint. The fourth cause of demurrer assigned by the appellees claims that the sale made under the decree of the United States circuit court for the Western district of Tennessee was void because the court was without jurisdiction to order the sale of lands situated within the state of Mississippi. The appellant, as a subsequent purchaser of the lands, relies upon the deed which was executed pursuant to the Tennessee decree as an indispensable link in its chain of title. It is obvious, therefore, that if that deed did not pass the legal title, the appellant is without standing in court; for although, under the laws of Mississippi (Code 1892, § 500), a bill may be maintained in the circuit court of the United States by a person not in possession against another who is also out of possession, as is the case here, "still this does not make the complainant's rights any the less dependent upon title in him, nor does it put him in a position to have a cloud removed from a title which has no existence." *Dick v. Foraker*, 155 U. S. 415, 15 Sup. Ct. 124, 39 L. Ed. 201. In *Holland v. Challen*, 110 U. S. 25, 3 Sup. Ct. 501, 28 L. Ed. 56, it was said: "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises;" and in *Frost v. Spitley*, 121 U. S. 557, 7 Sup. Ct. 1132, 30 L. Ed. 1012: "The necessary conclusion is that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title."

It is shown by the bill that the proceeding in the United States circuit court for the Western district of Tennessee was instituted by Luke P. Blackburn against the Selma, Marion & Memphis Railroad Company. That company had issued interest-bearing bonds amounting to \$4,400,000 for the purpose of constructing, equipping, and putting in operation its line of railway contemplated to extend into the states of Tennessee, Alabama, and Mississippi; and, to secure the payment of the bonds, it duly executed, on the 18th day of March, 1871, a mortgage, conveying to trustees "all its rights and franchises, together with all property and real estate, its depots, warehouses, roadbeds, and all and every description of property, real and personal, which it then owned, or might thereafter acquire, either by donation, subscription, or purchase." The lands in controversy,

which were wild, outlying lands, situated in several counties of the state of Mississippi, and which had been conveyed to the railroad company by stockholders in payment of their subscriptions to the capital stock of the company, were embraced in the mortgage executed as above mentioned to trustees. As one of the bondholders, Blackburn filed his bill on behalf of himself and others on December 18, 1874, and the trustees in the mortgage and all proper and necessary parties were brought before the court. On the 3d day of June, 1879, a decree of foreclosure was passed, under and by virtue of which, on June 1, 1880, "all the rights, franchises, roadbeds, depots, and equipments of the road were sold and bought by J. J. Busby" and associates. But the lands in controversy were not included in this sale. "After," it is alleged in the amended bill, "all proper interlocutory orders and decrees had been regularly taken and entered in the case, to wit, on the 24th day of July, 1883, a decree was duly entered in said cause, under and by which the lands acquired by the Selma, Marion & Memphis Railroad Company [the same as involved herein] were, after due advertisement, sold in legal subdivisions by the proper officers of the court in front of the federal court building in the city of Memphis, and were bought by the said Memphis, Selma & Brunswick Railroad Company, to whom a deed therefor was properly executed and delivered, and which sale and deed thereunder was confirmed by proper order of the court." It is not distinctly alleged what officer of the court sold the lands. Counsel for the appellant, on page 2 of his brief, states that the sale was made by the clerk of the court; but, as such sales are ordinarily made in chancery suits by a master or commissioner, the natural meaning of the allegation, that the lands were "sold by the proper officers of the court," would be that the sale was effected by the officers usually authorized to make it, to wit, a master or commissioner. And it may be said that "a sale made by a special master, under the direction of a court of chancery, is not a sale made by either of the parties to the litigation or under his direction. The master is a representative of the court, as a marshal or sheriff is in an action at law. He is not under the control of either party. He is not the agent of either to make the sales." *Mining Co. v. Mason*, 145 U. S. 361, 362, 12 Sup. Ct. 887, 36 L. Ed. 732, citing authorities.

It will thus be observed that the decree in *Blackburn v. Railroad Co. (C. C.)* 3 Fed. 689, did not operate directly upon the trustees or the railroad company, by requiring conveyances to be made by them, but, partaking of the nature of a proceeding in rem, it acted immediately upon the property, and was to be executed through the instrumentality of independent officers appointed by the court. A writ of assistance, issued by the court in Tennessee to put the purchaser at the sale made by the master in possession of the property, would be wholly inoperative, because such process could have no extraterritorial effect. *Toland v. Sprague*, 12 Pet. 300, 9 L. Ed. 1093; *Picquet v. Swan*, 5 Mason, 40, Fed. Cas. No. 11,134; *Ex parte Graham*, 3 Wash. C. C. 456, Fed. Cas. No. 5,657; *Chittenden v. Darden*, 2 Woods, 437, Fed. Cas. No. 2,688; *Walker v. Lea (C. C.)* 47 Fed. 645. See, also, *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

Notwithstanding the want of power in a court of one state to deliver by its process the possession of land in another, it is nevertheless a recognized and accepted doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. *Muller v. Dows*, 94 U. S. 449, 24 L. Ed. 207; *Massie v. Watts*, 6 Cranch, 148, 3 L. Ed. 181; *Pennoyer v. Neff*, *supra*. In the case of *Massie v. Watts*, 6 Cranch, at page 159, and 3 L. Ed., at page 186, Mr. Chief Justice Marshall, after reviewing the English decisions, announced the general doctrine in the following language: "Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that in a case of fraud or trust or breach of contract the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree." In such cases the decree operates upon the person, not upon the thing, and the person is required to execute it under the pains and penalties of contempt for disobedience. Where, however, it is sought by the decree to effect a transfer of the title to land lying within another jurisdiction, by directing its sale by a master, who is not clothed with the title, the decree in such case operates upon the thing, and does not divest the title of the owner; the master being, as we have seen, a mere representative of the court, not under the control of either party, nor the agent of either to make the sale. In the case last mentioned the deed is simply inoperative to pass the title; for, to judicially divest the title to real estate out of one person and place it in another, the holder of the title must be before the court, and the decree must operate upon the person by requiring him to make the conveyance. This principle is elementary, and should have special application to decrees rendered by the courts of one state authorizing the transfer of title to lands lying within the limits of another state.

In *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437, the facts, briefly stated, were as follows: Watts, in order to obtain the legal title to a tract of land claimed by Robert Powell's heirs, instituted a suit in chancery in the United States circuit court for Kentucky against the heirs, and obtained a decree for the land. In pursuance of the decree, a commissioner appointed by the court executed to Watts a conveyance. The question, among others, arose whether the decree vested in Watts the legal title. At pages 400, 401, 6 Pet., and page 442, 8 L. Ed., the court said:

"But the most decisive objection to the decree against Powell's heirs is, it is contended, that it does not vest the legal title in Watts. A decree cannot operate beyond the state in which the jurisdiction is exercised. It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt; but it is insisted that the decree executed by the commissioner under the decree, by virtue of a statute of Kentucky, was a legal conveyance in that state, and as such, by a statutory provision, is good in Ohio. The words of the statute referred to are 'that all deeds, mortgages, and other instruments of writing for the conveyance of lands, tenements and hereditaments, situate, lying and being within this state, which hereafter may be made and executed, and acknowl-

edged or approved in any other state, territory or country, agreeably to the laws of such state, territory or country, or agreeably to the laws of this state, such deed, mortgage, or other instrument of writing shall be valid in law.' The deed executed by the commissioner in this case must be considered as forming a part of the proceedings in the court of chancery, and no greater effect can be given to it than if the decree itself, by statute, was made to operate as a conveyance in Kentucky, as it does in Ohio. The question then arises whether, by a fair construction of the above provision, it is in the power of a court of equity, sitting in Kentucky, by force of its decree, to transfer real estate in Ohio. Can this effect be given to such decree by this statute? It is believed that no state in the Union has subjected the real property of its citizens to the exercise of such a power. Neither sound policy nor convenience can sustain this construction, and, unless the language of the statute be imperative, no court can sanction it. The legislature of Ohio could never have intended, by this provision, to place the real property of the citizens of that state at the disposition of a foreign court. The language used in the act does not require such a construction. It refers to deeds executed by individuals in any other state, and not to conveyances made by the decree of a court of chancery. This is the true import of the section, and it does not appear that the courts of Ohio have given it a different construction. Thus construed, it promotes the convenience of nonresidents who own lands in Ohio, and may desire to convey them, and in no point of view can it operate injuriously to the interests of citizens of the state. In this view, it appears that Watts did not acquire the legal title from Powell's heirs, under the deed of the commissioner, and consequently he was unable to convey the legal title to Waddle."

In *Watkins v. Holman*, 16 Pet. 23, 10 L. Ed. 873, an administratrix, having duly taken out letters of administration in Massachusetts, was licensed and empowered by the Massachusetts court to make a deed to lands situated in Alabama. Discussing the validity of this deed, Mr. Justice McLean, speaking for the court (at page 57, 16 Pet., and page 886, 10 L. Ed.), said:

"That this deed is inoperative is clear. It was executed by the administratrix under a decree or order of the supreme court in Massachusetts and by virtue of a statute of that state. The proceeding it is not pretended was authorized by any law of Alabama. And no principle is better established than that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the land is situated. A court of chancery, acting in personam, may well decree the conveyance of land in any other state, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court."

The principle is clearly stated by the court, through Mr. Justice Field, in *Corbett v. Nutt*, 10 Wall., at page 475, and 19 L. Ed., at page 979:

"In this case it appears to be conceded that the supreme court of the District of Columbia exceeded its authority in appointing McPherson trustee in place of Nutt of the land in Virginia. That court could not, by the mere force of its decree, transfer the title to land lying without its jurisdiction from the party in whom it was vested by the will of Mrs. Hunter. A court of equity, acting upon the person of a defendant, may control the disposition of real property belonging to him situated in another jurisdiction, and even in a foreign country. It may decree a conveyance, and enforce its execution by process against the defendant; but neither its decree, nor any conveyance under it, except by the party in whom the title is vested, is of any efficacy beyond the jurisdiction of the court. This is familiar law, and was declared by this court in *Watkins v. Holman*, the court observing that 'no principle was better established than that the disposition of real estate, whether by deed,

descent, or by any other mode, must be governed by the law of the state where the land is situated.'"

Boyce v. Grundy, 9 Pet. 275, 9 L. Ed. 127, was a case where the United States circuit court for the district of West Tennessee had rendered a decree which created a lien upon land in Mississippi, and ordered a sale of the land to be made in Mississippi in discharge of the lien. In holding the decree erroneous, the court, among other things, said:

"Another objection is to that part of the decree which creates a lien upon the land in controversy lying in another state, and decrees a sale for a discharge of the lien. We are of opinion that the decree is erroneous in this respect. In the first place, the court had no jurisdiction to decree a sale to be made of land lying in another state by a master acting under its own authority." *Story, Conf. Laws*, § 543.

The principle thus declared has been adhered to and emphasized by the state courts in the following cases: *Poindexter v. Burwell*, 82 Va. 507; *Wimer v. Wimer*, Id. 890, 5 S. E. 536; *Farmers' Loan & Trust Co. v. Postal Tel. Co.*, 55 Conn. 334, 11 Atl. 184; *Robinson v. Johnson* (Tenn. Ch.) 52 S. W. 704; *Burnley v. Stevenson*, 24 Ohio St. 474; *Page v. McKee*, 3 Bush, 135.

We quote from but one of the cases last cited. In 55 Conn., at page 335, and 11 Atl., at page 185, the supreme court of errors of Connecticut made the following statement of the principle:

"The courts of our state will not recognize the right of courts in other states to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner, and recognize as valid titles so acquired. We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of court by authority of law in another jurisdiction. The rule seems to be that the courts of each state have exclusive jurisdiction to settle the title to lands within its own limits."

But it is claimed by counsel for the appellant that *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207, has overruled or modified the earlier cases decided by the supreme court. In this view we are unable to concur. The suit in that case was brought by the trustees named in the mortgage. The Chicago & Southwestern Railway Company was one of the defendants. A part of its railway was in Missouri, and the mortgage which the bill sought to have foreclosed covered that part, as well as the part in the state of Iowa. The court decreed a sale of the entire property covered by the mortgage, and directed the master, who was ordered to make the sale, to execute a deed to the purchaser. The mortgagor was also directed to make a conveyance to the purchaser in further assurance. Upon appeal the decree was affirmed. It will be observed that the railway, extending into two states, was sold in its entirety; that the trustees were complainants in the suit seeking a sale of the property; and that the mortgagor was required also to execute a deed to the purchaser. The court seemed to lay stress upon the fact that the sale was made at the instance of the trustees, who, notwithstanding the appeal, could also be directed by the trial court to join in a conveyance. In discussing the question the court (at page 450, 94 U. S., and page 209, 24 L. Ed.) observed:

"The mortgagors here were within the jurisdiction of the court. So were the trustees of the mortgage. It was at the instance of the latter the master was ordered to make the sale. The court might have ordered the trustees to make it. The mortgagors who were foreclosed were enjoined against claiming property after the master's sale, and directed to make a deed to the purchaser in further assurance, and the court can direct the trustees to make a deed to the purchaser in confirmation of the sale. We cannot, therefore, declare void the decree which was made."

The case of *McElrath v. Railroad Co.*, 55 Pa. St. 189, cited with approval in *Muller v. Dows*, *supra*, and relied upon by the appellant, is in harmony with the views which we have expressed. There the trustee in the mortgage, who had brought the suit, was authorized to sell a railroad which was partly in West Virginia and partly in Pennsylvania. And in making the order the court used this language:

"Without deciding what estate would pass by the trustee's sale under the mortgage, we are of opinion that we can by our decree, operating upon the trustee himself, authorize and compel him to sell and convey whatever interest of the railroad company will pass under the terms of the mortgage."

In the present case the validity of the sale of the Selma, Marion & Memphis Railroad is not in question. That road, with all its rights, franchises, roadbeds, depots, and equipments, was sold on June 1, 1880, more than three years prior to the sale of the lands in controversy, and with its sale we have no concern. It was under the decree of July 24, 1883, that the lands were sold, all being wild and uncultivated, and all situate in the state of Mississippi. Thus *Muller v. Dows* is clearly distinguishable from this case. Not only so; in *Blackburn v. Railroad Co.* a bondholder brought the suit, and the trustees in the mortgage were made defendants. Neither the trustees nor the mortgagor were required to execute conveyances to the purchaser, and the sale rests alone for its validity upon the deed of an officer of the court, presumably a master, executed pursuant to the court's decree.

Our conclusion is that the deed of the master did not pass the legal title of the Selma, Marion & Memphis Railroad Company to the lands so attempted to be conveyed.

We might well rest our decision upon the question above discussed. But there is another objection, apparent upon the face of the original and amended bills of complaint, which is fatal to the appellant's right of recovery in this proceeding. The lands in controversy were conveyed by the state of Mississippi to Jacob Thompson and associates between the years 1854 and 1860, and by the latter transferred to the Selma, Marion & Memphis Railroad Company in 1871. Before, however, the execution of the deed by Thompson and associates, the lands had been sold for the nonpayment of taxes, and bought in by the state in the years 1860, 1861, 1862, 1864, 1866, and 1868. By an act of the legislature of Mississippi passed on March 16, 1872, the auditor of the state was authorized, upon certain prescribed considerations, to convey to the railroad company the lands which had been previously transferred to it by the Thompson deed. Pursuant to this legislative enactment, the auditor, on March 18, 1873, conveyed to the railroad company such title as the state possessed. It was by virtue of the

deeds above recited that the Selma, Marion & Memphis Railroad Company held its title, which, as we have seen, was attempted to be passed to the Memphis, Selma & Brunswick Railroad Company by the master's deed in 1883. Subsequently, and for a valuable consideration, the appellant acquired the title of the last-named company. It is further shown by the bills that the titles of the appellees had their inception in purchases of the lands, in 1873, by the board of liquidating levee commissioners, at sales at which they were sold for delinquent taxes accruing for the years 1858 to 1873. Under an act of the legislature passed in 1875, and known as the "Abatement Act," the lands were again sold for nonpayment of taxes due for 1874 and purchased by the state, and it is charged that the appellees rely upon that purchase by the state as one of their sources of title. On February 20, 1877, Joshua Green, as a holder of bonds issued by the board of liquidating levee commissioners, filed on behalf of himself and others a bill in the chancery court of Hinds county, Miss., against W. H. Gibbs, auditor, and W. L. Hemmingway, treasurer, of the state, as the successors of the rights, powers, and liabilities of the board of liquidating levee commissioners, by which it was sought to have the lands previously purchased by the board at tax sales, as above mentioned, sold, and the proceeds applied to the payment of the bonds. A decree was rendered ordering a sale of the lands, and upon appeal to the supreme court of the state the decree was affirmed. The lands were sold in obedience to the decree, and the title thereby acquired passed by subsequent mesne conveyances to the appellees. But, the appellees failing to pay the taxes due for the year 1882, the lands were again sold for the delinquent taxes, and the state became the purchaser. It is further charged that the appellees thereafter procured the passage of two acts by the legislature of Mississippi, one in 1884 and the other in 1888, under and by virtue of which deeds were executed by the auditor conveying to the appellees the state's title, the deed, under the latter act, having been executed after July 1, 1888. It will also be noted that the bills charge fraud and collusion in the institution and prosecution of the suit of Green against Gibbs and Hemmingway, as well as in reference to the subsequent nonpayment of taxes and the passage of the act of 1884. The bills charge that the sales, judicial decrees, legislative acts, and all other evidences and muniments of title relied upon by the appellees are nullities, and seek to have them canceled, and the cloud thereby operating upon its title removed. It will thus be observed that 25 years after the acquisition of the title to the lands by the board of liquidating levee commissioners, approximately 20 years after their purchase by the appellees under the decree in the suit of Green against Gibbs and Hemmingway, and more than 9 years after the execution of the deed to the appellees by the auditor of the state under the act of 1888, the appellant seeks for the first time to vacate the tax deeds, judicial proceedings, and legislative enactments which culminated in its divestiture of title, without tendering anything approaching an adequate excuse for its long continued silence. It does make a feeble attempt to justify or excuse its delay on the ground that, under its charter of incorporation, the Selma, Marion & Memphis Railroad Company was

thought by counsel to be exempt from the payment of taxes. Acting under this belief, the appellant alleges that, being a nonresident corporation with no agents in the state of Mississippi, it gave the matter no immediate attention until its supposed period of exemption was about to expire. It does appear, however, by plain inference from the allegations, that it was advised that the tax exemption would expire about the year 1884, and yet it failed to act until the year 1898. While fraud is charged in the bills, no reason is given for its failure to act promptly upon its discovery. It further attempts to explain its laches upon the theory that the suit of *Ford v. Land Co.* (C. C.) 43 Fed. 181, which involved questions similar to some of those involved in the present litigation, relieved it from the necessity of proceeding earlier in the assertion of its rights. But it is obvious that reliance cannot be placed on that suit to excuse the negligence of the appellant, because it is expressly alleged in the amended bill that the decision in *Ford v. Land Co.* "was in no way conclusive against it, as many questions of both law and fact, which it here relies upon, were not passed upon, or even presented, in that case."

Without, therefore, deciding whether the present suit is barred by the statutes of limitation of Mississippi, we are clearly of opinion, in view of the facts of this case, that a court of equity should not grant relief to the appellant at this late day. The delay has been too prolonged to invoke the aid of the chancellor, since "nothing can call forth this court in activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing." *Sullivan v. Railroad Co.*, 94 U. S. 806, 24 L. Ed. 324; *Brown v. Buena Vista Co.*, 95 U. S. 157, 24 L. Ed. 422; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Speidel v. Henrici*, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836; *Pennsylvania Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626, citing numerous authorities. In *Badger v. Badger*, 2 Wall. at pages 94, 95, and 17 L. Ed., at page 838, the rule is stated by Mr. Justice Grier, speaking for the court, in the following language:

"Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern courts of law in like cases, and this rather in obedience to the statutes than by analogy. In many other cases they act upon the analogy of the like limitation at law. But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitation governs the case. In such cases, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor. The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise, the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of the statute of limitation contained in the answer."

In concluding our consideration of this case, we take the liberty of commending to the appellant an attentive perusal of the opinion in *Ford v. Land Co.*, 164 U. S. 662, 17 Sup. Ct. 230, 41 L. Ed. 590, where the question of title to the lands in controversy seems to have been adjudicated in favor of the appellees. If that case be not decisive of this, it falls short of the danger line by scarcely a hair's breadth. The decree of the circuit court is affirmed.

RAMSDELL v. NATIONAL RIVET & NOVELTY CO. et al.

(Circuit Court, D. West Virginia. October 6, 1900.)

EVIDENCE—PROCEEDINGS OF CORPORATIONS—RECORDS.

Under Code W. Va. c. 53, § 52, which requires corporations to keep records of their proceedings, the records of a corporation of that state constitute the best evidence of facts which should be shown thereby, such as the names of incorporators and officers, the action taken at meetings, etc.

On Exceptions to Master's Report.

Hoadley, Lauterbach & Johnson and Walker & Syme, for plaintiff.
Chilton, McCorkle & Chilton and Dill, Seymour & Kellogg, for defendants.

JACKSON, District Judge. This case is now heard upon exceptions to the master's report. The first exception taken by the plaintiff to the report insists that there is no evidence to sustain the conclusion of the master that the corporation was organized on the 5th day of October, 1891. The certificate of incorporation was issued by the secretary of state of West Virginia on the 11th day of September, 1891, and the evidence of H. B. Haigh, at page 2 of the defendants' depositions, shows that on the 28th day of September, 1891, special notice was given by a majority of the incorporators, by publication in the *New York Evening Post*, of a "meeting of the stockholders of the National Rivet and Novelty Company at the office of Ernest C. Webb, 181 Broadway, New York City, on October 5th, 1891, at 4 o'clock p. m., for the purpose of electing a board of directors, making and adopting by-laws, and transacting any other business which may be lawfully done in general meeting." The witness testifies that that meeting was held, and that there were present a majority of the incorporators of the defendant company, and that there was an election of officers for the company. There is an exception to this finding of the master, and I presume the exception is founded upon the fact that there were no records or minutes of any character produced before the master for the purpose of showing what transpired at that meeting. As to the fact that the meeting was held, I do not deem it important that the records of what transpired at the meeting should be produced. That is an independent fact, which may be proven by any witness who was present (that the meeting was held), but what transpired at that meeting, or after the organization of the company, should be a matter of record as pro-

vided for in section 52, c. 53, of the Code of West Virginia. In this connection it is contended by counsel for the plaintiff that the defendant company has never complied with the laws of the state of West Virginia in appointing an attorney in fact, as required by the statute, so that process could be served upon said attorney in fact. I do not regard this as material to the questions now before the court. A failure upon the part of the company to comply with the provisions of the laws of the state in regard to the organization of corporations is a matter for the state to deal with. The commissioner was required by the decree to ascertain by whom the corporation was organized, and under that requirement he finds that it was organized by the following persons: Ernest C. Webb, H. S. Reynolds, George P. Benjamin, A. M. Brush, Walter Snyder, J. H. Snyder, H. C. Mechling, and H. B. Haigh. To support his finding the master relies upon the deposition of H. B. Haigh. This evidence is, in the opinion of the court, entirely insufficient to sustain any such finding. What transpired at the meeting of the incorporators, and each and every act of the incorporators, must necessarily be a matter of record, as provided for and required by the acts of assembly *supra*. The master makes no reference to the production of the minutes and records of the proceedings that took place on the 5th day of October, 1891, nor is any legal reason given why such records are not produced, if any in fact exist.

The first, second, third, and fifth exceptions taken by the plaintiff to the master's finding are based upon the fact that these records were not produced, so as to disclose who of the incorporators were present, and who were elected officers of the company. The court, for the reasons assigned, is of opinion to sustain the exceptions to the master's report as to so much of his finding as is based upon *parol* evidence in the case of what transpired at the meeting of the incorporators when it is claimed the company was organized. As to the remainder of the exceptions taken, the court is of opinion to postpone its action upon them until the final hearing of the cause, as the exceptions involve the merits of the controversy, and for the additional reason that, if it should appear from the master's report hereafter to be filed that the company was never organized according to law, then there would be no necessity for the court to consider the other exceptions filed in this cause. And, inasmuch as one of the prayers of the bill is to require the defendants to produce the records and minutes of their proceedings, it is ordered that the defendant company produce before the master all the minutes and records of their proceedings from and including the organization of the company down to the commencement of this action, upon pain and penalty of having their answer stricken from the records of this case if they fail or neglect to do so.

SAVAGE v. WORSHAM.

(Circuit Court, S. D. California. April 4, 1892.)

1. EQUITY—PLEADING—INSUFFICIENCY OF BILL.

A bill is demurrable which is so defectively drawn that it is impossible for the court to determine the questions attempted to be presented for decision.

2. PUBLIC LANDS—SUIT TO DETERMINE PRIVATE RIGHTS—JURISDICTION OF COURTS.

A suit in equity cannot be maintained to determine the rights of the parties in a tract of land so long as the title to such land remains in the United States, and a contest between the parties in respect to it is still pending in the land department.

In Equity. On demurrer to bill.

Wm. E. Savage, in pro. per.

J. S. Chapman, for defendant.

ROSS, District Judge. The bill is so defectively drawn as to make it impossible for the court to determine the questions attempted to be presented for decision. The facts of the case should be stated in ordinary and concise language, unaccompanied by matters of argument, which have no place in a pleading. If the complainant relies upon a mistake of law on the part of the officers of the land department of the government, the bill must contain a clear statement of such mistake, and if fraud is relied upon the facts constituting the fraud must be set out. It needs no argument to show that the mere use of the words "fraud" and "fraudulent" to stigmatize acts which are adverse to complainant's view of his own rights is insufficient.

It may be added that it would seem from the bill that the title to the land in question is still in the United States, and that the contest between complainant and respondent in respect to it is yet pending in the land department. If so, it is clear that the suit cannot be maintained. "After the United States has parted with its title, and the individual has become vested with it, the equities subject to which he holds may be enforced, but not before." *Johnson v. Towsley*, 13 Wall. 72, 20 L. Ed. 485; *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. Ed. 800. Demurrer sustained, with leave to complainant to amend within the usual time.

SAVAGE v. WORSHAM.

(Circuit Court, S. D. California. October 3, 1892.)

EQUITY PLEADING—AMENDMENT OF BILL—STATING INCONSISTENT CAUSES OF ACTION.

Where the object sought by a bill was to establish a trust in complainant's favor in a tract of land, and to compel the defendant to convey the title thereto to complainant, on the ground that, through fraud and irregularities, defendant had been permitted to enter the land from the United States, a second pleading, which seeks to quiet the complainant's title to the land, cannot be regarded as an amendment of the original bill,

which may be filed under leave to amend, since it not only states a different cause of action, but one which depends for its support on a different and inconsistent state of facts.

In Equity. On motion to strike out amended bill.

Wm. E. Savage, in pro. per.

J. S. Chapman, for defendant.

ROSS, District Judge. "To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily incumbered with the original proceedings, increases expenses, and complicates the suit. It is far better to require the complainant to begin anew. To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject." *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Hardin v. Boyd*, 113 U. S. 764, 5 Sup. Ct. 771, 28 L. Ed. 1141. A mere perusal of the original and amended bills in this case shows that the causes of action attempted to be stated in them are essentially unlike, and proceed upon entirely different theories. The subject of the suit is a certain 40-acre tract of government land. The original bill, among other things, alleged the complainant's entry upon, improvement and possession of, the land, and various steps taken by himself and the respondent looking to the acquisition of the government title to it, resulting in a contest between them in the United States land department; and complainant sought thereby to impose a trust in his favor in respect to the land on the ground of fraud, errors, and irregularities committed by the respondent and by the land department in the matter of such contest. A demurrer to the original bill was sustained by the court on the ground that it was so defectively drawn as to make it impossible for the court to determine the questions attempted to be presented for decision, and because it seemed from the averments of the bill that the title to the land in question was still in the United States, and that the contest between complainant and respondent in respect to it was still pending in the land department. Leave was given the complainant to amend his bill, and pursuant to that permission he filed what is styled an "amended complaint," in which it is alleged that the complainant is now, and has been for the past seven years, in the possession and entitled to the possession of the tract of land in controversy, and claims title thereto under sections 2289, 2290, 2291, and 2372 of the Revised Statutes of the United States; that the respondent claims and asserts an interest in the land adverse to the complainant, which claim is without right; and that respondent has not any estate, right, title, or interest therein. The prayer is that the respondent be required to set forth the nature of his claim; that it be decreed to be invalid; that respondent be enjoined from asserting any right or claim thereto adverse to complainant; and that complainant be adjudged to be "entitled to the ownership and possession of said tract of land." The question of the sufficiency of this pleading as a bill to quiet title is not now presented, for the present motion is one to dismiss the "amended complaint" on the ground

that the cause of action therein attempted to be stated is in its nature and substance different from that attempted to be set out in the original bill, and therefore cannot be regarded as an amendment of the bill.

The motion must be granted. The original bill proceeded upon the theory that, by reason of fraud, irregularities, and errors committed by the respondent and by the officers of the land department of the government, the respondent had been permitted to enter the land in question, which the complainant had become entitled to by reason of his compliance with the laws in relation to the acquisition of such lands, and the object sought by the bill was to establish a trust in complainant's favor in respect to the land, and to compel the respondent to convey the title thereto to complainant. A suit to quiet title proceeds upon an entirely different theory. The very object of such a suit is to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title. It is so essentially different from a suit to establish a trust in respect to land, and to compel the conveyance of the legal title, that, under the equity practice, a suit to quiet title cannot be maintained without clear proof that the legal title as well as possession is in the plaintiff. *Frost v. Spitley*, 121 U. S. 556, 7 Sup. Ct. 1129, 30 L. Ed. 1010, and cases there cited. The motion to strike out the so-called "amended complaint" must therefore be sustained. Ordered accordingly.

COSMOS EXPLORATION CO. v. GRAY EAGLE OIL CO. et al.

PACIFIC LAND & IMPROVEMENT CO. v. ELWOOD OIL CO. et al.

(Circuit Court, S. D. California. September 24, 1900.)

1. EQUITY—RIGHT TO PRELIMINARY RELIEF.

A court of equity will not deprive a defendant of property in his possession on a preliminary hearing, either by the granting of an injunction or the appointment of a receiver, unless strong and clear equities are shown in behalf of the complainant.

2. PUBLIC LANDS—EQUITABLE RELIEF TO CLAIMANT—FRAUDULENT ENTRY.

A claimant of land entered under Act June 4, 1897 (30 Stat. 36), in lieu of land situated within a forest reservation, on an affidavit stating its nonmineral character, that it was free from mining claims, and was entered for agricultural purposes, will not be granted relief in equity against another claimant in possession under an oil placer mining location, made prior to such entry, and followed up by development work, which was being prosecuted on the land when the entry was made, and resulted in valuable producing wells, where the affidavit of the entryman was also false in other particulars, the land being valueless for agricultural or grazing purposes, but situated in an oil district, and the entry being in fact made because of its supposed value for oil, although no discovery of oil had then been made thereon.

3. SAME—JURISDICTION OF COURTS.

A court is without jurisdiction to entertain a suit to determine the rights of the parties in land the title to which remains in the United States, and in regard to which a contest between the parties is still pending in the land department.

4. SAME.

A court cannot take jurisdiction in such case on an allegation that the protests filed against complainant's entry in the land office were insuf-

ficient to warrant the ordering of a hearing, that being a matter for determination by the land department.

5. **SAME**—EXCHANGE UNDER FOREST RESERVATION ACT.

Under the provisions of Act June 4, 1897 (30 Stat. 36), permitting an owner of land situated within the limits of a forest reservation to relinquish the same, and select in lieu thereof a tract of vacant land open to settlement of equal area, and the regulations of the land department to carry out the same, which require the officers of the local land office to forward all applications for a change of entry thereunder to the general land office for consideration, the applicant acquires no vested right in the land selected, for the protection of which he can maintain a suit in the courts, until his selection has been approved by the department, and especially when objections have been filed pursuant to such regulations and are still undisposed of.

6. **SAME**.

Since the act of March 3, 1891 (26 Stat. 1095), repealing the pre-emption law, and thereby eliminating from the homestead law the language incorporated therein by reference which exempted from entry "lands in which are situated any known salines or mines," entries under the homestead law, and, that being the only law under which land is "open to settlement" for agricultural purposes, selections made as forest reserve lieu lands, under Act June 4, 1897, are subject to the broader provision of Rev. St. § 2302, that no "mineral lands shall be liable to entry and settlement under its provisions," and the actual character of lands entered or selected is a question of fact to be determined by the land department, by applying the rule that they are to be considered mineral or nonmineral according to the use for which they are the more valuable.

In Equity. Suits to quiet title to lands. On motions for preliminary injunctions and for the appointment of receivers, and on demurrers to the bills.

Jefferson Chandler, Shirley C. Ward, J. W. Swanwick, and T. C. Van Ness, for complainants.

C. Linkenbach, J. S. Chapman, Everts & Ewing, Bicknell, Gibson & Trask, Flint & Barker, Geo. W. Baker, and Frank H. Short, for defendants.

ROSS, Circuit Judge. These cases were heard together, and may be so considered and determined, as the principal questions involved are common to them both. In that of the Cosmos Exploration Company the lands involved constitute the fractional W. $\frac{1}{2}$ of section 30, in township 28 S., range 28 E., Mt. Diablo base and meridian; and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 4, in township 29 S., range 28 E., same base and meridian, constitutes the property in controversy in the case brought by the Pacific Land & Improvement Company. Each is a suit in equity; in the one first mentioned the complainant claiming to be the equitable owner of an undivided three-fourths of the lands there in question, and in the other the complainant claiming to be the equitable owner of the whole of the lands in controversy. In each the complainant seeks a decree quieting the alleged title as against the defendants to the suit. In each the defendants to the bills are alleged to be in the possession of the property in controversy, and to be extracting therefrom large quantities of oil, and each bill includes a prayer for an injunction restraining the defendants thereto from extracting any of the oil in the land, and also for the appointment of a receiver to take posses-

sion of the property and conserve it pending the litigation. Upon the filing of the respective bills, orders were made on the defendants to show cause why the preliminary relief asked should not be granted. The defendants appeared by counsel, and to each bill demurrers were filed, as also verified answers, and upon the orders to show cause a large number of affidavits were filed by and on behalf of the respective parties. The demurrers and orders to show cause came on for hearing, and were heard together; the verified answers being also used as affidavits. In each case the title claimed by the complainant is alleged to have been acquired by virtue of a selection made by its predecessor in interest under and by virtue of the act of congress of June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," which contains, among other things, various provisions in respect to forest reservations, commencing with the declaration that "no public forest reservation shall be established, except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein or for agricultural purposes than for forest purposes"; and including this provision:

"That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government and may select in lieu thereof a tract of vacant land, open to settlement, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: provided, further, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims." 30 Stat. 11, 35, 36.

In the suit brought by the Cosmos Exploration Company the bill alleges that on the 16th day of November, 1899, one C. W. Clarke was the owner in fee simple, free of any incumbrance, of a tract of 165.35 acres of nonmineral land situated within the limits of a public forest reservation, for which a patent had been issued to him by the United States; that on the 9th (evidently intended to be the 8th) day of December, 1899, lots 1 and 2 of the S. W. $\frac{1}{4}$ of section 30, in township 28 S., range 28 E., Mt. Diablo base and meridian, containing 165.35 acres of land and no more, were, and for more than one year continuously theretofore had been, a tract of surveyed, unappropriated, and vacant public land of the United States, open to settlement, and returned and characterized upon the official records of the United States as "agricultural land," and did not then contain any known mines, known salines, or known minerals of any kind, nor had any petroleum or other mineral substances of any kind ever been discovered within the limits thereof; that, on the said 16th day of November, Clarke, being

desirous of availing himself of the above-mentioned act of congress, relinquished to the United States the tract for which he held its patent by conveying the same by deed to the United States, and recorded the deed in the office of the county recorder of the county in which the land was situated, and on the 8th day of December, 1899, delivered to the register and receiver of the United States land office at Visalia, Cal., his said deed, indorsed as so recorded, together with a full and correct abstract of his title to the relinquished tract, duly certified by the county recorder of the county in which the land was situated, showing him to be the owner thereof by title in fee simple, free of incumbrance, at the time of such relinquishment, and also a nonmineral affidavit, together with his selection of lots 1 and 2 above described in lieu thereof; that the register and receiver of the local land office thereupon, to wit, on the 8th day of December, 1899, duly accepted, received, and filed the deed, abstract of title, nonmineral affidavit, and selection of the said Clarke, and duly entered such selection upon the official records of the office, and that the register did then and there certify that the land so selected was free from conflict, and that there was no adverse filing, entry, or claim thereto; that on the 16th day of November, 1899, Clarke was the owner in fee simple, free of any incumbrance, of a tract of 165.17 acres of nonmineral land within the limits of a public forest reservation, for which the United States had issued to him its patent; that on the 8th day of December, 1899, lots 1 and 2 of the N. W. $\frac{1}{4}$ of said section 30, containing 165.17 acres of land and no more, were, and for more than one year continuously theretofore had been, a tract of surveyed, unappropriated, and vacant public land of the United States, open to settlement, and returned and characterized upon the official records of the United States as agricultural land, and did not then contain any known mines, known salines, or known minerals of any kind, nor had any petroleum or other mineral substances of any kind ever been discovered within the limits thereof; that on the said 16th day of November the said Clarke, desiring to avail himself of the provisions of the act of congress of June 4, 1897, relinquished all of the 165.17-acre tract so owned by him to the United States, free of incumbrance, by deed of conveyance, which deed he recorded in the office of the county recorder of the county in which the land was situated, and on the 8th day of December, 1899, delivered to the register and receiver of the land office at Visalia, Cal., the said deed, indorsed as so recorded, together with a nonmineral affidavit, and a full and correct abstract of his title to the relinquished tract, duly certified as such by the county recorder of the county in which the tract was situated, showing him to be the owner thereof in fee, free of incumbrance, together with his selection of lots 1 and 2 of the N. W. $\frac{1}{4}$ of said section 30, and that thereupon, to wit, on the 8th day of December, 1899, the register and receiver of the local land office duly accepted, received, and filed the deed, abstract of title, nonmineral affidavit, and selection of the said Clarke, and duly entered such selection upon the official records of the office, and that the register did then and there certify that the lands so selected, containing 165.17 acres, were free from conflict, and that there was no ad-

verse filing, entry, or claim thereto; that the tracts so selected by the said Clarke are situated in Kern county, Cal., and within the district of lands subject to sale and disposition by the United States at its Visalia land office, and are contiguous, and constitute one body of land, and together are known as the fractional W. $\frac{1}{2}$ of said section 30; that on the 13th day of January, 1900, the said Clarke, believing there might be a possible defect in the title to the forest reserve lands relinquished by him to the United States, and used as a basis for the selection of the fractional W. $\frac{1}{2}$ of said section 30, filed in the land office at Visalia two amended selections, under the act of June 4, 1897, in one of which he selected lots 1 and 2 of the N. W. $\frac{1}{4}$ of said section 30, containing 165.17 acres, and in the other lots 1 and 2 of the S. W. $\frac{1}{4}$ of the same section, containing 165.35 acres, in which amended selections he substituted instead of the lands formerly designated as a basis for such selections other nonmineral lands lying within a public forest reservation, of the United States of equal area, to which the said Clarke had perfect title at the time of conveying the same to the United States, which conveyance was made by the said Clarke to the United States on the 4th day of November, 1899, and duly recorded in the office of the county recorder of the county in which the lands were situated, and which amended selections were accompanied by an abstract of title prepared by the county recorder of the county, showing that perfect title to such surrendered lands was vested in the said Clarke at the date of his deed therefor to the United States, and showing that by virtue of such deed the United States acquired perfect title to such surrendered lands, and that such amended selections were accompanied by nonmineral affidavits showing that the selected tracts contained no known minerals at the date of such amended selections; that the deeds of said Clarke for the tracts relinquished to the United States as a basis for such amended selections had prior thereto been filed with the register and receiver of the land office at Visalia, and were then on file in such office; that the officers of the local land office accepted such amended selections, and entered the same on the books of the office as amendatory of the former selections made by the said Clarke of the same lands upon December 8, 1899; that upon the said 13th day of January, 1900, said lots 1 and 2 of the S. W. $\frac{1}{4}$, and said lots 1 and 2 of the N. W. $\frac{1}{4}$, of said section 30, were, and for more than one year continuously theretofore had been, tracts of surveyed, unappropriated, and vacant public land of the United States (save in so far as the same were affected by the prior selections made by the said Clarke), open to settlement, and returned and characterized upon the official records of the United States as agricultural lands, and did not then contain any known mines, known salines, or known minerals of any kind, nor had any petroleum or other mineral substances ever been discovered within the limits thereof, and that on the 9th day of July, 1900, the said Clarke, by an instrument in writing, sold and conveyed an undivided three-fourths interest in the said fractional W. $\frac{1}{2}$ of said section 30 to the complainant, who ever since has been the owner thereof. Clarke was made one of the defendants to the bill in the suit brought by the Cosmos Exploration Company for the reason, as alleged therein, that he would

not join in the bill as complainant. The bill in that case further alleges that the defendants thereto, other than Clarke, base their rights and claims to the lands there in controversy upon some one or more of four certain pretended placer mining locations, the first purporting to cover the S. W. $\frac{1}{4}$ of said section 30, and known as "Luck No. 4 Oil Placer Mining Claim," made on the 2d day of June, 1899, under the mining laws of the United States, by eight named persons; the second purporting to cover the N. W. $\frac{1}{4}$ of said section 30, made on the same day by the same persons, and called the "Luck No. 3 Oil Placer Mining Claim"; the third purporting to cover "a portion of the fractional west half of lots 1 and 2 of the northwest quarter of section 30, township 28 south, range 28 east, M. D. B. & M., containing 5.17 acres," located on the 7th day of November, 1899, by W. H. Mallory, Sadie J. Mallory, Sarah Starkie, and Charles Starkie, under the name of the "Surplus No. 1 Placer Mining Claim"; and the fourth purporting to cover "the west one-half of lots 1 and 2 of the south-west quarter of section 30, township 28 south, range 28 east, M. D. B. & M., containing 5.35 acres," located November 7, 1899, by the same four persons, and called the "Surplus No. 2 Placer Mining Claim." The Cosmos Exploration Company's bill proceeds to allege the particulars in which it is claimed that each of those mining locations is invalid, one of which is the alleged fact that there was no discovery of any mineral within either of the claims until after the selections were made by Clarke under the act of congress of June 4, 1897, which, it is averred, thereupon entitled him to patents from the government for the selected tracts. Luck No. 3 and Luck No. 4 mining claims are each alleged to be invalid for the further reason that each of them embraces more than 160 acres of land, and also for the alleged reason that they were both located by the same eight persons, and upon the same date, and that such tracts are contiguous. Surplus No. 1 mining claim is also alleged to be invalid for the further reason that the same purports to be the W. $\frac{1}{2}$ of lots 1 and 2, in the N. W. $\frac{1}{4}$ of said section 30, whereas the N. W. $\frac{1}{4}$ of said section is alleged to be divided into lots 1 and 2, the most easterly 80 acres thereof being alleged to be lot 1, and the most westerly 85.17 acres thereof being alleged to be lot 2; and Surplus No. 2 mining claim is alleged to be invalid for the further reason that the same is alleged to be described as the W. $\frac{1}{2}$ of lots 1 and 2, in the S. W. $\frac{1}{4}$ of said section 30, whereas the said S. W. $\frac{1}{4}$ of said section is, according to the averments of the bill in the case brought by the Cosmos Exploration Company, divided into lots 1 and 2, the most easterly 80 acres thereof being alleged to be lot 1, and the most westerly 85.17 acres thereof being alleged to be lot 2. In neither bill is it alleged that the boundaries of the locations under which the defendants claim were not so marked that they could be readily traced on the ground.

The Pacific Land & Improvement Company's bill alleges, among other things, the selection by its predecessor in interest, one J. R. Johnston, on the 23d day of December, 1899, under the act of congress of June 4, 1897, of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 4, in township 29 S., range 28 E., Mt. Diablo base and meridian, containing 80 acres of land and no more, in lieu of a tract of 80 acres of non-

mineral land included within the limits of a public forest reservation, for which the United States had issued to him a patent, and which the said Johnston, on the 20th day of December, 1899, under and pursuant to the provisions of the act of June 4, 1897, relinquished to the United States by the deed of conveyance recorded in the office of the county recorder of the county in which the land was situated, which deed Johnston duly delivered at the time of his selection on the 23d day of December, 1899, to the register and receiver of the land office at Visalia, Cal., within which district the selected land is situated, which deed, indorsed as recorded as aforesaid, the said Johnston at the time filed in the local land office, together with a full and correct abstract of his title to the relinquished tract, duly certified as such by the county recorder of the county in which the tract is situated, showing him to be the owner thereof in fee, free of any incumbrance, at the time of such relinquishment, together with his nonmineral affidavit, and together with his selection of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 4, in lieu of the tract relinquished; that on the said 23d day of December, 1899, the register and receiver of the local land office duly accepted and filed the deed, abstract of title, nonmineral affidavit, and selection of the said Johnston, and duly entered such selection upon the official records of the office, and the register did then and there certify that the tract so selected by Johnston was free from conflict, and that there was no adverse filing, entry, or claim thereto; that on the 11th day of April, 1900, Johnston conveyed the tract so selected, and all his right, title, and interest therein, to the complainant, who has ever since been the owner thereof; that the defendants to the suit base their right and claim to the tract in controversy upon a certain pretended placer mining location covering the S. W. $\frac{1}{4}$ of said section 4, alleged to have been made on the 11th day of June, 1899, under the mining laws of the United States, by eight named persons, whose interests the defendants claim to have acquired by mesne conveyances. It is alleged that that location was void for the reason that no discovery of oil or other mineral was made within its limits until after the selection by Johnston pursuant to the act of congress of June 4, 1897, and also for the reason that seven of the eight persons who located that mining claim also on the same day located, or attempted to locate, certain immediately adjoining and contiguous property as placer mining claims.

Both bills allege that, after the selections under which the respective complainants claim were made, certain of the defendants to the suits filed in the local land office at Visalia written verified protests against such selections, wherein it is alleged that the lands so selected were not subject to selection under the act of June 4, 1897, for the reason that the same was mineral land, and was included within the boundaries of a valid placer mining location. Each protest prayed that the commissioner of the general land office order a hearing to determine the mineral character of the land, and that the selection thereof under the act of June 4, 1897, be rejected and disapproved. Each bill alleges that such protests are pending before the commissioner of the general land office, and

that the time allowed by the rules and regulations prescribed by the land department for the filing of such protests has now elapsed, for which reason it is alleged that no amended protests can be filed in the land office. The bill in each case alleges that the protests so filed are, and that each of them is, insufficient to warrant or justify a hearing being ordered by the land department to re-establish or redetermine the character of the land selected, or to change its specification as fixed by the report of the surveyor general, for the reason that the protests do not, nor does either of them, show that there was any known mine, or any known salines, or any known or existing petroleum wells, or known petroleum deposits, on the selected land at the time of its selection showing the same to be more valuable for mining than for agricultural or other purposes.

To each bill demurrers were filed upon the grounds, among others, that this court is without jurisdiction of the subject-matter, and that the bills themselves are without equity. Verified answers were also filed to each bill, all of which put in issue each and every averment of the bills in respect to any and all interests of the complainants in the property in controversy, and all the allegations of the bills in respect to the invalidity of the mining locations therein mentioned, and in respect to any acceptance by the register or receiver of the local land office at Visalia of the selections under which the respective complainants claim.

The answer of the defendants Gray Eagle Oil Company, Timothy Spellacy, J. W. Woods, C. A. Canfield, and J. A. Chanslor to the bill of complaint of the Cosmos Exploration Company, for further and separate answer, alleges, among other things, that on the 2d day of June, 1899, J. M. Terrell, Lee Terrell, E. L. Terrell, T. L. Luck, S. F. Wells, T. A. Wells, W. H. Wells, and N. W. Wells, each of whom was then a citizen of the United States over the age of 21 years, and a resident of the state of California, located, as an association of persons, a part of the N. W. $\frac{1}{4}$ of section 30, township 28 S., range 28 E., Mt. Diablo base and meridian, under the name "Luck No. 3 Oil Placer Mining Claim," at the time so marking the boundaries thereof by monuments and stakes at each corner and at intermediate points as that the claim could be readily traced upon the ground, and posted on the claim a notice of location, describing its boundaries, and containing the names of the eight locators, and the name of the claim, a copy of which was duly recorded in the office of the county recorder of the county in which the land is situated; that at the time of the making of the location the land was public mineral land of the United States, and was unoccupied and unappropriated by any one; that prior to the time of the making of the location the locators discovered on the land sands and shale containing the residuum of petroleum and bituminous matters and strata of oil-bearing sands in such state and quantity as would lead any petroleum miner to make further development thereof, and did lead the said locators and their successors in interest to make further development of the claim for the purpose of determining the full quantity of petroleum that may be found therein; that on making the said location the locators thereof took full possession of

the claim, and remained in open, quiet, and exclusive possession of the whole of it, and that they and their successors in interest have, since the 2d day of June, 1899, to the present time, caused four wells to be drilled thereon, all of which produced petroleum, and each of which but one, which was abandoned by reason of the collapse of the casing, has produced, and is still producing, it in large and profitable quantities; that since about the 1st of November, 1899, the work of drilling for oil thereon has been prosecuted continuously, and with due diligence and in good faith, by the successors in interest of the said locators, and that since about the 20th day of November, 1899, there has been a full-sized standard drilling rig at work upon the claim, and for a long time past there have been two standard drilling rigs at work thereon, and within the last three weeks three such rigs; that at the time the said land was, according to the averments of the bill, selected by the said C. W. Clarke, there was a full-sized derrick and drilling rig thereon, together with houses and buildings occupied by the defendants' employés,—all of which was known by the said Clarke at the time of his pretended selection, or could have been known to him if he had gone upon the premises; that subsequent to December 12, 1899, there was published, in a paper known as the "Visalia Delta," the following:

"Notice.

"United States Land Office, Visalia, Cal., December 12, 1899.

"To Whom It may Concern: Notice is hereby given that C. W. Clarke has filed in this office an application to select, under the act of June 4, 1897, the following tract, which is embraced in a township containing mineral claims of record, viz.: Lots 1 and 2 of N. W. $\frac{1}{4}$ of Sec. 30, T. 28 S., R. 28 E., M. D. M. A copy of said lists, so far as they relate to these tracts by descriptive subdivisions, has been conspicuously posted in this office for inspection by any person interested and the public generally. Within the next sixty days following the date of this notice, under the departmental regulations of November 15, 1899, protests or contests against the claim of the said applicant to any of the tracts or subdivisions herein described, on the ground that the same is more valuable for mineral than for agricultural purposes, will be received and noted for report to the general land office at Washington, D. C. Failure to protest or contest the claim of the said applicant to said lands within the time specified will be considered sufficient evidence of their nonmineral character, and selections being otherwise free from objections will be recommended for approval.

Geo. W. Stewart, Register.

"O. Scriber, Receiver."

That pursuant to that notice the defendant Gray Eagle Oil Company, then being the owner of said Luck No. 3 oil placer mining claim, made protest against the application of Clarke, which protest bears date February 9, 1900, and was filed in the local land office and noted upon the books thereof on that day or the next, and which protest sets forth fully the work and development that had been done by the Gray Eagle Oil Company and its predecessors in interest, and all the facts concerning the making of the said mining location, and showed its validity, and accompanied the protest with numerous affidavits showing that the said Gray Eagle Oil Company and its predecessors in interest had drilled oil wells upon the said claim, and that petroleum had been found therein in paying quantities, and that the said Gray Eagle Oil Company and its predecessors

in interest have continuously worked and developed the said mining claim since the date of its location, on June 2, 1899; that such protest, and affidavits accompanying the same, also showed that the land covered by the said mining claim was high, dry, sandy, and desert land, absolutely unsuitable either for grazing or agricultural purposes, and of no value for any other purpose than for the petroleum that it contains,—all of which, the protest and affidavits showed, the said Clarke well knew at the time that he made his application for the said land; that the said protest was duly filed in the office of the register and receiver of the land office at Visalia long prior to the expiration of the 60 days mentioned in the notice set out, and that the said register and receiver duly noted the filing thereof, and carefully considered the same, and forwarded the protest to the general land office at Washington, D. C., with recommendations that a hearing be ordered as prayed for therein.

Similar answers were filed to the bill of the Cosmos Exploration Company by the defendants Burton E. Green and M. H. Whittier, and by the Mt. Diablo Oil Mining & Development Company, W. T. Sesnon, W. E. Knowles, and A. J. Samuels, except that, in the answer of Green and Whittier, the mining location under which they claim embraces a part of the S. W. $\frac{1}{4}$ of said section 30, and is known as "Luck No. 4 Oil Placer Mining Claim," and except that in their answer it is alleged that their predecessor in interest, the Gray Eagle Oil Company, which was the successor in interest of the original locators of the claim, commenced the work to drill an oil well thereon with a standard drilling rig on the 28th day of November, 1899, hauling thereon the necessary lumber and other material, and that soon thereafter a full-sized drilling rig was put at work upon that claim, and that the work of boring and drilling for oil has been prosecuted thereon continuously, and with all possible diligence, ever since, and that the well has produced oil in large quantities for many months last past; and in the answer of the Mt. Diablo Oil Mining & Development Company, W. T. Sesnon, W. E. Knowles, and A. J. Samuels the mining location under which they claim is alleged to embrace the excess of the N. W. and S. W. quarters of the aforesaid section 30 over the regular acreage of such quarter sections, and is alleged to be known as the "Lexington No. 5 Placer Mining Claim," and to contain 10.52 acres, and except that in this answer it is alleged that the location under which these defendants claim was made by one Milton McWhorter on the 3d day of November, 1899, from which time the said locator and these defendants, as his successors in interest, have been continuously in the open, quiet, and peaceable possession of the whole of said claim, and on or about the 1st day of December, 1899, commenced boring an oil well thereon, having theretofore placed the proper derrick and machinery therefor, which was being actually and diligently operated at the time of the selection under which the complainant in the suit claims.

I have not overlooked the statement in one of the briefs for the complainants to the effect that the answer of the Mt. Diablo Oil Mining & Development Company, W. T. Sesnon, W. E. Knowles, and

A. J. Samuels in effect admits that no protest or objection of any kind was filed in the land office contesting the right of Clarke to enter that portion of the lands described in the bill included within the limits of the Lexington No. 5 placer mining claim. In that statement, however, counsel are altogether mistaken. It is true that the bill of the Cosmos Exploration Company alleges that that portion of the lands in controversy is claimed by the defendants to have been located on the 7th day of November, 1899, by W. H. Mallory, Sadie Mallory, Sarah Starkie, and Charles Starkie, under the names, respectively, of "Surplus No. 1 Placer Mining Claim" and "Surplus No. 2 Placer Mining Claim"; but the bill expressly alleges that the complainant's predecessor in interest, C. W. Clarke, selected the entire fractional W. $\frac{1}{2}$ of section 30, which includes that portion of the lands covered by the location under which the defendants Mt. Diablo Oil Mining & Development Company, W. T. Sesnon, W. E. Knowles, and A. J. Samuels claim, and that those selections were and are still being contested in the land office, not only by the defendant Gray Eagle Oil Company, but by W. H. Mallory, Sadie Mallory, Sarah Starkie, and Charles Starkie as well. It is true that the answer of the defendants Mt. Diablo Oil Mining & Development Company, W. T. Sesnon, W. E. Knowles, and A. J. Samuels denies that either of them claims under any mining claim named in the bill, but under a location called "Lexington No. 5 Placer Mining Claim," located by one McWhorter. The fact remains that the selection of the land under which the complainant claims, by whatever name called, is, according to the express averments of the bill, being contested in the United States land office.

The answer of the defendants to the bill of complaint of the Pacific Land & Improvement Company alleges, among other things, that on the 11th day of June, 1899, J. F. Elwood, H. M. Rogers, Frank R. Lindsey, D. S. Snodgrass, V. I. Willis, F. M. Garrison, A. B. Elmore, and George L. Hoxie, each then being a citizen of the United States over the age of 21 years, located, as an association of persons, under the mining laws of the United States, the S. W. $\frac{1}{4}$ of section 4, in township 29 S., of range 28 E., Mt. Diablo base and meridian, at the time marking the boundaries of the claim with monuments and stakes so placed at each corner thereof and at intermediate points as that the claim could be readily traced upon the ground, and posted a notice in writing thereon describing the said boundaries, and containing the names of the locators and the name of the claim and the witnesses to the posting, and on the 5th day of July, 1899, caused to be recorded a copy of the notice so posted in the office of the county recorder of the county in which the land is situate; that at the time of making the said location the land thereby embraced was public land of the United States, unoccupied and unappropriated by any one, and that prior to the making of the location the locators discovered thereon seepages of oil, and the residuum of petroleum and bituminous matter, and strata of oil-bearing sands, in such state and quantity as would lead any miner to locate such claim and make further developments, and did lead the said locators to do those things, for the purpose of determining

the full quantity of petroleum that might be found therein; that at the time of the making of the said location the locators thereof took full possession of the claim, and that they, and their grantees and successors in interest, have ever since remained in the open, quiet, and exclusive possession of the whole of the land described in the bill of the Pacific Land & Improvement Company, being the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 4; that on or about July 1, and prior to July 3, 1899, the said locators proceeded to the exploration and further development of the claim, and did dig and cause to be opened up thereon a prospect and discovery shaft to a depth of 60 feet or thereabouts, in sinking which they discovered petroleum therein, thereby demonstrating the great value of the property for mining purposes, at which point they were for a time enjoined at the suit of certain adverse mineral claimants; that during the month of January, 1900, the successors in interest of the said locators placed a drilling plant on the said claim immediately adjacent to the above-mentioned shaft, and drilled a well which produced petroleum in large and valuable quantities; that at the time of the location of the said claim the land thereby embraced was dry and barren, and is so situated that it is impossible to bring water thereon for the purpose of irrigation, and is so rough that if water were brought thereon for that purpose it could not be used; that it is utterly worthless for the purposes of agriculture, is situated about five miles from the town of Bakersfield, and was surveyed by the United States about the year 1855, and was never claimed, appropriated, or entered by any person for any purpose until located for mineral purposes as already stated, and that the selection by Johnston of the said land, under which the complainant Pacific Land & Improvement Company claims, was falsely and fraudulently designed and intended only to acquire and possess the same for its mineral value, he well knowing that the said land was utterly worthless for any purpose of agriculture or grazing; that ever since the location of the said tract, on the 11th day of June, 1899, these defendants and their predecessors in interest have been in the quiet, peaceable, exclusive, and uninterrupted possession of the same, and have expended thereon, in the erection of houses, derricks, drilling outfits, engines, pumping stations, and other buildings and appliances for the operation of the property as a mining claim, more than \$10,000; that the said Johnston, in making his said application for the said land, supported it with an affidavit required by the rules of the land department of the United States, whereby and wherein he falsely swore that said land was essentially agricultural, was nonmineral in character, was not occupied or claimed as a mining claim, and that he in good faith desired, designed, and intended to acquire the same for its agricultural value, and did not desire, design, or intend, under the guise or pretense of acquiring it as agricultural land, to acquire it for its mineral value,—all of which was false and fraudulent, and was at the time known by the said Johnston to be false and fraudulent.

All of these answers were used, as has been said, as affidavits on the hearing of the orders to show cause; and many other affida-

vits were filed by the defendants in support of the allegations contained in the answers, as also many affidavits on the part of the complainants in contradiction of many of the averments of fact made by the defendants. In respect to such conflict, the court would not, upon the mere preliminary hearing of motions for an injunction or for the appointment of a receiver, undertake to make a decisive determination. Even on such a hearing, however, unless the proof, taken as a whole, shows that the case of the complainants has a reasonable ground to rest upon, it is the duty of the court to deny the application for preliminary relief; for courts do not lightly enjoin parties from operating property in their possession, nor appoint receivers to take property out of their possession. *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 674; 20 Am. & Eng. Enc. Law, pp. 18, 21, and cases there cited. The fundamental question in every suit in equity is, on which side is justice? Law, unfortunately, is sometimes not justice; but equity always is,—so much so that in one of the townships within this judicial district the justice of the peace is understood to maintain on one page of his docket "The Justice's Court" of law, and on the opposite page a "Court of Justice," and to give to suitors before him the choice of forums. There may not be any law for such action on the part of that distinguished magistrate, but congress has constituted the circuit courts of the United States both courts of equity and courts of law, and all suits that are here brought on the equity side of the court must be governed and controlled by the eternal principles of right. The affidavits filed on behalf of the defendants to these suits, several of which are made by men holding positions of trust and confidence in the community in which they reside, corroborate the sworn statements in the answers of the defendants in respect to the actual and continuous possession by the locators and their successors in interest of the respective mining claims in controversy, and in respect to the actual and diligent working of those claims for oil at the very time when the selections under which the complainants claim were made. That those developments resulted in a large production of oil on each of the mining claims in controversy is not only not disputed by the complainants, but it is to preserve the oil in them, that the defendants and their predecessors in interest have disclosed and produced; that the complainants seek at the hands of this court a receiver or an injunction. The character of the affidavits filed on behalf of the complainants is far less satisfactory than those filed by and on the part of the defendants; for the latter are of positive, affirmative acts, such as the building of houses, the erection of derricks, the sinking of shafts, the drilling of holes, and other matters of like nature, about which there could not be any mistake, and were either true or the parties swearing to them committed willful and deliberate perjury. Moreover, the eagerness and activity with which lands in the Kern river field are shown to have been at that time sought, and their great value for oil, make it reasonable and natural to believe that those locating them for that purpose would not be slow to prosecute their development, nor careless in the matter of maintaining their possession. The affidavits

on the part of the complainants, although many in number, are generally to the effect that the affiants had been on and over the lands in controversy, had carefully examined their surface, and were familiar with them. Some of the affiants state in positive terms that at the times mentioned the lands contained no evidences of oil or other mineral, and many of them state that the affiants saw no such evidences. Some of them state in positive terms that the lands were unoccupied, without buildings, derricks, or other structures, and others that the affiants did not see any such improvements or evidences of possession. Many of them state in positive terms that the lands were covered with a good growth of native grasses, and some of them state that such growth was luxuriant, and that they are good grazing lands. When it is remembered that there are none so blind as those who do not wish to see, and the pregnant fact is also borne in mind that these now claimed agricultural lands were surveyed by the United States in or about the year 1854, and are situated within a few miles of the prosperous town of Bakersfield, some of them being within five miles thereof, and were never at any time, so far as appears, considered of sufficient value for agricultural or grazing purposes to be taken up by any one at the nominal price for such lands fixed by the government, until after the predecessors in interest of the defendants to these suits had located them under the mining laws of the United States, it ought not to be a difficult matter for any fair mind to determine on which side is the preponderance of proof disclosed by the affidavits, if this be a matter of preponderance of proof. And when to all of this is added the sworn statements and admissions found in the affidavit of Mr. Ward, one of the counsel for the complainants in these suits, and one of the counsel for the complainant in the suit of Olive Land & Development Co. v. Olmstead, 103 Fed. 568, recently decided by this court, and hereinafter referred to, followed up by the nonmineral affidavits filed in the land office by and on behalf of the persons under whom the complainants assert title, the last vestige of ground for the appointment of a receiver or the granting of the injunction prayed for is swept away, if any such ground ever existed. The very injuries alleged in the bills themselves as grounds for the preliminary relief asked are not injuries to any agricultural character of the lands in controversy, but the despoiling of their value by the extraction of the mineral oil they contain. No mineral lands were authorized to be selected under the act of June 4, 1897, providing for the exchange of lands in certain cases, as we shall presently see. Yet the affidavits leave no room for any sort of doubt that the parties making the selections under which the complainants assert title knew at the time they did so that the lands in question were valuable for the mineral that they contained, or, at least, were supposed to contain, and were sought for that purpose only, and were practically worthless for agriculture or for any other purpose than that of mining. Take the sworn statements and admissions of Mr. Ward himself. It appears that he was the attorney and adviser in the matters in question for Johnston, who made the selection under which the complainant Pacific Land & Improvement Com-

pany claims, and who made the selection under which the Olive Land & Development Company claimed in the suit heretofore and hereinafter referred to, and also represented other parties seeking to secure other oil lands in the immediate vicinity of those here in suit, under and by virtue of the forest reserve lieu land act. One Herbert G. Wylie was at the times in question the superintendent of the Petroleum Development Company, some of whose lands, or, at least, lands to which that company claimed title under the mining laws, had been selected under the forest reserve lieu land act by clients of Mr. Ward, although it is but fair to the latter to say that he swears explicitly that he did not know that fact at the time of sending to Wylie the telegram and letter next mentioned, or at the time of the interview held between them, and to which reference is made in Mr. Ward's affidavit. In the affidavit of Wylie he states that on or about January 14, 1900, he received a telegram from Mr. Ward, dated San Francisco, and in substance as follows: "Can you meet me at Southern Hotel to-morrow 5 o'clock? Confidential," to which he states he replied: "You can find me at the wells at any time;" and that subsequently he received from Mr. Ward a letter, of which the following is a copy:

"On Board South Bound Owl, June 17, 1900.

"Mr. H. G. Wiley, Bakersfield, Cal.—My Dear Sir: I have an exceedingly important matter which I wish to present to you bearing upon the oil land situation in the Kern river belt, & I hoped to have gotten to Bakersfield the other day when I telegraphed you from San Francisco, to have talked the matter over with you there, but urgent matters prevented my doing so, & I would stop now to see you, but urgent business requires that I be in Los Angeles to-morrow morning. What I have to say I believe means a handsome thing for you if you care to co-operate with me. Quick action is necessary to take advantage of the situation, & if you can spare a day away from the wells I wish you would come to Los Angeles on the train to-morrow night, the 18th inst., & see me the next morning, & if we do no business I will gladly pay the expenses of your trip. Please let me hear from you by that train anyway. Yours, truly,
Shirley C. Ward."

Wylie states in his affidavit that he came to Los Angeles at the time suggested in this letter, and had an interview with Mr. Ward the next morning in his office, during which Mr. Ward stated to him, among other things, that he wished him (Wylie) to act as a representative of three corporations, of which Mr. Ward was attorney, in the oil field in Kern county; that it was a question in his (Ward's) mind how he could obtain the quickest title to the oil lands in that field, and that when in San Francisco he consulted with other attorneys and parties, and that they had determined to place scrip upon the lands as being the quickest and easiest way to obtain title thereto. The affidavit of Wylie also contains certain propositions stated by him to have been at that time made to him by Mr. Ward, which I do not find it necessary to set out. In the affidavit of Mr. Ward he admits sending the telegram and letter to Wylie, and admits the interview in his office, his version of which is given in his affidavit as follows:

"That at the time said interview occurred affiant knew that said Wylie was in the employ of the Petroleum Development Company, and was super-

intendent of the field work thereof, which company was operating in the production and marketing of oil in the Kern river oil district, in Kern county, California, but affiant did not know at the time of such interview that the Petroleum Development Company either owned or leased, or claimed under mineral locations or otherwise, any of the lands which had been selected under the act of congress of June 4, 1897 (30 Stat. 36) by any of the clients of affiant, or by any parties represented in any way by affiant. That the sole purpose of such interview between affiant and said Wylie was to engage said Wylie to make frequent examinations of, and keep in close touch with, the lands which had theretofore been selected under the act of congress aforesaid by parties represented by affiant, in order that said Wylie might be advised instantly of any trespass upon such property, or any portion thereof, by any parties entering upon the same for the purpose of developing petroleum thereon or otherwise, and in order that said Wylie might secure evidence, as the same arose, of any entry that might be made upon such lands by any parties attempting to bore or drill thereon for petroleum, and in order that said Wylie might keep a constant record of the dates at which any of such entries were made, and of the parties by whom made, and that said Wylie might be advised in the event that any oil developments were had upon such lands and of the progress thereof, and the exact time at which, if ever, oil was discovered or found in any of such borings or wells, all to the end that said Wylie might keep affiant and the parties whom he represented as attorney at once and constantly advised of the movements that were made from time to time upon such lands, to the end that affiant would have a complete and perfect record of everything that transpired upon the lands already selected subsequent to the date of such interview, so that he might thereby be in position to refute and overcome any false showing of fact which the mineral claimants might at any time attempt to make as to the time they entered upon any of such selected lands, or the time at which they discovered oil thereon. That affiant was led to resort to such a means of having a complete record and a check upon all the movements that might thereafter occur upon the lands which had been selected by his clients because he was impressed with the danger of being overwhelmed with a multitude of false affidavits as to the time the first discoveries of oil upon said premises were made, in the event that any such discoveries should ever thereafter be made thereon; and affiant having heard that certain mineral claimants had stated that they could produce an oil discovery with a hydraulic rig in a single night, by boring a shallow hole and pouring oil in from above, and fearing that some such fraudulent practice might be resorted to, he felt the necessity of having some one, who was in touch with everything going on in the district, constantly on the watch to discover and expose any such fraudulent practice, if the same should be resorted to on any of the lands which his clients were interested in. That affiant realized that the outcome of such selections as had been made by his clients in said Kern river district depended upon being able to show truthfully and accurately to the court or to the land department the facts as they actually existed at the date of such selections, and that affiant realized the difficulty of presenting the truth to the court upon such questions where the sentiment existing in the community in which such lands were located was as strongly adverse to scrip titles and as strongly in favor of placer location titles as was the case in such community. That, realizing such difficulty, affiant sought to obtain the assistance of some one who was upon the ground, and in a position to know from day to day exactly what transpired upon the lands in which his clients were interested; and realizing the importance of being able to show the facts as they actually existed at the date of such selection, and realizing the absolute necessity of being able to expose and show the falsity of any perjured testimony concerning such matter, affiant wired and wrote to said H. G. Wylie as in the affidavit of said Wylie stated. That the statements contained in such affidavit of said Wylie, except in so far as they conform to the following statements of facts, are wholly untrue. Affiant alleges that the following was the purport of the conversation had between said affiant and said Wylie at the office of the affiant, upon January 20, 1900: Affiant stated to said Wylie that, as a result of his examination of the law and his consultation with other attorneys in San Francisco, he had, early

in December, 1899, come to the conclusion that there could be no valid mining location of lands supposed to be chiefly valuable for petroleum unless the same was based upon an actual discovery of oil upon the specific property, and that the actual discovery was the very basis of such a mining location; and that as there were no surface discoveries of oil in the Kern river district, except possibly the old Elwood discovery on section 3, down at the river bank, he had been tried to find a method by which good title could be acquired to such lands in the absence of, and prior to the actual discovery of, oil; and that early in December, 1899, he had come to the conclusion that good title could be acquired to such lands under the forest reserve lieu land act, and that having come to such conclusion, and advised some of his clients to that effect, they had already selected and entered under such act a large body of land scattered throughout the Kern river district, amounting to between two and three thousand acres. That such lands had been carefully examined by a number of witnesses before they were selected, and it was found beyond all question that the same were unoccupied, and that they contained no discoveries of oil or improvements whatsoever at the time of their selection. Affiant then stated to said Wylie that, notwithstanding such were the facts, the sentiment existing in the community at Bakersfield, as evidenced by the attempt at mob violence upon the persons of Mr. Stevens and Mr. Whitaker in the Alexander Case, was so strongly against the scrippers that affiant seriously feared that perjured testimony would be resorted to by the mineral claimants, in order to show that actual discoveries of oil had been made upon the lands selected by affiant's clients at the time of selection, and that as none of affiant's parties resided in Kern county, and had no representative there, affiant would like to employ him to keep tab on the situation, and keep a record of everything that was done upon such lands, so that he would be able to say exactly when, if ever, any parties entered thereupon for the purpose of boring for oil or otherwise, and exactly when, if ever, they discovered oil thereon, and all the facts concerning the same, together with corroborative evidence thereof, as affiant believed that said Wylie was in position to know everything that was going on in the way of oil development and exploration in that territory. Said Wylie told affiant at the time that he knew every driller in the field, and that every new rig that came in soon came in touch with him, because he furnished oil to run the engines of nearly all the drillers then working in the field. That he would be in position to advise affiant of everything just as it occurred, and that he could keep exact record of all borings, and inform affiant exactly when any one entered upon such land, so that affiant could take the action he saw fit, either in the way of injunction or otherwise. Said Wylie did not inform affiant at that time, nor until some months later, when he met affiant in the city of Los Angeles, that his employers were in any way interested in the land that had been selected by the clients of affiant. That affiant in no way referred to engaging said Wylie to aid him in making selections of land not already made, nor to obtain any information in any way that would be of value to affiant or to his clients in connection with lands yet to be selected under said act of congress; and affiant states as a fact that neither he nor any of his clients have since the said interview of said Wylie of January 20, 1900, made any selections of land in the said Kern river district, and further states that at the time of such interview they had no intention of making any further selections. That the proposed employment of said Wylie was solely for the purpose of enabling affiant and his clients to prove the truth as to the exact status of the lands which they had already selected, at all times after such interview, and until all controversy as to title thereto was finally settled; and the sole purpose of affiant's attempt to employ said Wylie was in order that he might know exactly when, if ever, any parties went upon the lands that had been selected by affiant's clients, and exactly when, if ever, any subsequent discoveries of oil were made thereon, and to thus be in a position to defeat any attempts that might be made to antedate such discoveries. That affiant did offer said Wylie the equivalent of an undivided 60 acres in the holdings of said Kern river district then controlled by clients of affiant, amounting to between 2,500 and 3,000 acres; but that such interest was to be represented, not in land, but in stock of corporations which would be organized to own and control such

property. That said Wylie led affiant to believe that such offer would be agreeable to him, provided the lands selected, upon examination, proved, in said Wylie's estimation, to be sufficiently valuable to make such compensation adequate for the service he was expected to render. That said Wylie left affiant with the understanding that he would examine the lands selected by affiant's clients as aforesaid, and that he would communicate with affiant his conclusion on the subject within a few days. That affiant expected to hear from said Wylie within a few days upon the subject, but said Wylie never communicated with affiant for several months thereafter, and, instead of treating as confidential the information which affiant had given said Wylie, affiant believes that said Wylie communicated affiant's information to the mineral claimants interested in, and claiming title to, the lands so selected by the clients of affiant as aforesaid. Affiant says it is not true that he ever stated to said Wylie that the corporations or companies which he represented had ten thousand dollars in cash, or any other sum in cash, for the purpose of scripping oil lands as the development thereof showed it to be of great value, or otherwise. That affiant in no way mentioned to said Wylie his intention of scripping any lands in addition to those which had already been scripped by his clients, as he had no such intention. Affiant says it is not true that he told said Wylie that he was to act clandestinely in the matter, or that he was to violate any confidential or fiduciary relations to any one; but affiant, supposing there was no conflict between the interests of the employers of said Wylie and affiant and his clients in connection with the lands which had been selected as aforesaid, affiant did not imagine that there would be any violation of the duty of said Wylie to his employers involved in the services which were called for by the employment proposed to said Wylie. Affiant says that it is not true that he proposed that said Wylie was to obtain leases upon oil lands, and was to proceed to develop the same, and that affiant and his associates would enjoin them, and that defendants would make no defense to such action, and that thereby a decision in favor of the persons placing the scrip upon said ground would be obtained. On the contrary, affiant states that no mention of any such matter was made between him and said Wylie. That the Alexander-Canfield Case was then pending in this court, which affiant expected would settle the law in such controversies. That the only matter discussed or proposed between him and said Wylie was the employment of said Wylie to secure information as to, and keep a record of, everything that transpired upon the lands already selected by the clients of affiant, and to secure corroborative evidence thereof, solely with the view of being able at all times to establish the exact truth as to developments or oil discoveries upon such lands subsequent to their selection by affiant's clients. That the chief purpose of affiant in his conference with said Wylie was the securing and preserving of evidence that would defeat perjury and falsification of the facts as affiant knew them to be at the time of such interview, and said interview was not in any way for the purpose of procuring information upon which affiant or his associates might act in making future selections of land under the act of congress aforesaid. That affiant is satisfied that said Wylie did not consider the proposition that was made by affiant to him either in the light of a bribe, or as an attempt to induce him to betray the interests of his employers, and is also satisfied that said Wylie did not regard the plan proposed by affiant as a conspiracy to unlawfully defraud any one, or as in any way illegitimate, and affiant is satisfied that the only reason that said Wylie did not accept the offer made him by affiant was that said Wylie, after taking the consensus of opinion among the mineral claimants in said district, had no confidence in the law being as claimed by affiant. In such conversation affiant asked said Wylie if the services that would be imposed upon him under this proposed employment would in any way conflict with his duties or obligations in his position as manager of the Petroleum Development Company. Said Wylie assured the affiant that, so far as he knew, there would be no possible conflict of interests, and affiant alleges that at the time of said interview he knew of no reason why said Wylie could not secure for him said information, and keep the record required, and that it was not until a long time thereafter that affiant learned that said Wylie's employers were in any way interested in any of the lands that had been selected by affiant's clients. That

affiant assumed that said Wylie was worthy of confidence, and would treat his conference as confidential, even if he did not accept his employment."

It is not necessary to here go into the question of veracity respecting the conflicting statements of the two affidavits, nor to inquire into the moral phase of the propositions made by Mr. Ward to Wylie, nor as to whether those propositions had reference to lands already selected, or to the ascertainment of lands to be selected in the future. The important point is that Mr. Ward's own affidavit discloses the fact that before any of these lands had been selected under the forest reserve lieu land act the question as to how to obtain them had been the subject, not only of his own meditations, but of consultations with his associates in San Francisco; that he knew that, to secure title to them under the laws which congress itself declares are the only ones that provide for the disposition of mineral lands, it would be necessary to make an actual discovery upon each claim; that what he sought to do, and that what was attempted by his clients, was the obtaining of title to these oil lands without complying with the mining laws of the United States, and by selecting them under the forest reserve lieu land act. If from the other affidavits in these cases there could exist any doubt that the parties under whom the complainants assert title made these selections of what they knew, or, at least, believed, to be oil lands for the very purpose of securing them by means unauthorized by law, and pursuant to a plan devised and settled in advance, it is shown beyond any question by the statements and admissions of Mr. Ward. And so, in pursuance of that plan, we find the lands here in controversy selected by the predecessors in interest of the complainants, and each of those selections accompanied and supported, in the one case by the affidavit of Johnston himself, and in the other by that of one G. W. Baker, on behalf of Clarke, in each of which the affiant swears that he is well acquainted with the character of the land selected, and that his personal knowledge thereof is such as to enable him to testify understandingly with regard thereto; that no portion of the land is claimed for mining purposes; that no portion of it is worked for mineral during any part of the year by any person or persons; that the land is essentially non-mineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing the same for agricultural purposes. If, instead of these palpably false and fraudulent statements, the affidavits accompanying and in support of the selections had stated the truth,—had stated that the applicants at least believed the lands sought contained oil, and that they wanted them for that purpose, and for that purpose only, and desired to select them under the law authorizing agricultural lands to be taken in exchange for lands situated within a forest reservation that had been surrendered to the government,—no one can doubt that the officers of the local land office would have refused to file or receive the selection of such land under the forest reserve lieu land act. It is said for the complainants that the nonmineral affidavit was not required either by the statute or by any rule or regulation of the land department. Even

if that be conceded to be true, the fact remains that the affidavits were made and filed in support of the selections, and constituted a representation, and one of the means by which the selectors sought to secure the lands, and being made and used for the purpose of evading and defeating the laws of congress, as well as of defrauding the claimants under the mining laws, no court of equity should lend them its aid in securing the fruits of the fraud. No such affidavits were before the court in the case of Olive Land & Development Co. v. Olmstead, and it need hardly be said that, if any such showing had been there made, the only decree that the complainant would have got would have been one dismissing its bill at its own cost. In *Finn v. Hoyt* (D. C.) 52 Fed. 83, a suit was brought by the United States to cancel two patents that had been issued by the government to the defendants in the suit for certain lands alleged by the complainant to be mineral lands, and that were known to be such by the defendants at the time they were purchased as agricultural lands, and concerning whose character the defendants made to the government officers at the time of the purchase false and fraudulent statements. The court found that the preponderance of the evidence showed that the lands were valuable for mineral, and that the defendants knew that fact at the time they represented them to be agricultural, and accordingly annulled the patents, citing a number of cases in support of its decision. Surely, if a court of equity would annul a patent issued under such circumstances, as it undoubtedly would, it should not grant any equitable relief in advance of patent in respect to claims based upon like false and fraudulent representations.

It is also insisted on the part of the complainants that the purpose for which a selection is made under the act in question is unimportant, and that this court so held in the case of Olive Land & Development Co. v. Olmstead; and, further, that there is in law no mining claim until a discovery of mineral within its limits has been made; that, until such discovery, such a pretended claim is a mere nothing, and that this court so held in the Olive Land & Development Co. Case. That case, and the manifest distinctions that exist between it and the cases at bar, will be hereinafter fully referred to; but I pause now to say, in answer to these two suggestions, that as that case was made to appear to the court, both as to the facts and as to the provisions of law upon which it was rested, the complainant sought to enforce its own right without interfering with any right on the part of the defendants to the suit, and it was under such circumstances that this court said, and properly said, that the motive with which the selection was made was unimportant. "Motive," as said by the circuit court of appeals for this circuit in the recent case of *Hanchett v. Chiatovich*, 41 C. C. A. 648, 652, 101 Fed. 742, 746, "does not count where one merely exercises his own right, without violating any right of another, but when he does violate the right of another the motive of the act enters largely into the problem." So, too, must the statement of this court in the Olive Land & Development Co. Case, to the effect that the location under which the defendants in that case claimed amounted to nothing, be taken

in connection with the facts about which the court was speaking. Such is the universal rule in respect to the opinions and decisions of courts. There the fact appeared to be that the defendants went upon the land there in controversy prior to the selection under which the complainant claimed, and, without making any discovery of any mineral, posted a notice of the location of a mining claim, and marked its boundaries upon the ground, and then left, and, so far as appeared, never returned. No possession was held or maintained by them, nor did they ever undertake to return until after the complainant made its selection, when they threatened to interfere with its possession and rights. Nor was the land involved in that case ever at any time ascertained to be mineral in character. It was in speaking of such a pretended location that this court said, and properly said, that it amounted to nothing.

The demurrers to the present bills raise the questions of jurisdiction, and of the sufficiency of the bills themselves. The bills expressly allege that upon the making of the selections under which the complainants claim, and the publishing of the notice required by the local rules and regulations of the land department, the defendants to the bills initiated in the land office contests by written protests against such selections, on the ground that the lands selected were mineral lands, and not, therefore, subject to selection under the act of June 4, 1897, and that those contests are still pending in the land department. Those averments of the bills, in my opinion, state the complainants out of court; for no court can lawfully anticipate what the decision of the land department may be in respect to the contests, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact, such as is that relating to the character of any particular piece of land. It was so decided by this court in the case of *Savage v. Worsham* in an opinion filed April 4, 1892 (104 Fed. 18), and has been likewise decided by other courts. *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62, and cases there cited; *Sioux City & St. P. R. Co. v. U. S. (C. C.)* 34 Fed. 835.

It is urged on the part of the complainants that the protests filed in the land office were insufficient to warrant or justify a hearing in respect to the character of the lands in controversy, in that they failed to show the particulars in respect to their character. It is a sufficient answer to this to say that that is a matter for the decision of the land department itself. Formal pleadings, such as are required in the courts, are not demanded in the land office. But, if the protests should be there held to be insufficient in form, the power to allow them to be amended doubtless exists; for they do allege in express terms that the lands were mineral in character, and therefore not subject to selection under the forest reserve lieu land act, which is the ultimate and controlling fact to be ascertained.

It is further insisted on the part of the complainants that, notwithstanding the averments of the bills in regard to the contests, the other allegations of fact therein constitute a selection of the lands in controversy by the predecessors in interest of the complainants,

and that a perfect equity in the lands was thereby acquired, if the lands were then vacant and contained no known mine or known saline; and it is said that this court so held in the case of Olive Land & Development Co. v. Olmstead, 103 Fed. 568. Let us see. In that case there were not only no affidavits of any kind presented to the court, as has been already stated, but neither in the oral argument nor in the briefs there presented were any rules or regulations prescribed by the land department for the carrying out of the provisions of the forest reserve lieu land act brought to the notice of the court, nor was the act of congress of March 3, 1891 (26 Stat. 1095), repealing the provisions of the pre-emption law, in which, in express terms, and by adoption in the homestead law, was the provision in respect to "known salines or mines," nor did it there appear that the land there in controversy was in the actual possession of any one at the time of the selection under which the complainant in that case claimed, nor that any mineral of any character had ever been discovered thereon, nor that any contest was ever pending or initiated in the land office in respect to the selection under which the complainant there claimed, but, on the contrary, that the selection was accepted by the register and receiver of the local land office, the records of which showed the land to be vacant and open to settlement, and that, as a matter of fact, the land was vacant and unoccupied; the defendants to the suit having only gone upon the land and marked out the boundaries of the mining claim, and posted a notice thereon claiming it as such, without making any discovery of any mineral, and then leaving and never returning. It was upon such facts and the statutory provisions there presented that this court held, and I think properly held, in the Olive Land & Development Co. Case, that the complainant there acquired an equity in which it was entitled to be protected, and the court accordingly awarded the complainant a decree, with a provision therein to the effect that, should the land department of the government at any time prior to the issuance of a patent for the selected tract, determine that the land was not vacant and open to settlement at the time of its selection, the operation of the decree should thereupon cease. In speaking of the act of June 4, 1897, in respect to the exchange of lands, the court said:

"The statute in question is a plain standing offer on the part of the government to exchange any of its land that is vacant and open to settlement for a like quantity of similar land within a forest reservation, for which it had previously issued a patent, or to which an unperfected bona fide claim had been acquired, provided that, in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements, and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims; the owner of or settler on the tract within the reservation, in the event of his acceptance of the offer, being required to relinquish his tract to the government, in consideration of which he is given the right to select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his patent or claim, as the case may be, with the further provision that no charge shall be made for making the entry of record or issuing the patent to cover the tract selected. From these provisions [the court continued] it is clear that in such cases of exchange title is to be given by the government for title received, and in cases of unperfected claims the claimant is to occupy a pre-

cisely similar status in respect to the tract selected that he did regarding that relinquished. In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly at the date of selection. It is upon its then character and condition that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future. The right to select is by the statute given to the party invited by the government to make the exchange, without other condition than that the land selected shall be vacant and open to settlement. Neither the act of the selector, however, in making the selection, nor that of the officers of the local land office, upon whose books the selected tract appears to be vacant and open to settlement, in accepting and filing the selection, is conclusive of the then character and condition of the land. Presumptively the character and condition of the selected tract is such as is indicated by the books of the land office, and therefore the selection, with the approval of the officers of the local land office, of a tract appearing upon the books as vacant and open to settlement, in lieu of a similar tract of like dimensions relinquished to the government, gives an equity in the selector which entitles him to protection until the fact in respect to the character and condition of the selected land is, upon proper notice to the equity claimant, otherwise determined by the land department. The right to make that inquiry extends to the time of the issuance of the patent contemplated and provided for by the statute. *Hawley v. Diller* (decided May 28, 1900) 178 U. S. 476, 20 Sup. Ct. 986, Adv. S. U. S. 986, 44 L. Ed. 1157; *Lumber Co. v. Rust*, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591; *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974. But this inquiry, as has been said, is limited to the character and condition of the land at the time of its selection. One reason for this has already been stated, namely, that, while the selector under the act in question may and must inform himself in regard to the then character and condition of the land he desires to take in exchange for that relinquished, it would be altogether unreasonable to hold that he is required to make a selection based upon what may be disclosed in that regard in the future. And, turning to the act under consideration, it is seen, as has already been observed, that the power to 'select' is by the statute given to the party who is invited to make the exchange, provided, always, that he confines his selection to the class of lands described in the statute, to wit, those vacant and open to settlement. No other condition is imposed by the statute. The act in question differs very materially in this respect from the indemnity clauses of many of the railroad and other grants requiring the selections to be made by and with the advice, consent, direction, or approval of some officer of the land department, in which case such consent or approval is deemed a condition precedent to the vesting of any interest in the selected land."

After referring to the case of *Culver v. Uthe*, 133 U. S. 655, 10 Sup. Ct. 415, 33 L. Ed. 776, this court proceeded to say in *Olive Land & Development Co. v. Olmstead*:

"It is true that in the case just cited (*Culver v. Uthe*) a certificate had been issued by the register and receiver of the local land office in lieu of the land warrant surrendered, while here nothing more was done by the register and receiver of the local land office than to receive the deed for the relinquished land, together with the certificate of title thereto, and to accept and file the selection of the tract selected in lieu thereof. But in the present case nothing more was required to be done. The statute makes no provision for the issuance of any certificate by the register and receiver to the selector, or for the issuance to him of any other instrument than a patent. It is well settled that in purchases of land from the government, where one has paid the full purchase price and done all that he is called upon to do by the terms of the statute, he has acquired an equitable title to the property bought."

And further on:

"As has been said, the question that remains open to inquiry by the land department, up to the issuance of patent, is whether or not the selected land was vacant and open to settlement at the time of its selection. Vacant public land is open to settlement under the laws relating to that subject when they contain no 'known salines or mines' (Act Sept. 4, 1841 [5 Stat. 455]; Rev. St. § 2258), whether of gold, silver, petroleum, or any other mineral. The law as to what constitutes a 'known mine,' under the statutes relating to the settlement of public lands, is also thoroughly well established. [Citing various cases.]"

In the main what was there said is correct, even as applied to the facts, statutory provisions, and rules and regulations of the land department presented in the present cases, and as applied to the facts about which the court was speaking, and upon the statutory provisions upon which that case was rested, is entirely correct. The right of selection given by the act of June 4, 1897, is conferred upon the party desiring to avail himself of the exchange proposed by the United States, subject only to the condition that the land selected shall be vacant and open to settlement. But he makes his selection with full knowledge of that condition. The statute of June 4, 1897, does not undertake to prescribe how the condition shall be ascertained and determined, but by the provisions of section 441 of the Revised Statutes the secretary of the interior "is charged with the supervision of public business relating to the following subjects: * * * Second. The public lands, including mines; * * *" and by section 453 of the same statutes it is declared that "the commissioner of the general land office shall perform, under the direction of the secretary of the interior, all executive duties appertaining to the surveying and sale of the public lands of the United States or in any wise respecting such public lands and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government"; and by the provisions of section 2478 of the Revised Statutes the commissioner of the general land office is authorized, under the direction of the secretary of the interior, "to enforce and carry into execution by appropriate regulations every part of the provisions of" the title on public lands, not otherwise specially provided for. Of course, such rules and regulations must be reasonable. As has been stated, it did not appear in the case of Olive Land & Development Co. v. Olmstead that any rules or regulations had ever been made pursuant to the provisions of the act of June 4, 1897, but that case was rested in that respect upon the admitted averment of the bill that the selection under which the complainant there claimed was filed and accepted by the register and receiver of the local land office. In the absence of all rules and regulations upon the subject, the court treated, and I think properly treated, such acceptance as an approval of the selection, which satisfied the condition prescribed by the statute, and completed the selection and exchange, leaving only in the officers of the general land office, until the issuance of patent, the right of inquiry into the facts and conditions of the exchange antedating its consummation. The selection, as has been seen, consists of two things—First, the act of selection upon the part of the selector; and, sec-

ond, the approval of his selection by the land department. Both acts are essential to constitute the selection authorized by the statute, but it cannot be that congress intended that the exchange once made should be rendered nugatory by any future discovery of mineral. *Shaw v. Kellogg*, 170 U. S. 312, 332, 18 Sup. Ct. 632, 42 L. Ed. 1050, and cases there cited; *In re McDonald*, 30 Land Dec. Dep. Int. 124; *Clarke v. Railway Co.*, Id. 145. The character of the land, and whether it is vacant or occupied, are questions of fact for the determination, and the exclusive determination, of the land department. *Steel v. Refining Co.*, 106 U. S. 447, 450, 1 Sup. Ct. 389, 27 L. Ed. 226; *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875.

In *Cornelius v. Kessel*, 128 U. S. 456, 461, 9 Sup. Ct. 122, 124, 32 L. Ed. 482, 483, the court said:

"The power of supervision possessed by the commissioner of the general land office over the acts of the register and receiver of the local land offices in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. * * * But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exercised only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

Fraud in the entry or selection, or any mistake of law or lack of authority on the part of the officers of the land department to make the entry, sale, or exchange, as the case may be, of the public lands, may be inquired into and determined by that department at any time prior to the issuance of patent (*Orchard v. Alexander*, 157 U. S. 372, 383, 15 Sup. Ct. 635, 39 L. Ed. 737; *Lumber Co. v. Rust*, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591; *Diller v. Hawley*, 26 C. C. A. 514, 81 Fed. 651; *Hawley v. Diller*, 178 U. S. 476, 20 Sup. Ct. 986, Adv. S. U. S. 986, 44 L. Ed. 1157); after which the matter becomes subject to inquiry only in the courts (*U. S. v. Stone*, 2 Wall. 525, 535, 17 L. Ed. 765; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *U. S. v. Schurz*, 102 U. S. 378, 396, 26 L. Ed. 167; *Bicknell v. Comstock*, 113 U. S. 149, 151, 5 Sup. Ct. 399, 28 L. Ed. 962; *Mining Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. 457, 34 L. Ed. 1026). But matters of fact, such as the character of the land, its condition as to occupancy, and the like, when once investigated and determined by the officers of the land department, and the applicant allowed to select or enter and pay for it, vests a right which cannot be affected by subsequent discoveries in respect to its character or condition. Authorities supra; *Colorado Coal & Iron Co. v. U. S.*, 123 U. S. 307, 328, 8 Sup. Ct. 131, 31 L. Ed. 182; *Spratt v. Edwards*, 15 Land Dec. Dep. Int. 290, 291; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed.

238; Jones v. Driver, 15 Land Dec. Dep. Int. 514, 518; and numerous cases cited in Olive Land & Development Co. v. Olmstead.

It is shown in the present cases that, as a matter of fact, rules and regulations were prescribed on June 30, 1897, by the commissioner of the general land office, with the approval of the secretary of the interior, for carrying out the provisions of the act of congress of June 4, 1897, both for the exchange of lands within a forest reservation covered by an unperfected bona fide claim and of such tracts as are covered by patent. Subdivision 15 of such rules relates to the former, and by subdivision 16 thereof it is prescribed that, "where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quitclaim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for"; which affidavit is required to show the period and length of claimant's residence on his relinquished claim as credit for the time spent thereon to be allowed under the new entry in completing the period of residence required by law. Subdivision 18 of the rules and regulations declares: "All applications for change of entry or settlement must be forwarded by the local officers to the commissioner of the general land office for consideration, together with report as to the status of the tract applied for." The rules and regulations also require notice of the selection to be published for 60 days, within which time objections thereto are authorized to be filed in the local land office. This fact not only appears from the averments of the present bills, but it also appears therefrom, as has been shown, that contests were filed in the local land office within the 60 days against the selections under which the complainants claim, and are still pending in the general land office. And although the court has not been referred to any rule or regulation adopted by the land department prior to the selections under which the complainants claim, requiring them to be accompanied by a non-mineral affidavit, it would seem from the letter of instructions from the secretary of the interior to the commissioner of the general land office, of date March 6, 1900 (29 Land Dec. Dep. Int. 580), in answer to certain questions propounded to him, that there is a rule in existence requiring such nonmineral affidavit to accompany selections under the act of June 4, 1897. The rules and regulations mentioned are in no respect inconsistent with the provisions of the statute, are reasonable, and are therefore valid, and have the same force and effect as statutory provisions. From them it is clear that the officers of the local land office are not empowered to approve any selection under the act of June 4, 1897, but are expressly required to refer the questions in respect to the condition and character of the land sought to be selected to the general land office for consideration, and that there the power rests to determine the second of the two essential things necessary to constitute a selection under the act of June 4, 1897, viz. whether the land sought is vacant and open to settlement. It is,

to say the least, doubtful if persons authorized to select vacant land only are authorized to select lands in the actual bona fide occupancy of others under the settlement laws or under a mining location, even though, in the case of the latter, the location be invalid by reason of the absence of a valid discovery of mineral (*Shaw v. Kellogg*, 170 U. S. 312, 332, 18 Sup. Ct. 632, 42 L. Ed. 1050); but they are certainly not authorized to effect such selection by any sort of fraud or circumlocution.

In *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed. 673, 680, this court said:

"It is true that, upon mineral land of the United States upon which there is no valid existing location, any competent locator may enter, even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no right upon any government land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Such entry must be open and aboveboard, and made in good faith. *Belk v. Meagher*, 104 U. S. 279, 28 L. Ed. 735; *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732. One who is in the actual possession of a mining claim, working it for the mineral it contains, and claiming it under the laws of the United States, whether the location under which he so claims is valid or invalid, cannot be forcibly, surreptitiously, clandestinely, or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin or temporarily absent from the claim; for he is there by the permission and invitation of the owner of the land, the United States."

The same reason which precludes the actual possession of another being surreptitiously or clandestinely entered upon prevents it being disturbed by false or fraudulent representations made in the land office. Nor, in my opinion, in view of the act of March 3, 1891, eliminating the words "known salines or mines" from the pre-emption and homestead laws, is it true, as contended on the part of the complainants, that the lands in controversy are necessarily open to settlement, and therefore to selection, under the act of June 4, 1897, unless they contain "known salines or mines." That was true, as was abundantly shown by the authorities cited in *Olive Land & Development Co. v. Olmstead*, while the pre-emption and homestead laws excluded from pre-emption and homestead entry only "lands on which are situated any known salines or mines"; but what was not then brought to the attention of the court, and what was apparently not then within the knowledge of counsel in that case, is now made to appear, namely, that congress, on March 3, 1891, by an act entitled "An act to repeal the timber-culture laws, and for other purposes" (26 Stat. 1095), repealed the pre-emption law, and thereby also eliminated from the homestead law the words "known salines or mines," which were in the latter by adoption (Rev. St. § 2289). But congress left in force the provisions of section 2302 of the Revised Statutes, by which it is declared, among other things, that no mineral lands shall be liable to entry and settlement under the provisions of the homestead law. The words "mineral lands" are certainly more general and much broader than the words "lands on which are situated any known salines or mines," formerly existing in the pre-emption and homestead laws. 5 Stat. 453, 455; Rev. St. §§ 2258, 2289, 2317. The wide distinction between them is clearly

pointed out by the supreme court in the cases of *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; *Davis' Adm'r v. Weibbold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; and numerous other cases that might readily be cited. Undoubtedly they should be read in connection with the general reservation of mineral lands contained in section 2318 of the Revised Statutes, which declares that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law," and in connection with the provisions of the law in respect to the exploration, occupancy, and sale of the mineral lands of the United States. The first act upon that subject was that of July 26, 1866 (14 Stat. 251), the first section of which declared that the mineral lands of the public domain were free and open to exploration and occupation by all citizens of the United States and persons who had declared their intention to become citizens, subject to such regulations as might be prescribed by law, and to the local customs or rules of miners in mining districts, so far as they are not in conflict with the laws of the United States. That act then provided for acquiring by patent the title to "veins or lodes in quartz or other rock in place bearing gold, silver, cinnabar, or copper." On the 9th of July, 1870, this act was amended so as to make placer claims, including all forms of deposit, "excepting veins of quartz or other rock in place," subject to entry and patent, under like circumstances and conditions and upon similar proceedings as those provided for vein or lode claims. 16 Stat. 217. The act of May 10, 1872, to promote the development of the mining resources of the United States, repealed several sections of the act of 1866, and, among others, the first section; but enacted in place of it a provision declaring that "all valuable mineral deposits" in lands belonging to the United States, both surveyed and unsurveyed, were "free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," subject to the conditions named in the original act. 17 Stat. 91. Other sections pointed out with particularity the procedure necessary to obtain the title to veins, lodes, and placer claims, and defined the extent of each claim to which title might be thus acquired. By the act of February 18, 1873, mineral lands in the states of Michigan, Wisconsin, and Minnesota were excepted from the act of May 10, 1872, and those lands were declared to be free and open to exploration and purchase, according to legal subdivisions, in like manner as before. 17 Stat. 465. The provisions of the act of 1872, with the exceptions made by the act of 1873, were carried into the Revised Statutes. The only settlement laws in force at the time of the selections under which the complainants claim, or now in force, are the homestead and town site laws. The town site laws (Rev. St. § 2380 et seq.) authorize the president to reserve from the public lands town sites on the shores of harbors, at the junctions of rivers, important portages, or at any natural or prospective center of population; declare when the survey of such reservations into lots may be made and the sale of the land had; prescribe with particularity the manner in which parties who have

founded, or may desire to found, a city or town on the public lands may proceed, and the title to lots in them be acquired. They also provide for the entry at the proper land office for portions of the public lands occupied as town sites, such entry to be made by its corporate authorities, or, if the town be unincorporated, by the judge of the county court of the county in which the town is situated, the entry to be in trust for the use and benefit of the occupants according to their respective interests. They contain many other clauses respecting such sites, which need not be enumerated, as enough has been stated to show that the lands here in controversy were never at any time open to settlement under those laws, for the reason that it is not pretended that the lands in controversy are or ever were within any town site, and therefore were never subject to settlement under those laws. The town site laws, therefore, have no application to the present cases, and the only settlement law that has is the homestead law, the pre-emption law having been repealed in 1891. And the homestead law, as has been seen, has not since March 3, 1891, contained the clause in regard to "known salines or mines," but declares "that no mineral lands shall be liable to entry and settlement" under its provisions. Rev. St. § 2289. Whether the lands in controversy, or any other particular tract or tracts of land, should be classed as mineral or agricultural, is a question for the determination of the land department. It appears that the lands in controversy were surveyed by the government about the year 1854, and that the surveyor returned them as agricultural lands, and that they were so entered upon the books of the land office. *Prima facie*, therefore, they are such, but *prima facie* only. "Information of the character of all lands surveyed," said the court in *Barden v. Railroad Co.*, *supra*, "is required of surveying officers, so far as knowledge respecting them is obtained in the course of their duties, but they are not clothed with authority to especially examine as to these matters outside of their other duties, or determine them, nor does their report have any binding force. It is simply an addition made to the general information obtained from different sources on the subject. In *Cole v. Markley*, 2 Land Dec. Dep. Int. 847-849, Mr. Teller, when secretary of the interior, in a communication to the commissioner of the general land office, speaks at large of the notations of surveyors, and says: 'Public and official information was the object of these notations, with a view to preventing entry until the facts are finally determined. They should be, and they are, only *prima facie* evidence, and subject to be rebutted by satisfactory proof of the real character of the land.' The determination of the character of the land granted by congress, in any case, whether agricultural or mineral or swamp or timber land, is placed in the officers of the land department, whose action is subject to the revision of the commissioner of the general land office, and on appeal from him by the secretary of the interior. Under their direction and supervision, the actual character of the land may be determined and fully established." And the court added: "There are undoubtedly many cases arising before the land department in the disposition of the public lands where it will be a matter of much difficulty

on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural, as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

In one of the briefs of counsel for the complainants it is said that since the repeal of the pre-emption law, and the elimination from the homestead act of the words "known salines or mines" in 1891, the land department has continued to hold that land is subject to settlement under the homestead laws, unless it contains known mines or salines; citing, in support of the statement, *Jones v. Driver*, 15 Land Dec. Dep. Int. 518; *Arthur v. Earle*, 21 Land Dec. Dep. Int. 92, 93; *Reid v. Lavallee*, 26 Land Dec. Dep. Int. 100. Neither of these cases at all sustains the point to which they are cited. In *Jones v. Driver* the land in dispute was sought to be entered as a homestead on November 13, 1888, against which a protest was filed May 31, 1890. The secretary held that, up to the time of the making of final proof, the making of payment, and the issuance of the final certificate as the basis of a patent, it was permissible to show the true character of the land. While this case does not, as has been said, at all support the point to which it is cited by counsel, it is in accord with what has been hereinbefore decided, to the effect that, after the sale or exchange of land has been consummated, no subsequent discovery can affect it. The case of *Arthur v. Earle*, 21 Land Dec. Dep. Int. 92, is to the same effect, and cites in support of the ruling there made *Jones v. Driver*, and also *Rea v. Stephenson*, 15 Land Dec. Dep. Int. 37. The case of *Reid v. Lavallee*, 26 Land Dec. Dep. Int. 100, involved a question of estoppel, not pertinent here, and also the question as to whether or not the land there in controversy was more valuable for mineral or for agricultural purposes, and those were the only questions in the case. Upon the latter the secretary said:

"It does not appear from the evidence that any mineral of appreciable value has been found upon the land in controversy. The work upon the lode claim prior to the cash entry consists chiefly of a tunnel of about 100 feet in length, which commences about 350 feet west of the west line of the homestead. Within 10 or 15 feet of the mouth of this tunnel some small bodies of rock carrying gold appear to have been found, and a little further on a stringer of quartz bearing small quantities of gold, but these all seem to have soon pinched out, and the amount of precious mineral obtained from the tunnel in the aggregate was of such small value as to afford no adequate compensation for the expenditure incurred. No well-defined ledge or lode carrying valuable mineral is shown to have been discovered, nor is the land shown to contain mineral in any state of such value as to justify expenditure to obtain it, nor does the showing warrant the belief that further expenditure would disclose the presence therein of valuable ore or valuable mineral of any sort. It is also shown, on the other hand, that the land in controversy, or the greater part thereof, has a rich, deep, black soil, is well adapted to the growing of fruits and vegetables, and can be easily irrigated, and that Lavallee raised thereon vegetables of good quality."

In conclusion, I think it proper to say that from the nature of the affidavits filed in these cases it is manifest that some of the affiants

have committed willful and deliberate perjury. The attention of the United States attorney for this district is therefore directed to the matter, that he may bring the affidavits to the attention of the grand jury now impaneled for this district, that they may look carefully into them, and take such course as may be found to be proper.

In each of the cases an order will be entered denying the applications for a receiver and for an injunction, sustaining the demurrers, and dismissing the bill at the complainants' cost.

WILLIAMS et al. v. UNITED STATES.

(Circuit Court, D. South Carolina. October 1, 1800.)

EMINENT DOMAIN—TAKING FOR PUBLIC PURPOSES—INJURY INCIDENT TO IMPROVEMENT OF NAVIGATION.

Where the United States government, in the proper exercise of its powers, has undertaken the improvement of the navigation of a river, and by means of the dams and other works therein built has caused a permanent rise in the level of the water of such river, resulting in the flooding of rice land adjacent, which was previously protected by embankments, and drained into the river, so as to render it permanently valueless for any purpose, such action constitutes a taking of the land for public purposes, within the meaning of the fifth amendment to the constitution, and the owner is entitled to recover just compensation therefor.

Proceeding under Act of Congress to Establish a Claim against the United States.

Mitchell & Smith, for plaintiffs.
Abial Lathrop, U. S. Atty.

SIMONTON, Circuit Judge. This is a proceeding under the act of congress of March 3, 1887, giving this court co-ordinate jurisdiction with the court of claims in certain causes of action against the United States. The object of the proceeding is to obtain just compensation for certain lands alleged to have been taken by the government for public purposes. The cause of action is on the implied contract arising from such alleged taking to give just compensation therefor under the fifth amendment.

The cause being at issue was tried by the court, in accordance with the act of congress, without the aid of a jury.

Findings of Fact.

(1) The above petition was made in compliance with the requirements of the act of March 3, 1887, duly filed in the clerk's office of the circuit court of the United States for the district of South Carolina, on the 22d day of March, 1897, and copies thereof duly served on the United States district attorney and the attorney general of the United States, and said law in all respects complied with.

(2) The plaintiffs are residents and citizens of the state of South Carolina, and are the owners in fee simple, as tenants in common, of a plantation situate in Beaufort county, in the state of South Carolina, on the Savannah river, known as "Beach Hill," containing

1,486 acres of high and rice land. They hold this plantation under sundry successive mesne conveyances showing a continuous unbroken chain of title from a grant of said land by the lord proprietors of South Carolina in 1738.

(3) A portion of this plantation—404.53 acres—has been cultivated in rice for a very long period of time, and has been so cultivated by the plaintiffs since their ownership of the said plantation in 1876 up to the time of the abandonment thereof.

(4) These 404.53 acres of rice land have been reclaimed by drainage, and the erection of dikes or banks, and have been used solely, and can be used only, for the purposes of raising rice. It was dependent for its irrigation upon the waters of the Savannah river and its ditches, drains, and canals, through and by which the waters of the river were flowed in and upon the lands, and were then drained herefrom, which were adapted to the natural level of the Savannah river, and dependent for its proper drainage and cultivation upon the maintenance of the natural flow of that stream through and over its natural channel along its natural bed to the waters of the ocean, and the maintenance of the natural level of the waters of that river.

(5) These acres of rice land were protected from the river by embankments erected upon lands of the plaintiffs, through which trunks or water ways were constructed with flood gates, which trunks were placed in such embankments, so that the bottoms thereof were a little above the mean low-water mark of the river. Through these the lands are irrigated, and through them also the lands are drained when the time comes for the draining the water off, and were dependent upon the natural rise and flow of the tide to effect this drainage. It is absolutely necessary, therefore, that the outlet of these trunks or water ways should always be above the mean low-water mark of the river. It is also absolutely essential to the production of rice and in the preparation of the lands therefor that at certain times the fields should be flooded and submerged with water, and that at other times they should be drained off so as to become perfectly dry.

(6) That for several years past the United States government, in the lawful exercise of its powers of eminent domain and regulation of commerce, under its proper officers, authorized thereto by acts of congress, has been making, and is now making, erecting, and maintaining, certain structures, dams, and training walls in the Savannah river, beginning at points below this plantation, and, in addition thereto, dumping mud and sand dredged from the Savannah river proper into the Savannah back river, below this plantation, tending thereby to stop up said river, and make the same shallow, and decrease and change the natural flow and current thereof.

(7) By reason of the erection and maintenance of these obstructions and the other work carried on by the said United States, the natural flow of said river in and along its natural bed has been obstructed and changed, and its waters have been caused to be kept back and to flow back, and to be lifted above its natural level in its natural bed.

(8) This plantation, Beach Hill, is situated on the Savannah back river, above these obstructions, and the direct effect thereof is to raise the level of the Savannah river at this plantation, to press it against

the embankments aforesaid, and so to keep the point of mean low water above its natural point, so that the outlet of the trunks and water ways in the banks of the said plantation, instead of being above the point of low-water mark, are now below the same, directly causing the water to lie, remain, and be upon the said plantation, without being capable of being drained off, and also by means of seepage and percolation causing the water to rise in the plantation itself until the water in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about 20 inches; the result of which was that, not only was it impossible to let off the water, and drain the plantation, but that these acres cultivated in rice became sogged, sour, and absolutely unfit for the cultivation or production of rice, or, so far as is known, of anything else.

(9) By raising the level of the Savannah river by these dams, obstructions, and dumping of mud therein, the waters thereof have been raised and caused to flow back upon and in and over the said plantation, actually invading the same, directly raising the water in said plantation about 20 inches, which it is impossible to remove therefrom; and this flooding is now a permanent condition on said plantation, which has been reduced to a bog, unfit for the cultivation of anything, and has no value.

(10) By reason of the superinduced addition of water actually invading the said plantation, and its destruction thereby for any and all purposes for which it might be utilized, plaintiffs have been compelled to abandon the cultivation of said plantation, and have been forced to pursue their calling of planting rice elsewhere. The direct result to plaintiffs is, therefore, an actual and practical ouster of possession.

(11) That, in addition thereto, by the erection of such obstructions, dams, training walls, and dumping of refuse material, the freshets coming down the Savannah river, and overflow therefrom, have been kept back and held up for a much longer period than before the erection of such obstructions, etc., and cannot be gotten off the land, which thereby and therefrom became sodden, boggy, and sour, gradually lessening its productive power, so that in 1895 it became valueless, which is its present and permanent condition, and it is useless for the product of rice or any other commodity.

(12) This gradual result was begun to be felt when the cross-tides dam between Hutchinson's Island and Argyle Island was built, in 1885, the summit of which was brought up in 1890, and the effect of which has gradually grown worse, not only with the continuing erection of obstructions, and the dumping of material dredged from the Savannah river proper, but also from the continued process of seepage and percolation by which the lands gradually each year became more sodden, boggy, and sour, and unfit and incapable of producing rice, the only system of cultivation of which the land is capable. From these causes the plaintiffs were finally driven away, and compelled to abandon the said plantation, in the year 1895, and have been compelled to pursue their calling of planting rice on other places. The direct result to plaintiffs is, therefore, an actual and practical

ouster of possession and invasion and taking by the government of this plantation.

(13) Beyond the backing up of the water on and in the plantation by reason of the aforesaid obstructions, and other works of the government, and the holding back upon the plantation of the waters brought down by freshets, and this invasion of these lands by this superadded water around and in and upon the plantation as above described, rendered necessary by the execution of the government plans for the improving the navigation of the Savannah river, the United States government has not and does not use these lands for any purposes, nor is it in possession of them or any part of them.

(14) The value of these lands before the obstructions aforesaid were put in and upon the said river was about \$30 per acre. The value of the rice plantation, 404.53 acres, thus taken, amounts to \$10,000.

(15) The effect upon the said plantation was first felt in 1885, upon the building of the cross-tides dam, the summit of which was finally carried up in 1890; the effect of which work and other continuing obstructions and improvements gradually increased until the year 1895, when the plaintiffs were compelled to abandon the said plantation.

Conclusions of Law.

1. The cause of action first accrued within six years of the commencement of this action.

2. The government of the United States, in undertaking the improvement of the navigation of the Savannah river, through its proper officers thereto empowered by acts of congress, was and is exercising its lawful power of eminent domain, and its power to regulate commerce and improve navigation.

3. The facts found show that by reason of the obstructions so placed in the Savannah river and the dumping of mud and sand therein, the water of the river has been directly backed up and against the banks of this plantation, and forced on the land; the superinduced addition of water actually invading it, destroying its drainage, and through seepage and percolation raising the level of the water within the plantation to the level of the water in the river, and, in addition thereto, holding back and restraining in, over, and upon said plantation the freshets, the water from which was retained upon the same; by all of which the plantation has been rendered absolutely valueless. All of which is the result of the government improvements and works, and without which its purposes could not be carried out and effected. This is a "taking," within the meaning of the fifth amendment.

4. The plantation of the plaintiffs being actually invaded by the superinduced addition of the water directly caused by the government dams, obstructions, and works backing up the water of the river, and raising the water level at and upon and in the rice plantation, and holding back and retaining upon the same the freshets, and making the same absolutely unfit for the cultivation of rice or any other known article, and plaintiffs having been compelled thereby to abandon their plantation, and being practically ousted of possession, and this being a permanent and continued condition, and the plantation being there-

by rendered irreclaimable and become of no value, renders the action of the government a taking of land for public purposes, within the meaning of the fifth amendment to the constitution, for which compensation is due to the plaintiffs.

5. The plaintiffs are entitled to just compensation for the taking of 404.53 acres of land. This is estimated to be \$10,000, the value of the lands so taken, for which amount let the plaintiffs have judgment.

ADAMS v. SHIRK et al.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 679.

1. APPEAL—SPECIFICATIONS OF ERROR.

A specification of error in holding or refusing to hold as stated, where such rulings were made in giving or refusing instructions, should state such fact, and comply with the requirement of rule 11, governing specifications of error which relate to the charge of the court.

2. SAME—QUESTIONS NOT PRESENTED TO TRIAL COURT—MOTION FOR DIRECTION OF VERDICT.

A general motion, made at the conclusion of the plaintiff's evidence, for direction of a verdict for defendant, unaccompanied by a statement or suggestion of reasons for it, may properly be overruled, and raises no question for review in the circuit court of appeals.

3. LANDLORD AND TENANT—ACTION FOR RENT—DEFENSES.

The refusal of a lessor in a ground lease, who holds as security policies of insurance on the buildings owned by the lessee, to produce such policies for assignment to one to whom the lessee has sold the buildings and assigned the lease without the lessor's consent, constitutes no defense by the assignor to an action against him for accrued rent, where there has been no loss under such policies.

4. SAME—CONSTRUCTION OF LEASE—RIGHT OF ASSIGNMENT.

The lessee under a ground lease sold the buildings, and assigned the lease to another, with the consent of the lessors, the assignee expressly covenanting that he assumed personally all the "terms, covenants, and agreements in said lease contained," among which was an agreement that the lessee should remain bound for the rent during the term, unless expressly released by the lessors on the acceptance of a substituted tenant. The lessors also executed an agreement at the same time to accept as a substitute any future assignee who should be a "responsible person," and "satisfactory" to them. *Held* that, to entitle the assignee to such substitution, he was bound to show to a reasonable certainty that his proposed transferee was pecuniarily responsible, and of such good repute as should, in fairness, render him satisfactory to the lessors, and that, in the absence of such showing, the lessors must be regarded as justified in refusing to recognize such transferee as a tenant, or to accept rent from him unless paid on behalf of the recognized lessee.

5. SAME—UNAUTHORIZED ASSIGNMENT OF LEASE—RIGHTS OF LANDLORD.

A lessor cannot be compelled by the lessee, by an unauthorized assignment of the lease, to exercise the right of re-entry and forfeiture given him by its terms, but may lawfully treat the assignee as in possession under the lessee, and hold the latter to his direct liability under the contract for the payment of the rent.

6. ARREST OF JUDGMENT—GROUNDS OF MOTION.

A motion in arrest of judgment cannot be based on an alleged variance, its only office being to challenge the sufficiency of the facts of record, apart from any showing by bill of exceptions, to support the judgment.

7. ACTION—OBJECTION TO FORM—WAIVER.

An objection that a cause of action stated in a declaration at law is cognizable only in equity must be promptly made to be of avail, and will not be considered when first taken in a motion in arrest of judgment.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This action was brought by the defendants in error against the plaintiff in error, as assignee of a ground lease, to recover rent which accrued after the defendant had assigned to another. One of the defenses insisted upon was that the assignee of a leasehold, "coming in only by privity of estate, and not by privity of contract, remains liable for the rent only so long as he remains owner of the term." The principal facts are these: The property, situated on the northeast corner of Clark and Kinzie streets, Chicago, with a frontage of 100 feet on Clark street, and having upon it a six-story brick building, a part of which was a theater, was owned by Emma L. Smith. In December, 1889, she and her husband, Perry Smith, mortgaged the property to the Northwestern Mutual Life Insurance Company to secure a loan of \$125,000. The debt was paid and the mortgage released in April, 1895. In March, 1891, Elbert W. Shirk, one of the defendants in error, bought of the Smiths the land, not including the building, paying therefor \$25,000, and assuming the mortgage to the insurance company; and at the same time executed to the Smiths a ninety-nine years lease of the land, for which they agreed to pay an annual rental of \$9,000, to discharge all taxes and rates, and to keep the property insured for \$100,000 by policies payable to Shirk, as security for the payment of the rent. The lease contains the following provisions touching assignments thereof:

"It is further covenanted and agreed by and between the parties hereto that the said parties of the second part, their heirs, executors, administrators, or assigns, shall not nor will during the said term assign, transfer, or set over, or otherwise by any act or deed procure their interest in the said premises and the improvements thereon, or on any part thereof, to be assigned, transferred, or set over unto any person or persons whatsoever, except by way of mortgage or trust deed as herein provided, except upon the written consent of the party of the first part, his heirs, executors, administrators, or assigns. If said lessees desire to sell, and the proposed assignee shall not be acceptable to said lessor, the question of such purchaser's standing and suitability as a tenant shall be submitted to two disinterested persons, one to be chosen by each of the parties hereto; and, in case of their inability to agree, the two so chosen shall choose a third to act with them, and the written report of a majority of the three shall be binding upon the parties hereto; and, if such report is in favor of the assignee's standing and suitability as a tenant, said lessor shall be bound to assent to such assignment, and, in case he does not, the said lessee may assign this lease to such proposed purchaser without the assent of such lessor. It is further agreed that the leasehold interest hereby created and the building herein mentioned may be conveyed in trust or by mortgage as security for a sum not exceeding two-thirds of the value of the building thereon, or to be erected thereon, notice in writing containing the name of the trustee or mortgagee being first given to said party of the first part, his heirs, executors, administrators, or assigns. And it is expressly covenanted and agreed by and between the parties hereto that any assignment made by the parties of the second part, or their assigns, of their interest in and to said premises, without complying with the conditions aforesaid, shall be absolutely null and void, and without effect. And it is further covenanted and agreed by and between the parties hereto, for themselves and their respective heirs, executors, administrators, and assigns, that, in the event that any assignment, trust deed, or mortgage shall be made (after complying with the conditions hereinbefore set forth), the assignment, or mortgage, or trust deed shall be subject to all the covenants, agreements, provisions, and conditions contained in this lease. And it is further covenanted and agreed by and between the parties hereto that, in the event that any assignment or mortgage be made (after complying with the conditions hereinbefore set forth),

the said parties of the second part shall still be and remain liable and subject to all the covenants, agreements, and conditions in this lease contained, unless by an instrument in writing, under seal, and duly acknowledged, said lessor shall consent to the substitution of said assignee and the release of said lessees. It is further provided that, if this lease shall be assigned without such substitution and release, then, in case of the default of any assignee hereof in the payment of the rent reserved hereby or in performance of any of the covenants or agreements herein contained, the said party of the first part shall at once notify the said parties of the second part, their heirs, executors, or administrators, of such default. It is further agreed that, in the event that any assignment, sale, or conveyance, after complying with the conditions hereinbefore set forth, shall be made by said parties of the second part, the same shall be evidenced by an instrument in writing, duly executed under seal, and acknowledged by the assignee, and duly recorded in the recorder's office of said county; and said instrument in writing whereby such interest shall be sold, assigned, or conveyed shall contain a clause sufficient in law to the effect that the assignee or assignees, purchaser or purchasers, and his or their heirs, executors, administrators, and assigns, personally accept and assume all the terms, covenants, and agreements in this lease contained, and will personally comply with them, and be bound by them, and will keep and perform all the covenants and agreements in this lease contained."

There is also a provision for forfeiture of the lease for violation of any of the covenants or agreements contained in it. Later, in 1891, Shirk conveyed a two-ninths interest to his brother, Milton Shirk; a like interest to his sister, Alice S. Edwards; and three-ninths to his mother, Mary Shirk. This was in fulfillment of the purpose of the purchase, in which he acted for himself and the others named; but there was nothing in the conveyance made to him by the Smiths to indicate that others were interested in the purchase. In August, 1894, Mary Shirk died testate. By her will she gave and devised all her estate, real and personal, to her three children named, as trustees, to pay debts and legacies, and the remainder to be kept intact, and together as one fund, the income of which should belong to the three children for their own use, until the expiration of the trust on the death of the last survivor of the three, when the principal should be divided among their children then living per stirpes. The will also gave the trustees full power to sell, convey, and rent real estate in which the testatrix had an interest, and at their discretion to deal with her corporate and other business interests. On December 27, 1895, Perry Smith, for himself and as administrator of his deceased wife, transferred and assigned to J. McGregor Adams the leasehold created by the 99-year lease referred to, and also sold and transferred to him all the buildings and improvements situated upon the lots, and all personal property therein and thereon, consisting of chairs, carpets, scenery, etc., belonging to the building and theater. In that assignment the stating part is as follows:

"This indenture, made this twenty-seventh day of December, A. D. 1895, between Perry H. Smith, Jr., in his own right, and also as administrator of the estate of Emma Louise Smith, deceased, party of the first part, and J. McGregor Adams, party of the second part, witnesseth that," etc.

The testimonium and the signatures to it are as follows:

"Executed at Chicago the day and year first above mentioned.

"Perry H. Smith, Jr. [Seal.]

"Perry H. Smith, Jr., [Seal.]

"Administrator of the Estate of Emma Louise Smith, Deceased.

"J. McGregor Adams. [Seal.]"

It also contains the following clause:

"And the said party of the second part, for himself, his heirs, executors, administrators, and assigns, personally accepts and assumes all the terms, covenants, and agreements in said lease contained, and will personally comply with them, and be bound by them, and will keep and perform all the covenants and agreements in said lease contained."

After the acknowledgment is appended the following:

"We hereby consent to the foregoing sale and transfer of the lease therein mentioned.

E. W. Shirk. [Seal.]

"Milton Shirk. [Seal.]

"Alice S. Edwards. [Seal.]"

This transfer to Adams was recorded January 2, 1896.

On January —, 1896, there was deposited with the Northern Trust Company a paper which reads as follows:

"Chicago, Illinois, December 27th, 1895.

"J. McGregor Adams, Esq.—Dear Sir: In consideration that you have to-day taken an assignment of the interest of Perry H. Smith, Jr., and of the estate of Emma L. Smith, in the lease bearing date of March 31st, 1891, executed by Elbert W. Shirk to said Emma L. Smith and Perry H. Smith, Jr., of lots six (6), seven (7), and eight (8) in block two (2) of Wolcott's addition to Chicago, situated at the northeast corner of Clark and Kinzie streets, in said city, and have assumed all liabilities of the lessees thereunder: Now, therefore, we, the present owners of the fee of said land, do hereby agree that, in case you shall, at any time in the future, assign the said lease and your interest therein to some responsible party who shall be satisfactory to us, we will, on the assumption by such assignee of all your liability under said lease, consent to the substitution of said assignee, and the release of yourself and your estate from all further liability thereunder. This document is to be held by the Northern Trust Company, and not to be delivered, except upon the joint order of yourself and ourselves. Neither this document nor any copy thereof is to be recorded. If the same or any copy shall be recorded, this document shall thereby become void.

E. W. Shirk.

"Milton Shirk.

"Alice S. Edwards."

Adams paid the ground rent up to and including the first quarter of 1897. In February, 1897, he sold and transferred to one Petterson the unexpired term of the ground lease, and also the improvements and personal property he had purchased in connection therewith from the Smiths. This action was brought to recover from Adams, as the assignee of the Smiths, upon that lease, for rent accruing for the last three quarters of 1897.

The twenty-first, twenty-second, twenty-third, twenty-fourth, and twenty-fifth specifications of error are as follows: "(21) The court erred in not directing a verdict for defendant because plaintiffs refused to allow the insurance policies to be assigned to Petterson, and also refused to submit that question to the jury, and in refusing to instruct the jury, as requested by defendant: 'That if the jury believes from the evidence that Shirk refused to produce the policies of insurance upon the property in order that they might be assigned to Petterson, his doing so was a breach of the provisions of the lease in a material part, and plaintiffs cannot recover.' (22) The court erred in refusing the request of the defendant that it instruct the jury: 'That, if Petterson made a tender to plaintiffs in June, 1897, of the rent due for the second quarter of 1897, then as to that quarter the jury must find in favor of the defendant.' (23) The court erred in refusing the request of the defendant that it instruct the jury: 'That if Petterson made a tender to plaintiffs in May, 1898, of the rent for the third and fourth quarters of 1897, then that tender released Adams from liability to pay the rent, and the verdict of the jury as to those two quarters must be in favor of the defendant.' (24) The court erred in charging the jury that there must be an opportunity given plaintiffs to investigate for themselves the responsibility of the proposed tenant before arbitration concerning the tenant could be demanded, being especially that part of the charge which said: 'But if, on the other hand, as they claim, as Mr. Shirk has testified, clearly and distinctly, there was an offer of this man Petterson to them, and their offer to make the investigation, and then they failed to furnish Mr. Shirk the information upon which to make that investigation, it was equivalent to a refusal to furnish him any opportunity to state whether he would accept this man or not, and he was not put to an option,—to the exercise of an option; and the subsequent transactions by which they wrote a letter to him after he

had left the city—after he was known to have left the city—would amount to nothing, and would not be considered.’ (25) The court erred in instructing the jury that it must find for the plaintiffs for the amount of the claim unless the defendant furnished a satisfactory tenant or assignee of the term, being particularly that part of the charge in which the court said: “ * * * And unless you are satisfied by the preponderance of the proof in this case that Mr. Adams furnished a person whom he believed to be satisfactory, and that the preponderance of the proof shows a refusal by Mr. Shirk in behalf of the plaintiffs to make the investigation, and to exercise a judgment on the matter whether this was a satisfactory person or not, then the defense fails, and you must find for the plaintiffs for the amount claimed.’ ”

William Burry, for plaintiff in error.

Frederic Ullmann, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and KOHL-SAAT, District Judge.

WOODS, Circuit Judge, after stating the case, delivered the opinion of the court.

But few of the numerous specifications of error insisted upon present any question. The first, second, third, fifth, and seventh allege error in the admission or exclusion of evidence, but do not, as required by rule 11 (31 C. C. A. cxlvi., 90 Fed. cxlvi.), quote the substance of the evidence admitted or rejected. The fourth conforms to the rule in that respect, but the evidence referred to was of so little importance that a ruling one way or the other upon the motion to strike it out could not have been a material error. The tenth to eighteenth and twenty-ninth to thirty-fourth specifications each allege error of the court in holding or not holding as stated, but, if the court so held, it must have been in giving or refusing instructions, and it should have been so specified. *Woodbury v. City of Shawneetown*, 34 U. S. App. 655, 20 C. C. A. 400, 74 Fed. 205; *Columbus Const. Co. v. Crane Co.*, 41 C. C. A. 189, 98 Fed. 946, 101 Fed. 55. The eighth, ninth, nineteenth, and twentieth specifications are to the effect that the court erred in not directing a verdict for the defendant; but the eighth the defendant waived by adducing further evidence after the ruling was made. The ninth specifies no particular in which there was supposed to be a lack of evidence; and while, in the nineteenth, the direction was asked “because of tender of all the rent sued for by Petterson to plaintiffs,” and in the twentieth “because no notice was given by the plaintiffs to defendant of nonpayment by Petterson of rent sued for,” it does not appear that either reason was suggested to the court at the time or before the motion for a peremptory instruction was denied. The bill of exceptions states simply that, all the evidence being in, “thereupon the defendant moved the court to hold the evidence insufficient to sustain the action, and to direct a verdict for the defendant”; but such a general motion, unaccompanied by a statement or suggestion of reasons for it, may properly be overruled. A practice is not to be approved which will permit of the presentation for review by this court of questions which are not shown to have been called to the attention of the trial court. *Columbus Const. Co. v. Crane Co.*, supra; *Stewart v. Morris*, 37 C. C. A. 562,

96 Fed. 703. The twenty-first specification, instead of being limited to the assertion of a single error, as rule 11 requires, presents three questions, which, though closely akin to each other, are yet distinctly different. There was, however, no error in refusing the special instruction set out in that specification. By the terms of the original lease the insurance provided for was to be payable to the lessor, and, while a notation upon the policies of the consent of the insurance companies to the assignment of the leasehold may have been necessary, there was apparently no right in any one to ask an assignment of the policies to Petterson; and, even if there was such a right, no loss having occurred, we are not ready to assent to the proposition that the refusal of Shirk to produce the policies for the purpose of assignment is a defense to the action for accrued rent.

What was the effect of the tenders made by Petterson to Shirk depended, perhaps, on other questions and propositions not embraced in the special instructions which were asked and refused. In no event could a tender made by Petterson be of effect unless Shirk, as against Adams, was bound to accept it. If, after his assignment to Petterson, Adams was not responsible for the rent, the question was irrelevant and immaterial, and the refusal of the instruction of no consequence. It could be of importance only upon the theory that Adams remained liable for the rent, but by reason of the assignment, which to that extent Shirk was bound to recognize as valid, he had come into the position of surety for Petterson, and therefore was discharged by the refusal of Shirk to accept the proffered payment. If that relationship of the parties was a question of fact on the evidence, the special instruction asked should have been so framed as to submit the question to the jury. As drawn, the instruction assumes everything essential to the proposition except the fact of tender. If that fact was a defense to the action against Adams, it is equally a bar to the right of the lessors "to proceed against the improvements or against the original lessees." We are of opinion that on the facts disclosed Shirk was justified in rejecting the tender. In the original lease it was stipulated that the lessees and their assigns should make no transfer of the leasehold except by way of mortgage or trust deed except upon the written consent of the lessor. Whether or not, without further stipulation, that restriction would have bound Adams, it is not necessary to consider. A further stipulation was made. He accepted an assignment by which, in express terms, "for himself * * * and assigns personally," he assumed "all the terms, covenants, and agreements in said lease contained," but with the modification expressed in the writing of the same date, signed by the Shirks, that, in case he should thereafter assign the lease "to some responsible person" who should be "satisfactory" to them, they would consent to the substitution of the assignee, and release him and his estate from further liability. Assuming that the document signed by the Shirks was executed upon a sufficient consideration, and became binding, Adams acquired thereby the right to transfer the term to a "responsible party" who should also be satisfactory to the lessors. The effect of that provision, in our opinion, was that, when Adams pro-

posed a transfer to Petterson, he was bound to show to a reasonable certainty that Petterson was pecuniarily responsible, and of such repute for honesty, capacity, and fair dealing as ought to make him satisfactory. Shirk, for himself and his associates, doubtless was bound to act fairly and reasonably, but he was not required to go out of his way to establish, or to convince himself of, the suitability of the proposed substitute. It was not enough, as indicated by that portion of the court's charge set out in the twenty-fifth specification of error, that Adams should have "furnished a person whom he believed to be satisfactory." It was a question, not of belief, but of actual responsibility and fitness, and, there being in the record no evidence that Petterson was responsible and otherwise of acceptable character, and there having been no arbitration to supply the place of such evidence, all charges that Shirk did not act in good faith become of no consequence. For all that appears in the record, it is to be assumed, as between the parties, that Petterson was not responsible, and in other respects was not one who should have been accepted as a satisfactory substitute for Adams. What the measure of pecuniary responsibility should have been, in the absence of express stipulation, if disputed, would have to be determined according to the circumstances; but, in the absence of proof, it would seem unreasonable that Adams should insist upon the acceptance of a substitute less responsible than himself. Direct evidence on the subject was not offered, but facts are shown which indicate that Petterson was largely indebted to Adams and others, and consequently his responsibility questionable. Shirk was, therefore, as we think, justified in refusing to recognize him as tenant, and in insisting, as he did, that he would accept no rent from him unless paid on behalf of Adams, his recognized lessee. We do not agree that the only remedy of the lessors for the wrongful transfer of the leasehold was a re-entry or other proceeding to forfeit the lease. The putting of Petterson in possession the lessors could not prevent, but they could insist, as they consistently did, that as to them the transfer was wrongful, and that they would regard Petterson as holding for Adams. It may be that, as between Adams and Petterson, the transfer was valid; but it does not follow that the lessors were bound either to proceed to forfeit the lease, or, failing to do so, must be held to have acquiesced in the assignment and the consequent conversion of the primary and absolute liability of Adams into a mere suretyship for Petterson. A forfeiture of the lease was just what Adams greatly desired to accomplish. He had offered to surrender it to Shirk for nothing, and, being denied that privilege, entered upon the negotiations to procure the substitution of Petterson in his place as lessee; but it was not in his power, by the course pursued, to compel the desired forfeiture or his own discharge through the enforced acceptance of a substitute of whose responsibility and fitness he offered then and at the trial no proof. It follows that the instructions asked on the subject of the tenders made by Petterson were properly refused, and that the instructions given of which complaint is made in the twenty-fourth and twenty-fifth specifications of error were more favorable to the plaintiff in error than they need have been.

The twenty-sixth specification has reference to the exclusion of evidence concerning the financial responsibility of one Wylie, to whom Petterson made an assignment of the term. It was properly excluded, because it had "nothing to do with the issue in this case."

The twenty-eighth specification—the last to be considered—is that the court erred in overruling the motion in arrest of judgment. The grounds of the motion, as stated, are:

"(1) The declaration does not state a good cause of action. (2) There is a fatal variance between the allegations of the declaration and proof. (3) There is no jurisdiction of the matter involved in this cause [except] on the chancery side of this court. (4) There is no jurisdiction of this cause in the United States court for want of proper citizenship of the parties."

The second ground is irrelevant. A motion in arrest raises no objection to the evidence (2 Enc. Pl. & Prac. 813), but challenges the sufficiency of "the facts of record, apart from any showing by bill of exceptions," to support the judgment (*World's Columbian Exposition Co. v. Republic of France*, 33 C. C. A. 333, 91 Fed. 64). The first and fourth are unavailing, because of the sufficiency of the declaration and of the diverse citizenship of the parties there is no ground for question. The objection that the suit should have been on the chancery side of the court would have been formidable if made in time. The bringing of the action at law is justified by the decision in *Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118, but that decision, it is insisted, is a departure from the well-established rule declared in earlier and later cases, such as *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *National Bank v. Grand Lodge*, 98 U. S. 123, 25 L. Ed. 75; *Furnace Co. v. Withrow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; *Lindsay v. Bank*, 156 U. S. 485, 15 Sup. Ct. 472, 39 L. Ed. 505. It is enough here to observe the settled rule of practice that an objection of this kind must be made promptly, and, if delayed, as in this instance, to the end of the trial, will be overruled. In this case the objection was patent on the face of the declaration, but, so far as appears, it was first brought to the attention of the court by the motion in arrest.

The judgment of the circuit court is affirmed.

GRAVES v. SALINE COUNTY, ILL.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 680.

1. INTEREST—LIABILITY OF COUNTY—OVERDUE COUPONS.

Under the law of Illinois, as declared by the supreme court, interest is recoverable only when authorized by statute, and the general statutory enactments on the subject do not apply to the state, or to counties, or municipal corporations, unless expressly so provided; hence interest is not recoverable on interest coupons from county bonds after their maturity, where they contain no agreement to pay interest.

2. SAME—ACCEPTANCE OF PRINCIPAL.

Where interest is not stipulated for in an obligation, although it may be recoverable under the statute as damages, it cannot be recovered after acceptance by the creditor of full payment of the principal, and it is immaterial that he accepted the principal under protest.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

George A. Sanders, for plaintiff in error.

Sigel Capel, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This is an action of assumpsit, brought on May 13, 1896, by George F. Graves, a citizen of Vermont, against the county of Saline, Ill., to recover the amount due upon 180 coupons. The bonds to which the coupons had belonged the supreme court and this court had declared valid. *Graves v. Saline Co.*, 161 U. S. 359, 16 Sup. Ct. 526, 40 L. Ed. 732; *Id.*, 34 U. S. App. 710, 20 C. C. A. 118, 73 Fed. 920. There seems to have been no appearance for the defendant, but on January 11, 1898, a rule to answer was entered, the entry containing a recital that the defendant had "been regularly served with process," and on the ensuing March 22d, "the defendant having failed to enter its appearance and plead pursuant to the rule" theretofore entered, "was three times solemnly called, and came not, but made default," and thereupon it was "considered by the court that the plaintiff has sustained damages by reason of the breaches of promises in his declaration mentioned; but because those damages are unknown it is submitted to the court to assess the same." On December 21, 1899, an entry was made showing the coming of the plaintiff by his attorney, the hearing of evidence by the court, and a general finding and judgment for the defendant. This is followed by an entry of "special findings of the court," from which it appears that "the plaintiff was the bona fide holder of the 180 coupons at \$60.00 each," described in the declaration; that the bonds and coupons were duly registered; that under the law the state treasurer could pay only the face value of the coupons, "and no interest on coupons is paid by that office"; that demand for the face value of the coupons and for interest thereon from the date of maturity "was made on the state treasury," and the face value of the coupons, to wit, \$10,800, was paid, and was received under protest by the attorney for the plaintiff in part payment of the claim in suit; and, finally, "that on December 21, 1899, the court found the issues for the defendant, and rendered judgment for the defendant for costs."

Raising no question of practice, counsel have addressed their discussion to the one question whether the plaintiff was entitled to a judgment for interest upon the coupons from the date of maturity, amounting to \$3,523.08. The surrender of the coupons to the state treasurer at the time of the payment of the nominal amount thereof, though not stated in the findings, is conceded. Each coupon appears on its face to be "twelve months' interest" on a bond designated by number; but it contains in itself no contract for the payment of interest. The supreme court of Illinois, following the rule at common law that interest is recoverable in no case except upon an express agreement to pay it, has declared it well established in that state that interest can be recovered only when the statute authorizes it, and "may,

therefore, be regarded as dependent upon, and a creature of, the statute." *Fowler v. Harts*, 149 Ill. 592, 36 N. E. 996. And the further rule seems to be well established in that state that general statutory enactments authorizing or requiring the allowance of interest do not apply to the state, or to counties, townships, or other municipal bodies, unless it be so explicitly provided. *Madison Co. v. Bartlett*, 1 Scam. 67; *County of Pike v. Horsford*, 11 Ill. 170; *City of Pekin v. Reynolds*, 31 Ill. 529; *City of Chicago v. People*, 56 Ill. 327; *Commissioners v. Dunlevy*, 91 Ill. 49; *Shoenberger v. City of Elgin*, 164 Ill. 80, 45 N. E. 434; *Town of Mt. Morris v. Williams*, 38 Ill. App. 401.

It is urged in behalf of the plaintiff in error that section 2, c. 74, p. 973, *Hurd's Rev. St. Ill.* 1897, was enacted for the purpose of changing the rule on this subject; but that statute is expressed in the same general terms as the prior enactments which had been in force when the decisions cited were pronounced. It contains no mention of municipalities, and apparently was intended simply to change from six to five the rate of interest.

The judgment of the circuit court seems also to be justified by the rule that, where interest is not stipulated for in the contract and is recoverable merely as damages, or as an incident to the debt, it may not be recovered after acceptance by the creditor of full payment of the principal of the obligation. It has been often so declared. Protest at the time of the acceptance of the principal is of no consequence, and the rule that partial payment of a debt furnishes no consideration for the discharge of the whole is not applicable. *Fake v. Eddy's Ex'r*, 15 Wend. 76, and cases cited; *Cutter v. Mayor, etc.*, 92 N. Y. 166; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198; *Stone v. Bennett*, 8 Mo. 41; *Suth. Dam.* 677; *Society v. Wells*, 68 Me. 572; *Succession of Anderson*, 12 La. Ann. 95; *Watkins v. Morgan*, 6 Car. & P. 661; *Robbins v. Cheek*, 32 Ind. 328, and cases cited. See, also, *Tuttle v. Tuttle*, 12 Metc. (Mass.) 551. In *Marks v. Trustees*, 56 Ind. 288, the distinction pointed out in *Robbins v. Cheek* between cases upon contracts containing and those not containing a stipulation for the payment of interest seems to have been overlooked. The judgment below is affirmed.

ZANE v. HAMILTON COUNTY, ILL.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 675.

COUNTY BONDS—INVALIDITY OF STATUTE AUTHORIZING—BONA FIDE HOLDEES.

The supreme court of Illinois having declared void section 20, Act March 10, 1869, authorizing the issuance of bonds in aid of the St. Louis & Southeastern Railway Company, which was incorporated by the same act, as in violation of the state constitution, such decision is binding on the federal courts, and bonds issued by a county under such provision, being without authority of law, are not rendered valid by any recitals they contain, and are unenforceable in the hands of all holders.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

George A. Sanders, for plaintiff in error.

J. M. Hamill, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This was an action in assumpsit, brought by Harriet M. Zane, a citizen of Massachusetts, against the county of Hamilton, Ill., to recover the amount alleged to be due upon six bonds for \$1,000 each, issued in the name of the county to the St. Louis & Southeastern Railway Company, or bearer, and of which the plaintiff was alleged to be an innocent purchaser. The circuit court sustained a demurrer to the declaration, and, the plaintiff refusing to amend, gave judgment for the defendant. The question is whether there was authority of law for the issue of the bonds. The bonds bear date October 23, 1871, and were not executed before that date. They are a part of the issue of \$200,000 referred to in the case of *Austin v. Hamilton Co.*, 22 C. C. A. 128, 76 Fed. 208, but are not a part of the 105 bonds which, as shown in that case, had been owned by Walter M. Jackson and in a suit to which the county and he were parties had been adjudged to be valid. The only authority asserted for the issue of the bonds is section 20 of the act of March 10, 1869, whereby the St. Louis & Southeastern Railway Company was incorporated. In *People v. Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, where the validity of these bonds was in issue, it was held that they were invalid, because section 20 of the act mentioned was void, as being in violation of the provision of the constitution of the state (article 3, § 23), that "no private or local law * * * shall embrace more than one subject, and that shall be expressed in the title." This court recognized the authority of that decision in the *Austin Case*, and must recognize it now. It follows that the bonds were issued without authority of law, and in the hands of any and all holders, unless, like Jackson, they can claim under an unreversed adjudication, must be regarded as invalid. No recital can supply the want of legal authority for their execution. The judgment below is affirmed.

In re SCHMECHEL CLOAK & SUIT CO.

(District Court, W. D. Missouri, St. Joseph Division. October 10, 1900.)

BANKRUPTCY—PROOF OF CLAIM BY GUARANTOR—EFFECT OF PREFERENCE.

Under Bankr. Act 1898, § 571, which entitles one whose individual undertaking secures the debt of a bankrupt, on the discharge of such undertaking, to be subrogated to the rights of the creditor against the estate of the bankrupt, his rights are measured by those of the creditor; and, where the latter cannot prove his claim without first surrendering a preference under section 57g, a guarantor who has paid the remainder of the debt since the adjudication is subject to the same condition, and can prove up the claim only on returning to the estate the amount of such preference.

In Bankruptcy. On exceptions to decision of referee.

Stauber, Crandall & Strop, for creditor.

J. B. Shackelford, for trustee.

PHILIPS, District Judge. The case certified to this court by the referee in bankruptcy for decision presents the single question: Where the principal creditor cannot prove up his claim against the bankrupt estate without first surrendering the amount of his preference, under section 57g of the bankrupt act, which declares that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," can the guarantor of the debt, who executed his note to the creditor for the balance of the debt after adjudication in bankruptcy, prove up against the bankrupt estate the amount of such payment without first returning the amount of such preference?

The bankrupt act treats of two classes of preferences: One is where the debtor has, within four months preceding the filing of the petition in bankruptcy, given a preference to the creditor, who, at the time of the payment or transfer, "shall have had reasonable cause to believe that it was intended thereby to give a preference." Such a preference "shall be voidable by the trustee, and he may recover the property or its value from such person." Section 60b. In such a case, I take it, the creditor thus practicing a fraud upon the bankrupt estate, with or without surrendering his preference, would not be heard to present his claim for the balance against the estate, and the surety or guarantor of such debt would be in no better position. This was the ruling under section 35 of the bankrupt act of 1867. *Bartholow v. Bean*, 18 Wall. 635-641, 21 L. Ed. 866.

The second class is where a creditor, within the prescribed four months, receives from the insolvent debtor a payment on his debt without notice of insolvency. The money or property thus received cannot be avoided and recovered back by the trustee. But the creditor cannot have his claim for the residue allowed against the bankrupt estate without surrendering to the estate the amount of such preference. Section 57g; *In re Ft. Wayne Electric Corp.*, 39 C. C. A. 582, 99 Fed. 400. The case under review comes within the latter class. It is noticeable that the provisions of the bankrupt act of 1867 (14 Stat. 534, § 35) interdict preferences only, in the particular under consideration, where "the person receiving such payment," etc., "had reasonable cause to believe such person is insolvent, and that such payment," etc., "is made in fraud of the provisions of this act." Such payment, etc., was declared void, and recoverable by the assignee. This provision applied to preferences made within four months. It is then provided that if such person, "within six months before the filing of the petition by or against him, makes any payment," etc., "to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment," etc., "is made with a view to prevent his property from coming to the assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect, or to evade any of the provisions of this act, the sale," etc., "shall be void, and the assignee may recover the property," etc. The present bankrupt act has gone further. Section 3, subsec. 2, declares it to be an act of bankruptcy in a person to transfer, "while insolvent, any portion of

his property to one or more of his creditors, with the intent to prefer such creditors over his other creditors." As the insolvent debtor is to be presumed to intend the natural consequences of his act, the existence of intent in such case on the part of the debtor may be inferred *prima facie* from the fact of the transfer having been made "while insolvent." Therefore, under the present statute, it is, nevertheless, an act of preference, participated in by the creditor, for the insolvent debtor to make payment to him within the prescribed four months, although the creditor at the time of the acceptance of payment has not sufficient reason to believe the debtor insolvent, or that he is in fact receiving a preference. The only penalty, however, visited upon him is that he shall not be permitted to prove up his claim against, and participate in any dividends of, the estate until he returns what he has received. The underlying reason for this is found in the policy and purpose of the bankrupt law to produce absolute equality among all the creditors of the insolvent existing at the time. This equality could not be worked out if the preferred creditor could come in to share, *pro rata*, with the unpreferred creditors in the remaining assets of the estate without bringing into hotchpot his advancements. This reasoning was applied by the supreme court in *Bartholow v. Bean*, *supra*, against the surety on a note, and was also applied against the guarantor of a note in *Re Ayers*, 6 Biss. 48, Fed. Cas. No. 685. It is true that the ruling there was under the provisions of section 35 of the bankrupt act of 1867, but the reasoning of the cases is not inapplicable to the present case. The present bankrupt act has made provision for a surety or guarantor in section 57i, as follows:

"Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor."

Congress having thus, by statute, made an express provision on this subject, under well-settled rules of construction, it is conclusive of any other rule or method. The claim of the creditor being "secured by the individual undertaking of" the guarantor, if the creditor fail to prove up the debt against the estate the guarantor could "do so in the creditor's name," or having, as he claims, discharged "such undertaking" by executing to the creditor his individual note for the balance thereof, "he shall be subrogated to that extent to the rights of the creditor." Unquestionably, had he pursued the first course, of presenting the debt "in the creditor's name" for allowance, he could have done so only by bringing to the estate the amount of the preferred payment. Having chosen, after the adjudication in bankruptcy, to discharge his collateral undertaking, he can only "be subrogated to that extent to the rights of the creditor." What would be the rights of the creditor? The same section of the statute (subsection g) makes answer: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." The term "subrogated" has a well-defined meaning in equity jurisprudence, which it is to be presumed was well understood by the able lawyers who framed this statute. Subroga-

tion would invest him with the rights and securities of the party in whose stead he was placed, and gave him no more and no less.

In the respect of preserving the just equality among all creditors, contemplated by the bankrupt law, the attitude of the guarantor is in no wise different from what it would be if the insolvent debtor, instead of making payment to the creditor, had turned the money over to the guarantor for his protection within the four months. In either case the guarantor would receive the benefit of the preference, and diminish his liability on his guaranty to that extent. The ruling of the referee in bankruptcy having been in accordance with the foregoing views of the court, the exceptions thereto are overruled, and the finding of the referee is affirmed.

IN re CHICAGO-JOPLIN LEAD & ZINC CO.

(District Court, W. D. Missouri, W. D. October 10, 1900.)

1. BANKRUPTCY—CORPORATIONS—NATURE OF BUSINESS.

To sustain proceedings in involuntary bankruptcy against a corporation, under Bankr. Act 1898, § 4b, it must be both alleged and proved not only that the corporation is authorized by its charter to carry on one of the kinds of business enumerated in the act, but that it is in fact "engaged principally" in such business.

2. SAME—MINING CORPORATION—INCIDENTAL BUSINESS.

Quære, whether the fact that a mining corporation buys or sells ore in connection with its business of mining renders it a trading corporation, subject to involuntary proceedings in bankruptcy, under Bankr. Act 1898, § 4b.

In Bankruptcy. Hearing on petition in involuntary bankruptcy.

Cole & Burnett, Galen & Spencer, and Bason & Buckley, for petitioners.

H. W. Currey, for defendant.

PHILIPS, District Judge. Certain alleged creditors of the Chicago-Joplin Lead & Zinc Company, a corporation, have filed a petition against the corporation in involuntary bankruptcy. The petition alleges that this corporation is "engaged principally in manufacturing, trading, and mercantile pursuits." The defendant, by its answer, denies that it is a corporation "engaged principally in manufacturing, trading, and mercantile pursuits, or any one of them." The answer further avers "that it is a corporation engaged solely, alone, and exclusively in the mining business." The petitioners filed a general replication. On this state of the pleadings the petitioners have submitted the case to the court on the sole evidence of the articles of association of the defendant company. These articles declare the purposes of the organization to be for "prospecting, mining, buying and selling ore, and smelting the same." The bankrupt act (section 4b) limits the corporations which may be put into bankruptcy to such as are "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits." Without stopping to consider the exact distinction between the terms "trading" and "mercantile pursuits," it may be con-

ceded that, if the defendant company was engaged principally in buying and selling ore, it was engaged in trading, within the meaning of the statute. But if it was engaged principally, and especially so if engaged exclusively, in mining, then it was not engaged principally in trading or mercantile pursuits, within the meaning of the statute. It was held by Judge Carland, in this court, recently, in *Re Victoria Zinc-Min. Co.* (oral opinion), that a mining company is not subject to an involuntary proceeding in bankruptcy. The correctness of this ruling is conceded by petitioners' counsel. Their sole contention is that, inasmuch as the charter of the company authorized it to buy and sell ore, it fixed upon the company the character of a trader, regardless of the question of fact as to whether or not it did engage solely in prospecting, mining, or smelting. This contention loses sight of the fact that it is the principal business in which the company was indeed engaged—that it is what, in fact, it was doing—which characterized it as a trader or merchant, rather than what it might have done within the provisions of its articles of association. It might have had the power to buy and sell goods, or corn and wheat, or stocks and bonds, in addition to operating as a mining company; but if, in fact, it did not exercise the privilege of dealing in goods and grain and stocks and bonds, how could it be said that it was "principally engaged" in such business? In other words, as the charter authorized the defendant to do various things, some of which, if pursued, would render it liable to an involuntary proceeding in bankruptcy, and some of which would not subject it to such liability, ought not the petition in involuntary bankruptcy to allege affirmatively that the defendant was principally engaged in the particular pursuit which brought it within the statute? For illustration, where a statute gives a right of action, and the same section conferring the right contains a material exception, the petition should be so framed as to show that the defendant is not within the exception. So, where a proviso is contained in the body of the instrument sued on, "it must be noted and the liability shown in consistency with it." Gould, Pl. 4, §§ 19, 20. This rule the petitioners have observed by averring that the defendant was "engaged principally in manufacturing, trading, and mercantile pursuits." This the defendant denies. The burden of proof rests upon the petitioners. As already stated, the only evidence offered in support of the petition is the articles of association, which do not limit the powers of the defendant to "buying and selling ore," but extend the right to do other things, which do not constitute the defendant either a trader or merchant or manufacturer. The proof must be restricted to, and be as broad as, the allegation. The petitioners were put on notice by the distinct denials and averments of the answer as to what the real issue was. The fact that the petitioners declined to present any direct evidence on this distinct and vital issue as to the principal business in which the company was engaged satisfies the court that they are conscious of the nonexistence of the requisite proof. While it is to be presumed that the defendant company was conducting its business within its charter, yet, as it was authorized to do a variety of things, the pursuit of some of which would subject it to the operation of the bankrupt law, and the pursuit

of the others would not, no presumption can arise that the defendant was "principally engaged" in the exercise of the particular grant which would subject it to the operation of the bankrupt law. And even if, in connection with the defendant's mining business, it had incidentally bought and sold ore, it is very questionable whether that would make it a trader, within the true intent of the bankrupt act. See *In re New York & W. Water Co.* (D. C.) 98 Fed. 711-714. It results that the petition is dismissed.

In re HIRSCHMAN.

(District Court, D. Utah. October 1, 1900.)

No. 221.

1. BANKRUPTCY—UNLIQUIDATED CLAIMS—WHAT ARE PROVABLE.

Bankr. Act 1898, § 63, subsec. "b," which provides for the liquidation by the court of unliquidated claims against the bankrupt, and that they may thereafter be proved against his estate, covers only such claims as, when liquidated, are provable debts under the specifications of the preceding subsection "a," and does not authorize the liquidation and proof of claims arising *ex delicto*, unless they are of such a nature that the claimant might, at his election, waive the tort, and recover in quasi contract.

2. SAME—RESCISSION OF SALE FOR FRAUD—EFFECT.

Creditors of a bankrupt, who have been permitted to rescind contracts by which they sold goods to the bankrupt, on the ground of fraud, and to recover from the trustee such of the goods as came into his hands, are not thereby precluded from having their claims for the proceeds of the goods which had been previously sold by the bankrupt liquidated by the court, and proving the same as debts against the estate; they being entitled to treat such proceeds of their property as money received to their use.

In Bankruptcy. On petitions for liquidation of claims against the bankrupt.

Booth, Lee & Ritchie, for petitioners Guthmann, Carpenter & Telling, Green-Wheeler Shoe Co., Geisecke Boot & Shoe Mfg. Co., Z. T. Lindsay, George Romney, Jr., Bay State Shoe & Leather Co., Packard & Field, Krohn, Fechheimer & Co., and Joseph P. Dunn Leather Co.

Krebs & Hoppaugh and Pierce, Critchlow & Barette, for George F. Sprague, trustee of estate.

Pierce, Critchlow & Barette, for W. S. McCornick, general creditor.

MARSHALL, District Judge. Several parties have applied to the court to direct the manner of liquidation of their claims against the bankrupt, under section 63, subsec. "b," of the bankrupt act of 1898. These claims all arise under similar circumstances. The bankrupt was a retail dealer in boots and shoes. After the adjudication, a trustee was regularly appointed, who took possession of the bankrupt's stock. Thereupon the present petitioners severally filed petitions in the bankruptcy proceeding, in which they alleged that the

bankrupt had purchased from them certain goods by fraudulent representations; that they elected to rescind such sales; that a described portion of the goods sold was in the possession of the trustee in bankruptcy, and the remainder had been disposed of by the bankrupt prior to the adjudication. The petitioners prayed that they might recover from the trustee the goods in his possession, which had been procured from them by fraud, and that their claims against the bankrupt for the residue might be liquidated under the direction of the court. The trustee answered these several petitions. To the answers replications were filed. Trial was had before the court, and a decree for the petitioners for the possession of the goods so held by the trustee.

For the petitioners it is contended that section 63, subsec. "b," of the bankrupt act of 1898 authorizes the liquidation and subsequent proof of claims ex delicto. Except as to causes of action which, at the option of the claimant, permit a recovery in quasi contract or in tort, I am unable to accede to this proposition. Section 63 of the act specifies all provable debts. The word "debt," as used in this section, includes any "debt, demand, or claim provable in bankruptcy." Section 1, subd. 11. Unless a claim is authorized to be proved by section 63, it is excluded. The section is divided into two subsections,—“a” and “b.” Subsection “a” commences, “Debts of the bankrupt may be proved and allowed against his estate which are,” etc. Then follow five classes of claims: (1) Those founded on a judgment or written instrument existing at the time of the filing of the petition in bankruptcy; (2) and (3) those for taxable costs in certain cases; (4) those founded upon an open account, or upon an express or implied contract; (5) those founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt’s application for a discharge. Subsection “b” is as follows: “Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.” The intent of congress was to specify in subsection “a” all provable debts, and in subsection “b” to provide for the liquidation of such as, falling under subsection “a,” were yet unliquidated. This was to prevent the construction of this act in the way the older bankrupt acts in England were construed. Under those acts unliquidated damages, although arising ex contractu, were held not to be provable debts, because the statutes seemed to require the creditor to swear to a precise sum. *Lee & Chapman’s Case*, 30 Ch. Div. 216. The care used to particularize various provable debts in subsection “a” negatives the extended construction of subsection “b” urged by petitioners. If the latter subsection authorizes the liquidation and subsequent proof of damages ex delicto, the whole subject could have been covered in very general language. Assuming petitioners’ construction of section 63, subsec. “b,” it would embrace claims arising from any tort. There is no language in the section which can be held to include some, and not all, torts. Yet the general policy of bankrupt acts has been not to include in provable debts claims for damages for personal wrongs. It is hard-

ly possible, if congress had intended such a departure from the history of bankrupt legislation, that it should not have expressed the intent unmistakably. Section 17 of the act prescribes the provable debts which are not released by a discharge in bankruptcy. Among such debts judgments in actions for certain torts are mentioned; but no cause of action for a tort not reduced to judgment is excepted. If the latter, when liquidated otherwise than by judgment, constitutes a provable debt under section 63, subsec. "b," it would be released by a discharge in bankruptcy, although a judgment on the cause of action would not be affected. This distinction would seem to rest on no principle, and there is a presumption against any construction of the act which would render it necessary. It follows that the petitioners must bring themselves under section 63, subsec. "a," in order to prove their claims.

Section 63, subsec. "a," does not authorize the proof of any claim arising *ex delicto*, unless a recovery may be had *quasi ex contractu*. Under subsection 4, claims founded upon a contract, express or implied, may be proved. The implied contract intended includes the fictitious contract implied in law,—only treated as a contract for the sake of the remedy,—and the true contract implied in fact. As the petitioners rescinded the several contracts of sale, the goods must be considered as tortiously acquired by the bankrupt, except as against a purchaser without notice. If the goods were sold by the bankrupt, the petitioners can treat the sales as made for them, and maintain a claim for the consideration obtained by the bankrupt as money had and received to their several use. This is said to be waiving the tort and suing in contract. In truth it is but an election of remedy, as the tort is not waived, but insisted on as the basis for the rescission of the contract. If petitioners have once made an election, and prosecuted the elected remedy to judgment, it is final; for "*nemo debet bis vexari pro eadem causa*." Moreover, the person defrauded cannot recover his goods, or the proceeds of the sale of them, and at the same time recover their value in trover. It is claimed for the trustee that this principle applies here, for the petitioners have recovered a part of their goods in a proceeding equivalent to an action of detinue at law, and now seek to prove for the remainder. In the proceeding to recover the goods no recovery could be had for such of the goods as had been sold by the bankrupt, and therefore never came into the possession of the trustee. The two proceedings against the trustee for the recovery of the goods held by him and against the bankrupt estate for money had and received by the bankrupt to the use of the petitioner both rest on the rescission of the contracts of sale. Neither violates the rule laid down by Parke, B., in *Ferguson v. Carrington*, 9 Barn. & C. 59, that "the plaintiffs cannot avail themselves of the defendant's fraud so as to rescind the contract, and substitute a new contract of sale on different terms." The rescinding of the contract of sale revests the petitioners with the title to the goods; and the person who has wrongfully sold them may, for the purposes of the action, be considered as their agent, and the sale made for them. *Allen v. Ford*, 19 Pick. 217; 3 Rob. Prac. 403. In *Browning v. Bancroft*, 8 Metc.

278; the defendant purchased goods from the plaintiff by means of fraud. A part of these goods he sold. The plaintiff rescinded the contract of sale, and brought an action to recover the money received by the defendant for the goods sold by him as had and received to the plaintiff's use. Thereafter the plaintiff brought replevin for the goods unsold, and it was held that he was not precluded from recovery by the former action for money had and received. *Bigelow, Fraud, 435; Keener, Quasi Cont. 207.* The petitioners will be given leave to file claims before the referee for the several sums received by the bankrupt on sales of their respective goods. The referee shall, on a hearing after notice to the trustee, determine the respective amounts so received by the bankrupt, and for the sums so determined the petitioners may prove.

In re ADAMS.

(District Court, N. D. New York. September 20, 1900.)

1. BANKRUPTCY—DISCHARGE—OBJECTIONS.

Only such grounds as are specified by the objecting creditors will be considered in opposition to the discharge of a bankrupt.

2. SAME—SUFFICIENCY OF OBJECTION.

An allegation that a bankrupt, "with a fraudulent intent, has failed to include in his schedules property belonging to him," describing it, is insufficient as a specification that he "knowingly and fraudulently" concealed the property from his trustee, within Bankr. Act 1898, § 29b, subd. 1, which will constitute ground for refusing a discharge.

3. SAME—CONCEALMENT OF PROPERTY—INSURANCE POLICIES.

A bankrupt, who was a man of advanced years, had life insurance policies maturing in five years, and, in case of his death, payable to his daughters. Their surrender value was about \$500, and they were pledged as security for a note of \$500. *Held*, that the failure of the bankrupt to include such policies in his schedules was insufficient to establish a charge of fraudulent concealment which would prevent his discharge.

4. SAME.

After a bankrupt became insolvent, and had made an assignment, some years before the passage of Bankr. Act 1898, he established and conducted a small business in the name of his daughters, who furnished the capital. It did not appear that any of the parties interested in the business accumulated anything therefrom. *Held*, that the failure of the bankrupt to schedule his interest in such business did not constitute a fraudulent concealment of property which prevented his discharge.

In Bankruptcy. On motion to confirm the report of the referee recommending a discharge.

Badger & Cantwell, for bankrupt.

John P. Kellas, for objecting creditor.

COXE, District Judge. The discharge is opposed upon two grounds: First, failure of the bankrupt to keep proper books; second, fraudulent concealment by him of property consisting: first, of his interest in the Adams Lumber Company; second, of his interest in certain policies of insurance upon his life; and, third, of his interest

as a residuary owner in funds amounting to \$5,000 transferred by general assignment to one Charles T. Eldred. There is no specification charging the bankrupt with having made a false oath; that question cannot, therefore, be considered in this proceeding. *In re Pierce* (D. C.) 103 Fed. 64.

The objection that the bankrupt failed to keep books is unsupported by the proof and is not seriously pressed.

The specification alleging concealment of property is insufficient. The allegation is that the bankrupt "with a fraudulent intent has failed to include in his schedules property belonging to him," describing it. The essential allegation, that he "knowingly and fraudulently" concealed this property from his trustee, is omitted. The counsel for the bankrupt has, however, waived all formal objections to the specification and the question may be considered as if the allegation properly stated a case of fraudulent concealment under section 29 of the act.

The principles of law involved in this controversy are almost identical with those considered in *Re Fitchard* (D. C.) 103 Fed. 742, the decision in which case will be filed simultaneously with this decision. It is unnecessary to repeat what was there said.

Regarding the policies of insurance it appears that, prior to the passage of the bankruptcy act, the bankrupt and his two daughters made a joint and several note for \$550, which was discounted at the Farmers' National Bank of Malone, N. Y. This note was the successor of two notes made by the bankrupt and indorsed by his daughter Etta during the time that the lumber business was transacted in her name. The money thus obtained was used in that business. The note was secured by two policies of insurance on the life of the bankrupt, the surrender value of which is about \$500. Both policies are payable in 1905 to the bankrupt and, in case of his death, to his daughters. Both policies were assigned to the Farmers' National Bank, May 13, 1897. The bankrupt is a man of advanced years. His daughters have a valuable interest in the policies. They are hypothecated as security for \$550, an amount greater than their surrender value. It is by no means clear, therefore, that the bankrupt has any appreciable interest therein. *In re Buelow* (D. C.) 3 Am. Bankr. R. 389, 98 Fed. 86; *In re Steele* (D. C.) 3 Am. Bankr. R. 549, 98 Fed. 78; *In re Diack* (D. C.) 100 Fed. 770. But conceding that the bankrupt has an interest, it is so vague, indefinite and uncertain that a charge of fraudulent concealment cannot be predicated of the omission of the policies from his schedules. The omission is not incompatible with honesty of purpose; he may, in entire good faith, have entertained the idea that he had no assignable interest.

The other allegations of fraud are based upon and grow out of the general assignment made by the bankrupt in December, 1891, to Charles T. Eldred. This was eight years before the petition was filed. The assignment has never been attacked in any legal proceeding. It must, therefore, be treated as an unimpeached and perfectly legal document which operated to transfer to the assignee all the property then owned by the bankrupt. There is nothing to show that the bankrupt, since the assignment, has had any part of the assigned

property in his possession or under his control except as the servant of others. The proposition that the assignment was a fictitious and fraudulent transfer of title, designed to conceal the property and enable the bankrupt to retain its possession and secretly enjoy its emoluments, is based upon the merest conjecture. On the contrary it appears that the property passed to the assignee and has been administered by him under the assignment. Whether his conduct has been wise or unwise, prudent or imprudent, are questions which are not pertinent to the present issue. He can be called to answer for his stewardship in the courts of the state. The fact that he has not been asked to account furnishes a strong presumption that the creditors have no valid ground of complaint. His wrongdoing, assuming it to exist, cannot be imputed to the bankrupt unless he is privy to it, or is to receive profit or advantage therefrom. There is no proof that the bankrupt and the assignee have entered into a conspiracy to plunder the creditors for the benefit of the bankrupt. Starting with the proposition, which cannot be controverted, that the assignment was and is a valid instrument vesting the title in Eldred to all the property, there is little difficulty in discovering the fallacy of the arguments in opposition to the discharge. They all rest upon the unsupported assumption that the assignment was a fraudulent device intended to create a secret resulting trust in favor of the bankrupt. Since the assignment the bankrupt has been endeavoring to support himself and family and has transacted business as agent for his daughters, a makeshift not infrequently resorted to by insolvent debtors who seek to exempt their future earnings from the grasp of creditors. His action in this regard may be the subject of criticism, but that it was not illegal has been asserted by the highest judicial authority. *Abbey v. Deyo*, 44 N. Y. 343, and cases cited. Surely it did not amount to a fraudulent concealment of his property. The assignee leased to one of the bankrupt's daughters a hop yard, which was part of the assigned property, and she realized about \$800 from its cultivation. This was in 1892. About the same time a small lumber business was organized under the name of the Adams Lumber Company. The bankrupt's daughters were the partners in this enterprise. They furnished the capital but took no active part in the business, which was managed by the bankrupt who contributed his experience, labor and skill. The business was at no time remunerative and there is nothing to show that any one connected with it was able to save any of the profits received therefrom. Certainly there is no proof that the bankrupt has property, derived from the hop yard or the lumber company, which he has hidden from his trustee.

Without pursuing the subject further it may be confidently asserted that, with the possible exception of the insurance policies, there was not a dollar's worth of the property formerly owned by the bankrupt, which at the date of filing the petition in bankruptcy, was owned by him or which was in his possession or under his control. There was no property the title to which vested in the trustee by virtue of the bankruptcy act. There was none which, upon the evidence here, can be recovered by the trustee. In 1891 the bankrupt assigned all his property to Eldred. He has acquired nothing since. How then

can he be convicted of fraudulent concealment? One cannot be guilty of concealment who has nothing to conceal. The bankrupt is entitled to a discharge.

In re HAGOP BOGIGIAN CO.

(Circuit Court, D. Massachusetts. May 23, 1900.)

No. 818.

CUSTOMS DUTIES—ACT APPLICABLE—SUFFICIENCY OF PROTEST.

Where the only question of difference between an importer and a collector with reference to the assessment for duty of goods entered on July 24, 1897, was as to whether they were dutiable under the act of 1894 or that of 1897, they having been first appraised under the former and afterwards reclassified under the latter, a protest by the importer, on payment of the duty, which distinctly states his claim that they should have been assessed under the former act, is sufficient, although it does not specify the particular provisions of either act which were held or claimed to be applicable.

Walter B. Grant, for petitioner.

Boyd B. Jones, U. S. Atty., and Albert H. Washburn, Asst. U. S. Atty.

LOWELL, District Judge. On July 24, 1897, the petitioner entered certain oriental goods in the port of Boston, which goods were examined and entered under the rates of the tariff act of 1894. The proper officer of the custom house indicated by memoranda upon the face of the consular invoice the various rates and duties on the various items of shipment according to the rates fixed by that act. He stamped on the invoice, "I certify that this invoice has been examined, and the articles therein named entered." He also indicated on the invoice the gross "entered value" of the items or articles. On the same day the proper officer estimated in figures upon the inward foreign entry sheet the amount of duty to be paid on the "entered value" of the shipment in the sum of \$785.55. The petitioner paid this sum, and took a receipt for the payment. Subsequently the articles indicated in the invoice were appraised according to the rates of duty of the tariff act of 1897. Thereupon the liquidating clerk struck out upon the inward foreign entry sheet the rates and estimates previously entered thereon under the act of 1894, and entered in red ink the rates and duties established by the act of 1897. The total duties under the act of 1897 were \$1,239.45, and for the difference between this amount and the amount already paid, \$453.90, demand was made upon the petitioner. This balance the petitioner paid under protest before the goods were released. The protest was as follows:

"Boston, Aug. 10, 1897.

"Hon. Winslow Warren, Collector, Port of Boston—Sir: We hereby protest against the liquidation of our entry per S. S. Sylvania from Liverpool, July 24/97, covering 8 pkges. oriental goods, and the assessment of duty under the so-called Dingley Bill or Act of 1897. The goods in question were entered and duties paid on July 24/97, before the new tariff bill had passed the U. S. senate, or been signed by the president, and we therefore claim that under the constitution of the United States the said bill had not become a law at the time

our entry was made. We claim that under these circumstances the goods in question are properly dutiable under the tariff law of 1894. We have paid the additional amount demanded in order to get possession of our goods, but we claim that the difference should be refunded.

"Very respectfully,

The Hagop Bogigian Co.,

"Per H. Bogigian, President, 22 Beacon Street, Boston.

"Entry 18,874.

"Man. 1,585.

"Liquidated Aug. 10/97.

"Decided April 14, 1899."

The board of general appraisers affirmed the decision of the collector as follows:

"Opinion of Somerville, General Appraiser.

"The merchandise covered by this protest was imported and entered for consumption on July 24, 1897, before the tariff act of that date had become a law. It was assessed for duty by the collector under the provisions of said act of July 24, 1897. The protestant claims that the merchandise is dutiable under the tariff act of Aug. 28, 1894, as 'oriental goods.' An inspection of the record shows that the invoice embraces about forty separate items, which were returned by the local appraiser and classified by the collector under some twelve different paragraphs of the tariff act of 1897. In view of these facts the claim that the goods are dutiable as 'oriental goods,' under said act of 1894, does not, in our judgment, set forth 'distinctly and specifically' the reasons for objection to the collector's action, within the requirements of section 14 of the customs administrative act of June 10, 1890. The protest is accordingly overruled, and the collector's decision affirmed.

"George C. Tichenor,

"J. B. Wilkinson, Jr.,

"Board of Classification of U. S. General Appraisers."

The sole question presented to this court is the sufficiency in law of the protest above set out. Section 14 of the customs administrative act of June 10, 1890, provides that the protest shall set forth distinctly and specifically, and in respect to each entry or payment, the reasons for the importer's objection to the decision of the collector. In my opinion, the protest in this case is sufficient. There was but one point of difference between the importer and the collector, viz. Were the articles indicated in the invoice dutiable under the act of 1894 or under the act of 1897? Further than this no question as to the rate of duty was raised. It is true that the estimated duty of \$785.55, which was paid without objection by the petitioner, had not then been liquidated, and so no technical protest under section 14 against the proposed classification under the act of 1894 had then become possible; but the importer and collector were entirely of one mind in considering that the controversy between them in no way concerned this classification, but only the applicability of the act of 1897. This is made abundantly clear by the letter of the deputy collector, found in the record, in which he says that the protestants claimed that the merchandise covered by their protests was dutiable under the tariff act of 1894, "on the ground that said act was the only act in force at the time their entries were made and duties paid." "The requirements of section 14, Act June 10, 1890, have been duly complied with. In view of the nature of these protests, I have not deemed it necessary to forward the invoices." Of course, the opinion of the collector is not binding either upon the board of general appraisers or upon this court, but his letter is quoted to show that the

controversy between himself and the petitioner was understood in the same sense by both parties, and that he considered the particular rates of duty imposed upon particular kinds of goods to be so little in question that he did not, in the first instance, think it worth while even to forward to the board of general appraisers the invoices showing the particular rates of duty imposed. Under these circumstances, the case at bar seems to me to fall wholly within the language of various decisions binding upon this court.

In *Davies v. Arthur*, 96 U. S. 128, 24 L. Ed. 758, the court said that two objects were intended to be accomplished by the requirement of a protest:

"(1) To apprise the collector of the objections entertained by the importer, before it should be too late to remove them, if capable of being removed. (2) To hold the importer to the objections which he then contemplated, and on which he really acted, and prevent him, or others in his behalf, from seeking out defects in the proceedings, after the business should be closed, by the payment of the money into the treasury."

Both these objections were fully accomplished by the protest in the case at bar.

Again, in *Arthur v. Morgan*, 112 U. S. 495, 501, 5 Sup. Ct. 243, 28 L. Ed. 827, it was said:

"The solicitor general concedes that the objection to the protest is a 'bare technicality,' and that its nature could hardly mislead the officers." "The protest must set forth 'distinctly and specifically' the grounds of objection to the decision of the collector as to the rate and amount of duties." "A protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party, and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure."

See, also, *Burgess v. Converse*, 2 Curt. 216, Fed. Cas. No. 2,154.

In *Herrman v. Robertson*, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. Ed. 538, the goods were classified by the appraiser as similar to manufactures composed wholly or in part of "the hair of the alpaca goat, or other like animals." The importer contended that the goods were dutiable as "nonenumerated, composed of hair and cotton only." The court held that the goods were dutiable as manufactures of hair not otherwise provided for, but that the protest was insufficient, as it did not suggest the classification which ultimately was held to be correct. In that case the protest "failed to point out or suggest in any way the provision which actually controlled," while in the case at bar the protest raised precisely the question upon which the case must be held to turn. The actual decision in *Davies v. Arthur*, above cited, went on the same ground as that in *Herrman v. Robertson*.

The district attorney ingeniously contended that, if the decision of the general appraisers was reversed, the collector, in assessing duties under the act of 1894, might not agree with the importer as to the application of the rates of duty imposed by that act, and so that another controversy between them might become the subject of another protest. It is not necessary now to determine if, in the unlikely event suggested, the importer could avail himself of another protest. Decision of the board of general appraisers reversed.

UNITED STATES v. MOORE.

(District Court, D. Kentucky. October 3, 1900.)

POSTAL LAWS—CONSTRUCTION—MAILING PROHIBITED BOOK OR PAPER.

Under the provision of Rev. St. § 3893, imposing a penalty for knowingly mailing any "obscene, lewd, or lascivious" book or paper, in which the word "or" has been construed by the supreme court to mean "and," it is not sufficient to bring a publication within the prohibition that it is obscene, but it must also be lewd and lascivious; nor is an article non-mailable because it offends the religious sentiments of a majority of the people by attacking the doctrine of the immaculate conception of Christ in coarse or even obscene language, where it has no tendency to induce sexual immorality; that being the class of publications against which it is the purpose of the statute to protect the public.

Prosecution for an Offense against the Postal Laws. On demurrer to indictment.

R. D. Hill, Dist. Atty., for the United States.
John G. Simrall, for defendant.

EVANS, District Judge. The demurrer to the indictment in this case demands a construction of section 3893 of the Revised Statutes, which declares to be unmailable, and which imposes a penalty for knowingly mailing, "every obscene, lewd, or lascivious book or paper." There might be some doubt as to the meaning and intent of congress in this legislation if the supreme court had not defined it in very clear, though possibly in very narrow, terms in the case of *Swearingen v. U. S.*, 161 U. S. 448, 16 Sup. Ct. 562, 40 L. Ed. 765. After holding that the word "or," first occurring in the sentence above quoted, should be construed to mean "and," the court, at page 450, 161 U. S., page 563, 16 Sup. Ct., and page 766, 40 L. Ed., said:

"The offense aimed at in that portion of the statute we are now considering was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit."

It may be that this is a most strict construction of the language of the statute. Still it is certainly binding upon this court, although four judges appear to have dissented from it. But for this construction, I would not have found it difficult, and, indeed, it might have been pleasant, to hold that the paper mailed in this case was, at least, "obscene." According to that decision, however, mere obscenity in a publication is not sufficient to make the mailing of it an offense. Under that ruling, in addition to being obscene, the paper mailed must also be both lewd and lascivious; the court holding that all these words were used in the statute to describe one and the same offense. An article entitled "The Virgin Mary," published by the accused in his paper, and knowingly mailed by him, is the basis of this indictment. Those parts of the article most relied upon to sustain the charge, though ostensibly a discussion of a religious subject, are couched in language not quite suitable for inser-

tion in a judicial opinion, however well adjusted to such applause as might be expected from taste of a certain degree of degradation. It is, indeed, extremely difficult to perceive any sensible, useful, or creditable object which the writer, publisher, or circulator of it could have had in view, at least in the manner of treating the subject, though not to gauge the type of mind and taste which might be supposed to enjoy or indorse it; but, notwithstanding few people would either agree with its sentiments, or approve the coarse indecency of its language and thought, even if they did, it will be equally difficult to find support for a judicial determination that, if a writer believed the leading proposition supposed to be advanced, he might not have the right to say so, and to give his reasons for it, even if his manner of doing so is brutal in the estimation of others. The published article claims to treat a religious question, and it is insisted that the right to do this freely exists under the law, that such right is without limitations, and that the mails are open to such papers and discussions unless the matter published is "obscene, lewd, and lascivious," as defined by the supreme court. It is, indeed, quite true that the mails of the United States are intended to be very wide open for the reception and transmission of matter desired to be sent through them by the public, but there are still certain restrictions imposed by law, and among them is the exclusion of such books, papers, etc., as are described in section 3893, and the only inquiry in this case is, does the article referred to come within that description? In matters of religion or religious teaching or discussion it is well-nigh impossible (and, indeed, in this country it should be so) for any one to fix the limit or to draw the line where religious notions and the right to advocate them ends. There must be the widest latitude and freedom upon these subjects, and one man's right to express his views must not be higher nor better than that of another. It does not make a notion upon a religious subject obscene, or lewd, or lascivious because it may be most radically different from those of the majority. The matter mailed in this case questions the chastity of Mary, the wife of Joseph, and the mother of Jesus, and ridicules in coarse fashion the idea of the supernatural origin of the Son. This, indeed, is the chief idea of the article, but, unless infidelity and atheism are to be proscribed as beyond the bounds of the rule of the freedom of religious thought and speech which prevails under constitutional protection in this country, it cannot be justly said that the man who believes that the child Jesus came in the ordinary way of humanity may not advocate that belief, and thus attempt to establish his contention that the Christian religion is not the true one, or, indeed, that there is no true religion at all. The manner of the advocacy of such views will doubtless depend upon the vulgar coarseness upon the one hand or upon the refinement upon the other of the mind and taste of the person advocating the doctrine; but the right to advocate it cannot be made to depend upon such a test. Nor can the right to advocate such views depend upon their unpopularity. The language of this publication respecting God, in which the writer insists that Mary was unchaste, or else that Jesus was the son of Joseph, may be blasphemous.

mous; but the statute does not forbid the mailing of merely blasphemous writings. What was mailed in this instance might be libelous of Mary if she were now living; but libels, even as disgusting to every refined, even if unbelieving, person, as this must be, are not unmailable under the statute. The coarse accusation against Mary, while possibly obscene, is in no sense lewd or lascivious within the meaning of the statute as construed by the supreme court, as it would in no way allure or invite, and evidently was not intended to allure or invite, any person to sexual impurity, or to immoral conduct, as distinguished from religious or irreligious beliefs.

The case of *Dunlop v. U. S.*, 165 U. S. 497, 17 Sup. Ct. 375, 41 L. Ed. 799, is one which appears to well illustrate the purpose of the statute. The paper there mailed contained an advertisement of an obscene, lewd, and lascivious occupation called "massage," which was but a respectable name for a licentious pursuit, and the persons mailing the paper well knowing these facts, and the immoral purpose of the advertiser, were held punishable under the statute for knowingly mailing such a publication. But to mail a paper which merely states or contends that even such a woman as Mary had actually been unchaste in the remote past is not, and cannot be, an offense under the statute, unless such statement is not only obscene, but one which, fairly construed, has a tendency to lead to lewdness and lasciviousness, within the meaning of those words as construed by the supreme court. To state such a proposition is to show that it cannot be maintained. To allege or contend, however falsely, that a woman, the most honored among men, was in fact unchaste thousands of years ago, cannot naturally or justly be said to have a tendency to allure men now to such immorality as relates to sexual impurity. A publication of the sort would rather arouse disgust. Without intending to compare the women, it may illustrate our meaning to say that Plutarch asserts that both Aspasia and Cleopatra, two of the most celebrated women of ancient times, had been unchaste. This assertion is made in language of characteristic refinement and taste, though none the less clearly on that account. Whether the assertion is true or false, the *Lives* is not unmailable under the statute, because he states these things to be the facts of past history. The reason is, under the decision of the supreme court, that the mere assertion in a book or paper that a woman has been unchaste, and has given birth to a bastard, even if the language used to do so is vulgar and unrefined, does not make that publication, even though obscene, also lewd and lascivious, within the intent of the statute, however gross and inexcusable the libel upon the person may be. So every day the newspapers make substantially similar statements about women, and sometimes in language quite unacceptable, but congress has passed no law to exclude them from the mails on that account. It seems to the court, therefore, under the stress of the decision of the supreme court referred to, that, in order to bring a book or paper within the meaning of the statute, the object and purpose of it, or of mailing it, must be, not to convert others to what may be absurd views of religion, or to ridiculous notions upon religion or upon the Bible, but

to corrupt the morals—that is to say, the manners and habits—of the people with respect to sexual indulgencies, or to invite them to lewd, obscene, and lascivious places, or to conduct properly described by those adjectives. To send through the mails papers advocating notions upon the Christian religion or its foundation which are different from those almost universally held in this country, or which may be abhorrent to those who oppose them, is not a violation of the statute referred to. Such publication may be offensive to the majority, but that furnishes no reason for holding that the individual violates any law of the United States in mailing it. The statute was not passed in any sense to protect or obstruct any form of religion, or of religious thought, as such, but its object is to prevent the use of the mails of the United States for the purpose of promoting such immoral tendencies as come within its provisions. We must look alone to the language of the statute, as properly construed, to ascertain whether the acts charged in an indictment violate the laws of the United States, for no act is punishable by the courts of the United States unless some express statute authorizes it.

In this case it seems to the court that the paper complained of was not obscene, lewd, and lascivious in the sense of the statute as construed by the supreme court, because, while it may tend to change, corrupt, or destroy the religious views of those who read it, it does not invite to any obscene, lewd, or lascivious conduct upon their part. And this seems to suggest the test by which the matter is to be determined, for otherwise the process of the court might be perverted into protecting the advocacy of one set of religious notions as against another. The statute, as already indicated, was not meant to protect religious views, or religion itself, in any general or special sense, but was intended to prevent the mailing of publications which are calculated to corrupt or debauch, with relation to sexual impurities, the morals—that is to say, the manners and conduct—of those into whose hands the papers might fall, by lewd, obscene, and lascivious suggestions, invitations, or tendencies. In the opinion of the court, whatever else may be said of the publication in this case, these elements are wanting. And not only has every man the right to advocate such religious or irreligious views as please him, but, subject, of course, to responsibility for their abuse, there must be for all freedom of speech and freedom of the press. The first article of amendments to the constitution of the United States is very clear and explicit. It is short enough, and certainly it is important enough, to be copied in full. It reads as follows:

“Article 1. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Many publications which might shock the average taste and the average notion of religion would still be entirely permissible under the guaranties of that amendment. Of course, congress could not constitutionally pass any law prohibiting the free exercise of religion, nor one which would restrict the free discussion, from every

point of view, of all religious topics, by speech and in the press; but it has supreme control and power over the mails of the United States, and, in its discretion, may limit and restrict the uses thereof as it pleases, even to the exclusion of any form of publication whatever. However, it has in fact gone no further in this direction than provided in the statute cited, and that is as far as the courts can go. In the light of the decision in the *Swearingen Case*, the court is of opinion that congress has not, by any legislation, forbidden the circulation through the mails of even such a coarse and vulgar treatment of a subject as is found in the article referred to. To say that an individual may not attack or ridicule the Christian religion, or the contents and statements of the book and events upon which it is founded, and mail such an attack when published, without being guilty, in the latter act, of violating the statute quoted, might be agreeable to all true believers who were more inflamed by indignation than awake to the guaranties of the constitution; but such a construction would equally bar the right of the Christian by the distribution of his publications through the mails to question the contention of those who uphold and advocate other systems of religion. Certainly the court, in the discharge of its duties, must recognize the rights of all as being equal, and cannot hold that a paper written in advocacy of unusual opinions, even in a disgusting way, is obscene, lewd, and lascivious, and as tending to corrupt the morals of the people in relation to sexual impurities, because it antagonizes the Christian's view of the divine origin of the Christ. If the Christian religion is divine, it can withstand all attacks; but, whether divine or not, the constitution of the United States gives to all the right to discuss it from whatever standpoint they please, and, unless obscene, lewd, and lascivious, these discussions are not under the statute excluded from the mails. The demurrer to the indictment must, therefore, be sustained.

CALIFORNIA FRUIT CANNERS' ASS'N et al. v. MYER et al.

(Circuit Court, D. Maryland. November 15, 1899.)

UNFAIR COMPETITION—GEOGRAPHICAL DESIGNATION OF FRUITS—FRAUDULENT LABELS.

Canning companies in California, who put up and sell fruits grown in that state, have the right to use thereon the name "California" as a trade designation, and, when their products have become well and favorably known by such name, are entitled to protection by injunction against the fraudulent use on cans of the same kind of fruit, grown and put up elsewhere, of labels designating it as California fruit, and falsely stating that it is put up in that state.¹

In Equity. Suit for unfair competition. On motion for preliminary injunction.

Moses R. Walter, for complainants.

Edgar H. Gans and Alfred J. Shriver, for defendants.

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

MORRIS, District Judge (orally). The complainants are a number of corporations of California, engaged in that state in the business of canning pears grown there. They allege that canned "California Pears" is the commercial designation by which the fruit grown and canned in California has been for a long time known to the trade and consumers, and as such has a high reputation and increasing sale; that the defendants are engaged in the canning business at Baltimore, and are putting up pears not grown in California, and labeling them so as to assert that they are California pears canned in that state, to the great injury of the complainants, and the destruction of the reputation of their goods and the defrauding of consumers; and they pray an injunction to prevent the use by the respondents of these deceptive labels. The respondents concede that they put up in cans pears grown in Maryland and adjoining states, and keep the cans without labels until they are sold, and then, at the desire of their customers, they label them as California pears, canned by some pretended packer at some place in California. This is a clear case of fraudulent competition by the use of a geographical name which the complainants are entitled to use, but the respondents are not. It is true that no one single packer can acquire an exclusive right to use, as a private trade-mark, "California Pears," or "California," as a label on canned pears; but all the persons who put up California grown pears in California have a right to use it; and it has acquired, the bill alleges, an especial trade significance of value. With regard to articles of food, and particularly with regard to fruits, the place where they are grown creates often an essential distinction as to quality and flavor; and this distinction, when it has become known in trade by the geographical name of the place where grown, the growers of the fruit are entitled to the benefit of, and the consumers should not be deceived. The present is such a case, and presents, I think, indisputable ground for the application of the equitable jurisdiction which prevents unfair and fraudulent competition by simulated trade designations. All the objections which have been urged by the respondents upon the ground that a geographical name cannot be a trade-mark, that no one of the complainants can show the actual money damage it has suffered, and that equity has no jurisdiction, are, I think, fully answered in the learned opinion of Judge Bunn, and the cases cited by him, in *Flour-Mills Co. v. Eagle*, 30 C. C. A. 386, 86 Fed. 608. The injunction prayed will be granted.

WELSBACH LIGHT CO. v. COSMOPOLITAN INCANDESCENT LIGHT CO.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 671.

1. PATENTS—PRELIMINARY INJUNCTION—EFFECT OF DECISIONS IN OTHER JURISDICTIONS.

The owner of a patent is not in any case entitled to a preliminary injunction against infringement as a matter of strict right, but the application therefor is addressed to the sound discretion of the court, which cannot be constrained by any rule of comity to follow the decisions in an-

other jurisdiction against its own independent judgment. Hence it is not ground for the reversal of an order refusing such an injunction that it is contrary to the decisions of the courts of another circuit.

2. SAME—INCANDESCENT MANTLES.

An order affirmed which refused a preliminary injunction against infringement of claim 1 of the Rawson patent, No. 407,963, for an improvement in strengthening incandescent mantles, on the ground that the evidence tended to show that the claim covered the sole invention of one of the two patentees.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

John R. Bennett, for appellant.

Douglass Dyrenforth and Charles K. Offield, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. This appeal is from an order denying an injunction pendente lite against infringement of the first claim of letters patent No. 407,963, issued on July 30, 1889, to Frederick L. Rawson and William S. Rawson, of London, England. The principal contention of the appellant, insisted upon with great elaboration and reiteration of argument, is that: "No new defenses having been interposed which had not already been considered and overruled, both by a court of co-ordinate jurisdiction and by the circuit court of appeals for the Second circuit, * * * the complainant, under the universally recognized and applied rule of comity, * * * was entitled to the injunction pendente lite prayed for." The rulings referred to were made in *Welsbach Light Co. v. Sunlight Incandescent Gas Lamp Co.* (C. C.) 87 Fed. 221, followed in the case against the *Rex Incandescent Light Co.* (C. C.) 94 Fed. 1006, and *Welsbach Light Co. v. American Incandescent Lamp Co.*, 39 C. C. A. 185, 98 Fed. 613. It is clear that "the plaintiff overstates somewhat the claims of comity." The opinion of the court below is reported in 100 Fed. 648. It shows that the court proceeded on the theory "that, by force of the decisions of this court, each case in this circuit must be decided upon its merits as disclosed by the record therein, and that a ruling or opinion of any other circuit court or court of appeals upon any question involved should be given only its just and reasonable weight according to the circumstances." Acting upon that theory, and in the exercise of an independent judgment, the court reached and declared its conclusion that the validity of the patent, because issued to two, when in fact, as the evidence seemed to show, only one of them was the real inventor, was brought into such doubt as to forbid the granting of a preliminary injunction. The last expression of this court on the doctrine of comity had been in the case of *Stover Mfg. Co. v. Mast, Foos & Co.*, 32 C. C. A. 231, 89 Fed. 333. The judgment in that case has since been affirmed by the supreme court (177 U. S. 485, 20 Sup. Ct. 708, Adv. S. U. S. 708, 44 L. Ed. 856), and from the opinion of that court we quote the following comprehensive and reasonable statement of the doctrine:

"Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views, that comity comes in play, and suggests a uniformity of ruling to avoid confusion until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals."

A direct utterance could not have made it more clear that no court is to be reviewed or reversed, without an inquiry into the merits, merely because it failed or refused to follow the decision of another court to which it was not directly subordinate. Not less than of the supreme court is it the duty of this court, within the sphere of its jurisdiction, to decide questions presented according to its own judgment. The purpose of congress in creating the circuit courts of appeals and in conferring upon them the extraordinary jurisdiction given them in appeals from interlocutory orders of injunction would be to a large extent thwarted if the doctrine of comity, always factitious and sometimes pernicious, should be allowed in these courts to take the place of independent and conscientious judgment. The safeguard against the evil of divergent and discordant decisions in the different circuits is in the power given to the supreme court to require the certification of cases to that court for review; and evidently a prompt and healthy exercise of that power is more likely to follow inconsistency of decisions in the courts of appeals than a harmony of rulings brought about by considerations of deference or comity.

In determining whether, in a given case, the circuit court erred in refusing an injunction pending the litigation, it is to be remembered that such an injunction in no case is a matter of strict right. The application for it is addressed to the sound discretion of the court. It may be granted or refused, unconditionally or upon terms; and upon appeal ordinarily the question is simply whether the court acted improvidently. Only when clearly erroneous will the order be reversed. *Ritter v. Ulman*, 42 U. S. App. 263, 24 C. C. A. 71, 78 Fed. 222.

It is conceded that a patent issued to two, one of whom alone was the inventor, is void; and it was mainly because of testimony, given by the patentees themselves, tending to show that the first claim of the patent in suit was for the invention of one, and not of both, of the patentees, that the court refused a preliminary injunction. The substance of that testimony is well stated in the opinion below, and, notwithstanding the opinion of the judges in the Second circuit that it was not satisfactory, we are not convinced that the judge below

gave it undue weight. Its force is certainly not impaired by the affidavits produced at the hearing. The reasonable supposition would seem to be that affidavits, prepared as these were, for the purpose either of meeting or evading the force of the explicit testimony which had been given in open court and under cross-examination, would have contained a direct reference to that testimony and such explanation as could be made; but these affidavits, prepared by counsel in identical terms for both witnesses, simply say:

"My brother and myself were the true, original, and joint inventors of the invention which is set forth and claimed in the said letters patent, and that invention * * * was the result of the joint thought, efforts and labors of my brother and myself. * * * That invention was not the result of a single thought, but occupied the mind and attention of my brother and myself for a period of several months, * * * and was not the result of the sole or separate thought, work, and experiment of either my brother or myself."

In his testimony one of them had said that the first thought of overcoming the difficulty about transporting mantles by dipping the mantle into a liquid was his; that he thought of it one night in bed; that the next day he tried it with paraffine; and, to a suggestion of counsel that he and his brother were both working and thinking and conversing together about the invention, he responded, "No, I do not think that we were conversing together about the matter till I showed what I had done, and told him what I had done." And to the question whether his experiments were limited to paraffine, he answered, "My personal experiments were, but my friend, who was working with me at that time, Mr. Donkin [not his brother], made other experiments." The brother, Frederick, to the question, "Who first suggested this paraffining?" answered, "My brother Stepney was the first who told me; he spoke to me about it"; and this statement is emphasized by other parts of his testimony. When the first witness, on cross-examination, admitted that in their declaration for the patent they swore that they were joint inventors, counsel, in explanation to the court, said:

"I may tell your lordship there are a number of other things in the patent. My friend is talking about 'this invention.' Of course, technically it is one invention, but in fact there are a number of things included in it which have since been cut out by disclaimer."

A like explanation is appropriate here. The patent contains two claims. The first, which is in suit, is for a single thought,—the described improvement in strengthening incandescent mantles, consisting in coating the completed mantle with paraffine or other suitable material. That thought might well have come to one when in bed, and have been put to the practical test the next day, as testified. It is difficult to apprehend how two could have shared in the conception. The second claim, however, is distinctly different. It is for a method of forming incandescent mantles, consisting of a number of steps, the combining of which, to produce the desired result, may well have been the joint achievement of two or more minds. The order of the circuit court is affirmed.

NATIONAL CHEMICAL & FERTILIZER CO. v. SWIFT & CO.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 674.

PATENTS—NOVELTY—FERTILIZER FROM CONTENTS OF TANK-WATERS.

The Van Ruymbeke patent, No. 367,732, for a fertilizer described in the claim as a "nitrogenous fertilizing material consisting of the undecomposed coagulated albuminoids of concentrated tank-waters, freed from undue deliquescence and viscidty," is void for lack of novelty, the same product, prepared by substantially the same chemical treatment of tank-waters, having been disclosed in a number of prior patents.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The decree appealed from dismisses the bill of complaint for want of equity, and is based on the opinion of the trial court that the patent in suit is invalid both for uncertainty and for lack of novelty. 100 Fed. 451. The bill alleges infringement of letters patent No. 367,732, issued to the appellant, as assignee of Joseph Van Ruymbeke, August 2, 1887, for a fertilizer. The original application was filed July 27, 1885, and called for a patent for the process described; but this was refused by the patent office for sundry reasons stated by the examiners, including the following: That "there is no specific process described"; that "neither the specifications nor the claims" comply with the law; and that "many other inventors have treated the same and similar material to that of the applicant with the same chemicals." Thereupon, the application being changed to one for the product, the patent was finally allowed for "certain new and useful improvements in fertilizers," with the following specifications and claim:

"Liquids technically known as 'tank-waters,' produced by the rendering of meats and fatty substances, contain so much of soluble gelatinous substances that, when evaporated, the product is so sticky and deliquescent that its utilization as a fertilizer has been abandoned. My present invention consists in the production from tank-water of a fertilizer free from undue deliquescence and viscidty, which I accomplish by rendering insoluble the gelatinous substances contained in these waters without the loss of any of the solids in solution, and without the transformation of them into several different products, each of which products requires to be differently and separately treated for utilization, as is the case when the stickiness is corrected by heat. In my method of making this new fertilizer by rendering insoluble the gelatinous substances contained in these liquors I preferably use a solution of sulphate of iron, and, for the purpose of ascertaining the minimum quantity to be used, I determine, first, the specific gravity of the liquid to be treated; secondly, the proportion of gelatinous substances which it contains. The class and character of the meats rendered and the tank-water therefrom vary so much in the relative proportions of fibrine and gelatine which they contain that it is necessary to make a chemical test of a sample of tank-waters about to be treated. This test consists in gradually adding to such sample of tank-water a solution of iron of known strength; and in my experience I have found that for one hundred parts of solids in solution in the tank-water it requires from fifteen to twenty per cent. of green copperas, which is added in solution to the tank-water, and mixed thoroughly therewith. This compound is then evaporated under 250° to 300° Fahrenheit, preferably by steam, after which it is placed in an open vessel, in thickness of one inch, and for a period of about ten hours is subjected to a heat of about 350° Fahrenheit, when it will become hard, brittle, and easy of pulverization. The heat should not be raised much higher than 350°, because the material would thus again become sticky, blacken, and suffer loss of ammonia. By this means the substances in solution in the tank-waters, with all the nitrogen they contain, are preserved in the resulting non-viscid, non-deliquescent fertilizer, rich in nitrogen, with soluble phosphate and potash. Instead of using sulphate of iron, as an equivalent I may use the same pro-

portions of chloride of iron, sulphate of aluminum, alum, acetate of lead, or other soluble salts of iron or aluminum, or twenty to thirty per cent. of organic tannins, or five to ten per cent. of chlorine or its equivalent hypochlorides. These are the proportions when either class of these chemicals is used alone, but, if used in combinations, equivalent proportions of each will take the place of the others. I am aware that the described chemical ingredients have been used in the treatment of sewage and similar liquids, but such use has been for the purpose of preventing odorous decomposition, and not for rendering insoluble gelatinous compounds, such liquids not usually containing gelatine. Having described my invention, what I claim is: The within-described nitrogenous fertilizing material, consisting of the undecomposed coagulated albuminoids of concentrated tank-waters freed from undue deliquescence and viscosity."

The appellee, Swift & Co., is operating as licensee under letters patent issued to Omar T. Joslin, April 11, 1893, for a "process of making fertilizer from tank-water"; and the following is stipulated as the process actually employed by the appellee, in conformity with such patent, producing the fertilizer which is alleged to infringe the appellant's patent:

"The tank-water is first concentrated to a consistency of about thirty-five degrees Baumé, at a temperature of 140 degrees F. The resultant product is called 'stick.' To the stick there is added two per cent. of sulphuric acid of from sixty to sixty-six degrees strength. The mass is then stirred for a few minutes to allow decomposition to take place. There is then added in solution enough sulphates formed by dissolving waste fuller's earth in sulphuric acid so, that on completion of the process the finished product will contain, on dry basis, eight per cent. of such sulphates. The mass is then stirred about ten minutes. Pressed cooked blood is then added until the finished product will contain, on dry basis, seventeen per cent. of blood, and the mass is stirred about ten minutes. The product is then finished by drying in shallow pans in a steam oven. This process is sometimes varied as follows: As a substitute for the two per cent. of sulphuric acid there is sometimes used an equivalent quantity of waste sinews or ligaments from slaughtered animals, dissolved in sulphuric acid. Another change is that, as a substitute for the pressed cooked blood, there is used about half the quantity of blood, and the deficiency is supplied by using steamed hoofs, the quantity of each and either depending upon the supply of either or both on hand; but usually there is a sufficient quantity of hoofs used so that the finished product will contain from eight to twelve per cent. of hoof, on dry basis."

In support of the defense of anticipation in the prior art, numerous letters patent of the United States were introduced, and the following are specially referred to and discussed in the testimony of the experts: Gale's, No. 38,040, for an "improvement in treating phosphatic guanos"; Wilson's, No. 90,328, for an "improved process of treating offal-gelatine and scrap for the manufacture of fertilizers"; Stephens', No. 144,877, for an "improvement in the manufacture of fertilizer by using plaster of Paris with animal matter"; Shaw's, No. 146,285, for treating slaughter-house wash for a fertilizer; North's, No. 165,172, for an "improvement in fertilizers"; Halverson's, No. 171,613, which distinctly claims "the improved process of utilizing 'soup' described, consisting in treating the same with persulphate of iron"; Terne's, Nos. 228,955, 246,242, 269,487, 282,411, relating to the treatment of sewerage and tank-waters; Huet's, No. 242,777, for treatment of animal substances, etc., for making a fertilizer; Myerson's, No. 163,099, and Strype's, No. 318,826, for treatment of blood; also several patents issued on applications of Joseph Van Ruymbeke, both prior and subsequent to the patent in suit, for the treatment of tank-waters to produce fertilizers.

L. L. Coburn, for appellant.

J. L. Jackson and L. L. Bond, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The appellant's patent, issued on the application of Joseph Van Ruymbeke, is for a product stated in the single claim of the patent as a "nitrogenous fertilizing material consisting of the undecomposed coagulated albuminoids of concentrated tank-waters freed from undue deliquescence and viscosity." The validity of the patent rests primarily on the assumption that Van Ruymbeke made the discovery of a new composition of matter; that, utilizing the waste tank-water which came from the rendering operations of slaughter houses, he produced a valuable fertilizer, through chemical action theretofore unknown. The process employed is not protected by patent, as the application for that object was rejected by the patent office; but the patentee is, nevertheless, entitled to the broader protection of his product for which the patent was finally allowed, if it be true that it is his discovery in the sense of the patent law, provided the means and method of production are clearly set forth. When a new article, a new property in the composition of matter, is thus brought to light for the enrichment of the world's knowledge and uses, the statute intends that the discoverer may be rewarded with exclusive rights to make and sell the article during the moderate term for which the patent is granted; and, as remarked in *Merrill v. Yeomans*, 94 U. S. 568, 571, 24 L. Ed. 236, this right prevails over an infringing article, "however produced." This broad monopoly can be granted for a true discovery only, and not for the mere improvement of a known composition. The "mere carrying forward, or new or more extended application of the original thought; a change only in form, proportions, or degrees; the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, with better results,—is not such invention as will sustain a patent." *Smith v. Nichols*, 21 Wall. 112, 119, 22 L. Ed. 567; *Grant v. Walter*, 148 U. S. 547, 553, 13 Sup. Ct. 701, 37 L. Ed. 557. And this rule is strictly applicable where the claim of the patent is for a new substance or composition of matter.

The contention on behalf of the appellant is thus stated in the brief of its counsel:

"Dr. Van Ruymbeke, the patentee, made a discovery in chemistry, to wit, that the application of sulphate of iron or green copperas would coagulate the gelatinous substances or albuminoids of the solids held in solution in 'tank-water,' which enabled him to utilize all of the solids in tank-water by evaporation, and render them non-viscid and non-deliquescent, without applying a high degree of heat. By this process he made a waste product valuable, and corrected the sanitary conditions surrounding all the packing houses."

If the testimony sustains this contention within the rules above indicated, the patent is sustainable, unless the description of the process is fatally defective; and in that view it would be questionable, to say the least, whether substantial difference in the appellee's process would save its product from infringement. The nature of the discovery must, therefore, be ascertained in the light of the prior state of the art. As usual in the expert testimony furnished in patent causes, the opinions of the chemists called on one side and the

other—including scientists of eminence in the profession—are directly opposed on the question whether Van Ruymbeke made a new discovery in chemistry; but we are of opinion that the various suppositions upon this point founded upon theories are set at rest by the evidence of prior patents and publications and of practical demonstrations thereunder. "Tank-water," which is the subject of the treatment described in the patent, is the name applied in the slaughter-house industry to the liquid produced in the rendering of meats and other animal matter through the process of subjecting such material to the action of steam and pressure. The fat rising to the top of the tank, and the undissolved solid matter settling to the bottom, the fluid which remains between them is known as tank-water, sometimes called "soup," and contains about 10 per cent. of solids in solution. In this condition the tank-water is both waste material and unsanitary. It is described by the experts as "an exceedingly complex substance," many of the constituents being unknown; but the presence of albuminoids and gelatinous substances was well known, although their exact nature and extent is still unknown; and these constituents are rich in nitrogen, and valuable as plant food. This tank-water has long been subjected to treatment which reduced it to a substance called "stick," with varying consistency, approximating 50 per cent. solids; and the stick, when further evaporated to dryness, at a temperature of about 212° Fahrenheit, possessed fertilizing properties of great richness, but was then defective for commercial use by reason of its extreme deliquescence, namely, having the property of absorbing moisture from the atmosphere so that it soon became sticky and viscid, "flowing like tar." The process described in the Van Ruymbeke patent overcomes this serious defect through the chemical action of a solution of sulphate of iron, or some of its numerous equivalents, and thus produces a fertilizer ingredient of great commercial value. Was it a "new discovery in chemistry" that a remedy existed in the use of such chemical agent under like conditions; that sulphate of iron, or known equivalents, "would coagulate the gelatinous substances contained in tank-water"? The answer to this crucial inquiry must be sought in the prior patents introduced in the record, and we are constrained to the opinion that they clearly negative the appellant's contention.

The application for the process of the patent in suit was filed July 27, 1885. (1) In 1863 letters patent No. 38,040 were issued to Gale for a process of making a fertilizer by combining phosphatic guano "with animal matter previously converted into ammoniacal products"; and for the treatment of the latter distinctly specifies the use of copperas (sulphate of iron), with a small proportion of sulphuric acid, and then boiling down the mixture "until the animal matter shall be broken down, and reduced to a gelatinous mass." These ingredients and the method set forth are quite identical with those employed by the appellee in the treatment of tank-water. (2) In 1869 letters patent No. 90,328 were issued to Wilson "for a process of treating offal gelatine and scrap for the manufacture of fertilizers," and the specifications show that the treatment is applied to the same material which is here called tank-water, together with such solids as

remain after drawing off the fat. The ingredient named for the mixture preparatory to concentration by heat is acid phosphate of lime, but salt of iron is also mentioned in language which would imply either additional or alternative use, or, as stated in the second claim of the patent, for application "separate or combined"; and the patentee says he thus overcomes "the well-known gummy and sticky property of commercial phosphate fertilizers." (3) The Stephens patent, No. 144,877, of 1873, clearly describes a process for treatment of tank-water which is identical with that of the patent in suit, except that plaster of Paris (sulphate of calcium) is used instead of sulphate of iron; and the qualities of the product are described in terms which cover the Van Ruymbeke claim. (4) In 1875, however, letters patent No. 171,613 were issued to Halvor Halverson with a single claim for "the improved process of utilizing 'soup' described, consisting in treating the same with persulphate of iron." The specifications unmistakably show that tank-water was the subject of treatment, with the twofold purpose of obviating its "injurious sanitary effects," and "converting the same into fertilizing material"; that it is treated with "a saturated solution of persulphate of iron until precipitation ceases, the precipitate thus formed being not only valuable as a fertilizer, but also, by subsequent treatment, for edible purposes." Whether the specifications of the process are open to the objection made that they are indefinite in respect of proportions of material and of the treating or boiling for concentration, is not essential to the question under consideration, as they furnish a clear disclosure by publication of the identical idea of means claimed in the appellant's patent; the use of the chemical reagent and its effect upon the gelatinous substances in the tank-water thus being distinctly pointed out. Given, through such publication of the processes in the prior patents, like ingredients, with coagulation of the albuminoids and resultant product clearly set forth, there was surely no pioneer discovery in chemistry on the part of Van Ruymbeke to authorize a patent for the identical product, however meritorious his advance may have proved in the process to that end. Moreover, the sample which was introduced of the product made in conformity with the Halverson patent presents every quality described in that of the Van Ruymbeke patent, and the exhibits made thereunder, differing only in color; and the same remark applies substantially to the sample made under the Wilson patent.

Of the other prior patents in evidence it is sufficient to remark that cognate use of sulphate of iron, or its well-known equivalents, for like purpose, appears in Shaw's No. 146,285, Terne's No. 228,955, and Huet's No. 242,777; that in Myerson's No. 163,099, and Strype's No. 318,826, salts of aluminum are alike employed to coagulate blood; and that North, in No. 165,172, treats tank-water by a high degree of heat, and describes the fertilizer thus produced as "not at all viscid, but brittle, and only slightly deliquescent." The contention that these prior patents must be treated as failures—as mere paper patents of no practical value—is untenable. "The very fact" of the grant of a patent for the process described "is some evidence of its operativeness, as well as of its utility," when introduced by way of anticipation

(*Dashiell v. Grosvenor*, 162 U. S. 425, 432, 16 Sup. Ct. 807, 40 L. Ed. 1029), and the testimony which was offered to overcome their presumptive value relates only to the patents of Halverson, North, and Terne. That referring to the Halverson process is entirely hearsay, and inadmissible; that as to the trial of the North process merely states the conclusion of the witness that "it was not practical," without explaining the circumstances; and finally, in reference to the Terne patents, which are owned by the appellant, its president states that they produced under them "a commercial fertilizer," which he does not attempt to differentiate from the product in suit, but says "the process could not be made profitable," leaving the cause unexplained. Thus standing unimpeached each of the patents in evidence is entitled to consideration, with its value dependent alone upon the identity and completeness of the means and results described, and with substantial identity of the Terne product conceded by fair implication. It is true that the testimony further shows that prior to the introduction of the Van Ruymbeke process the tank-water produced in slaughter houses was not successfully utilized, and that success, in fair measure, at least, followed its adoption in the development of an important industry. But it appears equally true that the industry cannot be conducted with profit, except in connection with the great packing establishments having an output of upwards of 1,000 hogs per day,—a condition which was not met by more than three concerns in the United States prior to the date of this patent. The magnitude and diversity of packing operations at great centers have greatly increased since that date, while comparatively few establishments are thus utilizing their tank-water. Whether the success of the operation under the patent in suit is due to the superiority of its process for economical production, or to the changed conditions referred to, or to both combined, is not material, in view of the fact that the product, and not the process, is the claim of discovery. We are of opinion, therefore, aside from other questions which are argued in their briefs, that no discovery was made by Van Ruymbeke to authorize a monopoly of the product described, and that the bill was rightly dismissed for want of equity. Accordingly, the decree of the circuit court is affirmed.

THE CLINTONIA.

NEALL et al. v. GENERAL MARINE INS. CO. OF DRESDEN.

(District Court, S. D. New York. July 30, 1900.)

1. SHIPPING—LIEN FOR INLAND FREIGHTS—CONSTRUCTION OF CHARTER.

A charter for a vessel provided that "the master shall, if required, give his draft on consignees, payable 3 days after arrival, for whatever inland railway charges are collectible from receivers of cargo as shown on bills of lading and manifest, subject to the usual charges of one per cent. commission and cost of insurance; and the draft shall be a lien on the vessel and her freight." While the vessel was loading and after she had loaded a considerable quantity of cargo shipped on through bills, on which there were inland charges, both she and the cargo on board were so badly damaged by a fire which occurred on the wharf that the voyage was abandoned, and the vessel and cargo undestroyed were sold in a suit for salvage charges. No drafts for inland freight had been required of

the master previous to the fire, and none given, and a demand therefor afterwards made was refused. *Held*, that under such provision there was no lien on the vessel for inland freight, unless a draft therefor had been given; that the conditions had been so changed by the fire that such drafts were no longer demandable, because the charges for inland freights were no longer "collectible from receivers of cargo," and it was against such collections, to be made by the vessel for a commission, that the drafts were to be drawn; nor could the insurance required to be furnished at the cost of the charterer for the protection of the vessel be then effected.

2. SAME—EFFECT OF CUSTOM.

In view of the provision of the charter fixing the duty and liability of the vessel in regard to inland freights, no custom or practice, even if established, could be allowed to affect or change the express contract of the parties.

3. MARINE INSURANCE—ADVANCES ON FREIGHT.

The charterer's agents having, previous to the fire, procured insurance for the benefit of whom it might concern on the inland freights, which it had obligated itself to advance, presumably designed in conformity to the charter provision to inure to the benefit of the vessel when drafts for such freights should be given, the insurer, and not the ship, would be primarily, as well as ultimately, liable for the loss.

4. SAME—WHAT CONSTITUTES ADVANCES.

An insurance policy for the benefit of whom it may concern, covering advances on inland freights on a cargo, is effective for the protection of a charterer which had obligated itself by contract to advance such freights, although no payment had actually been made thereon when the cargo was lost, the obligation given being in effect an advance for the purposes of the insurance.

In Admiralty. Libels against a vessel and against an insurance company to recover advances made on inland freight charges on a cargo shipped on through bills of lading, and destroyed by fire at the wharf while loading.

Convers & Kirlin, for libelant United States Shipping Co. and respondent General Marine Ins. Co. of Dresden.

Robinson, Biddle & Ward, for libelants Neall and others.

Butler, Notman, Joline & Mynderse, for the Clintonia.

BROWN, District Judge. The above libels grew out of a fire which originated on one of the wharves at Newport News on April 27, 1897, and extended to the steamship Clintonia, which was loading alongside, and so damaged her that the voyage was broken up, and ship and cargo were sold in a subsequent suit for salvage.

In the first above libel the net proceeds of the Clintonia amounting to \$2,759.49, after satisfying the claims allowed in the salvage suit, have been attached upon a claim of a lien thereon in libelants' favor, to the amount of \$3,092.11 for advances paid by them to different railroad companies for inland transportation charges on through bills of lading, upon the goods laden on board the Clintonia partly at Norfolk, and partly at Newport News, prior to the fire. For those charges, it is contended that the steamer became responsible under the terms of her charter to the shipping company.

In the second libel the same advances for inland charges are claimed against the respondent insurers upon a policy of \$6,000 on "advances and disbursements" taken out for the benefit of whom it may concern by the libelants, who compose the firm of Peter Wright

& Sons, and who were the financial agents of the United States Shipping Company, and accustomed to discount for that company the master's drafts given for inland charges and freight differences, and to provide the insurance requisite to cover them.

The charter of the *Clintonia* was a charter of affreightment to the United States Shipping Company for a single voyage. That company had vessels of its own, and it chartered others, and in all it dispatched from Atlantic ports from 100 to 150 vessels yearly. The cargoes came largely from inland points, whence they were brought to the seaboard by different railroads upon through bills of lading stating a gross freight payable on delivery at the foreign ports. These bills of lading were given at the interior points of shipment and were signed in behalf of the railroad companies and of the shipping company jointly, each being made separately responsible for its own share of the transportation. By agreement between them the shipping company was made responsible to the railroads for the latter's share of the through freight, i. e. for the inland transportation, from the moment of the delivery of the goods at the seaboard within reach of the vessel's tackles. Under that obligation the shipping company paid the railroad companies for inland charges, as appears from the adjustment made in the salvage suit, \$3,021.22 on inland goods laden on the *Clintonia* before the fire, which sum it now seeks to charge upon the ship.

The usual course of business was for the master on clearance to give in settlement of freight his obligation to the charterer called a draft, with a lien on vessel and freight agreeing to pay a given sum equal to the whole freight collectible at the foreign port both on the through bills of lading, as well as on the ship's own bills of lading for local cargo shipped at the point of loading, less the charter hire and certain other stated charges. This obligation contained a direction to his consignees to pay the same and to deduct it from the freight due the vessel. By "consignees," I understand the consignees of the ship to be there referred to, who are expected to collect the freight on discharge.

No doubt the established usages of the business are part of the implied contract if clearly proved and not inconsistent with the written charter. But the provisions of this charter clearly distinguish between the ship's own bills of lading and the freight payable thereon, with a settlement by draft of differences between that freight and the charter hire, and a settlement by draft for the inland charges. For the former, a lien on freight alone is authorized; for the latter, a lien on both vessel and freight. The former, moreover, was only demandable "on clearance"; the latter, as often as the different consignments were loaded. Clause 11 of the charter provides:

"The master shall, if required, give his draft on consignees payable 3 days after arrival for whatever inland railway charges are collectible from receivers of cargo as shown on bills of lading and manifest, subject to the usual charges of one per cent. commission, and cost of insurance; and the draft shall be a lien on the vessel and her freight."

There is no other provision in the charter authorizing a lien on the vessel for inland charges, or for making such charges any debt

of the ship. Clause 10 provides, as I understand it, for the settlement of charter hire by the freight on the (ship's own) bills of lading, with a draft for the amount of any difference, and a lien therefor on the freight alone. That difference in this case was small, and as I understand, does not enter into this controversy. Goods laden under inland through bills of lading, are dealt with by clause 11 above quoted, and by clause 18 of the charter, which provides for "receipts" to be given by the master for such goods, and the delivery thereof at the foreign port on presentation of a through bill of lading agreeing in particulars with the master's receipt.

In the present case, no bills of lading were given by the ship for any of the inland goods; but authorized master's receipts were given for the inland goods laden at Norfolk, but not for those laden at Newport News, where the loading was incomplete, being interrupted by the fire. No draft was given by the master; nor was any requested by the shipping company until after the fire, when the master refused to give any draft.

No lien for inland charges can arise against the ship, except upon some express contract by the charter or otherwise, or upon some settled usage or course of dealing from which such an agreement can be fairly implied. The charter provisions in this case certainly do not give such a lien, since the prescribed conditions of clause 11 in several particulars were evidently unfulfilled.

(a) The provision is that "the draft shall be a lien"; not that the inland charges without a draft shall be a lien from the moment of loading; and no draft was ever given. No doubt the master would be bound to give a draft, "if required," from time to time during loading as each consignment was laden; but (b) the company did not ask or "require" this; and it was not only customary to defer this until the loading was complete, but the company might, at its option, dispense with a draft altogether, and look out for the collection of the inland freights by other means. No draft having been asked of the master before the fire, up to that time no duty rested on him to give it. The charterer's option was not exercised. After the fire, the circumstances were so wholly changed, that other provisions of clause 11 made a demand of the draft then too late, and no longer enforceable.

The provision is for a draft, (c) "for whatever railway charges are collectible from receivers of cargo." This means whatever is apparently collectible according to the circumstances as they exist at the time when the demand for a draft is made, or when the duty to give it arises. But after the fire, when this demand was first made, the cargo was in part wholly destroyed; on that part nothing was "collectible from the receivers," nor (d) could there any longer be any "receivers" of such cargo. The residue of the cargo was so damaged by the fire as to be presumably not worth forwarding, since it was ordered sold in the salvage suit, and upon nearly all of it the net proceeds were insufficient to pay the inland freights and these freights were therefore no longer "collectible from the receivers of cargo."

Again, (e) the draft was to be given "subject to the cost of insurance"; but in the situation after the fire, the inland freights were manifestly incapable of being insured. This provision for insur-

ance was designed for the ship's benefit. It was manifestly indispensable to her security, from the moment she should become liable to a lien by the master's draft for freights payable on delivery at a foreign port. If for this purpose new insurance was to be relied upon, that could no longer be obtained after the fire, and this essential condition could not be performed. This objection, however, would not apply if there were already existing insurance which the company could make available to the ship, to which reference will be made below.

Nor is the libelants' case strengthened by the further reference of clause 11 to inland freights "collectible of the receivers of cargo as shown on bills of lading and manifest." For (f) the bills of lading do not "show" any inland freights collectible on goods destroyed, nor on goods so damaged that commercially they cannot be forwarded but must be sold before the voyage begins. On the contrary, the bills of lading provide for the payment of freights only on delivery at the port of destination; and at the time when this draft was "required" there could not be any such delivery as respects the goods or inland freights here in question.

The entire situation was, therefore, so changed in this case by the fire, that in my judgment no draft could thereafter be lawfully demanded of the master under the charter, because the essential conditions contemplated by clause 11 no longer existed or could be complied with, and that clause therefore became inapplicable in the existing situation.

It is said, however, that under the established usage and known course of dealing, independent of the charter, the inland charges upon the goods when laden on board become ipso facto a debt of the ship. But I do not find any sufficient foundation for this claim. Such a charge is a highly burdensome one, and without any direct benefit to the ship. Her interest is only in the ocean freights, which are distinguished and separated from the inland charges in the manifest furnished her. The claim here is, not that the ship should become merely collecting agent of the inland freights, but an insurer of them for the charterer's benefit from the moment the goods were put on board. Such a claim, aside from any express agreement written or oral and based only upon an alleged usage, should only be admitted on clear evidence of such a usage in the particular circumstances under which the claim arises. Here there is no evidence that by usage the inland charges are assumed and understood to become a debt of the ship, from the moment of loading; but only that the general practice is similar to the provisions of this charter, in the absence of any charter or specific agreement. The alleged custom, therefore, has reference only to the conditions usually existing and the practice to give a draft on clearance under such conditions; but it proves nothing as to the ship's responsibility for inland freights while loading, or as to her obligation to give a draft before clearance, when she cannot clear, and after the goods have been destroyed or so damaged that they cannot be forwarded and the voyage is broken up.

But if any such custom were sufficiently proved, I should feel bound to find it in this respect superseded by the express conditions

of clause 11 of this charter, because inconsistent with the restrictions of that clause. One of the most material conditions of clause 11 is that any such draft is "subject to the cost of insurance." This requires the charterers either to pay the ship the cost of insuring the inland charges which she assumes to collect, or else to furnish the ship available insurance thereon for her own protection. This must evidently be done contemporaneously with the giving of the draft, since the ship cannot be required, under an arrangement that is optional with the charterer, to be for any period uncovered by insurance. The custom to give a single draft at the close of loading, instead of numerous separate drafts on each consignment, is manifestly greatly to the convenience of both parties. But this alone would leave the contingency of loss during loading unprovided for. The evidence shows the practice of the shipping company to be to procure insurance in advance through its financial agents. That was done in this case. It was done in the expectation of receiving on clearance the usual draft including the inland charges. This insurance, for whom it may concern, was manifestly designed for the benefit of all interested in the draft or in the inland charges which were insured by the policy. The persons interested were, first, the shipping company under its obligation to pay the railroad companies as soon as the goods were on board the *Clintonia*; next the ship and owners, on their obligation when the draft was given; and, finally, Peter Wright & Sons, upon their discount of the expected draft. As the shipping company was bound to pay or provide insurance for the vessel's benefit on receiving the draft, it is not conceivable that that company expected to pay for or to procure duplicate insurance for the same interest. The insurance taken out in advance on the inland freights must, therefore, have been designed in part for the ship's benefit, and for the fulfillment of clause 11. Mr. Gotheil testifies that it was intended to cover the company's obligations. It must be inferred, therefore, that any practice of calling for a draft for inland charges includes covering the ship's liability by available insurance thereon; so that if any draft could have been lawfully called for in the present case after the fire, it could only be upon covering the ship's liability by insurance through the application of the policy in the second suit to the ship's benefit. That policy being originally intended for that purpose would thereby become the primary fund for the payment of the ultimate loss on inland freights, with consequently no right of subrogation in favor of the insurers against the ship on payment of the loss.

If on the other hand, the policy was not designed to cover the ship's liability on giving a draft, so that the shipping company at the time the draft was demanded could not furnish the ship with valid insurance, nor enable her to get it, and did not offer to pay the cost of it, that company had no right to a draft under any practice or custom that appears in evidence. The result would be the same in either view, that the insurance company must pay the loss and not the ship.

2. The policy seems expressly designed to cover all interests as above stated, and to be sufficient for the present loss. It was for

whom it might concern, and it covered: "(a) Advances and/or disbursements secured by master's draft pledging the vessel and freight, insuring against loss total or partial, caused by loss total or partial, of the vessel or freight pledged through sea perils, or by postponement of the lien to prior liens subsequently arising or by contribution to general average.

"(b) Advances upon freight for inland freight and/or charges upon cargo and/or differences in ocean freight due by the ship secured by master's draft, etc.

"(c) It is agreed that advances and/or disbursements and/or advances for differences in freight made prior to the signing of the master's draft, or pending negotiations of it, are also covered by this policy, as interest may appear."

Had any draft been given for inland freight, clearly clauses (a) and (b) would have covered them; and clause (c) seems to me plainly designed to cover the risk of loss on advances generally, prior to obtaining the master's draft. That is the precise situation here, which also needed to be covered under the practice of waiting until the loading was complete before calling for drafts for inland charges; and the application, as the answer alleges, was for insurance on advances "shipped or in course of shipment."

It is objected that clause (c) did not take effect, because the shipping company had not in fact made any advances at the time of the fire. But its obligation to pay had become complete and absolute before the fire, and it afterwards made the payments which it was in law compelled to do. The company had advanced its obligation to pay, and by the receipt of the goods this obligation became fixed and absolute. This was sufficient; for insurance purposes, the advance was in effect already made, as much as if the company's note had been given therefor, although not actually paid until afterwards.

Clause (c) as I have already said was not intended to be limited to drafts given, but to secure the shipping company prior thereto, and prior to any lien obtained on the ship for inland charges. The company's interest in these charges was plainly an insurable interest from the moment the goods were shipped on board, independent of any lien on the ship therefor. I do not perceive any sufficient legal defense to the company's claim for the loss on inland freight sustained by it through the fire; and the libelants in the second libel are entitled to a decree for the amount of that loss over and above the amounts heretofore received by them on account, with costs.

As respects the sum of \$739.41 apparently drawn by the Buffalo Iron Company improperly from the fund in the salvage suit before the adjustment of the charges, if the insurance company was a party or privy to that proceeding, I think the shipping company which also was a party cannot be charged with it, both being presumably chargeable for its disappearance; otherwise, the latter should I think be charged with it, as either lost by its inattention, or recoverable, if it be recoverable, at its own charge and risk.

The first libel is dismissed with costs; in the second, the libelants are entitled to a decree with costs.

THE FRIESLAND.

(District Court, S. D. New York. September 18, 1900.)

1. SHIPPING—DAMAGE TO CARGO—LIMITATION OF LIABILITY.

A provision of a bill of lading exempting the carrier from liability for loss or damage occasioned by unseaworthiness, provided the owners had exercised due diligence to make the vessel seaworthy, leaves upon the owners the burden of proving such due diligence, which includes thorough and careful inspection.

2. SAME—INSPECTION OF PIPES.

A cargo was injured by sea water which entered the vessel through a hole which had been worn and eaten by corrosion through the iron bottom of a valve chest three-eighths of an inch thick. The peculiar liability to corrosion of iron in such place was well known, and, while there was evidence of inspection, it was not specific as to manner in which such inspection was made, and it did not appear that the valve chest had ever been removed for examination since it was placed in the ship nine years before, or even that the valve itself had been taken out. *Held*, that such evidence did not show reasonably careful inspection, such as was incumbent upon the owners under a provision of the bill of lading requiring them to exercise due diligence to make the vessel seaworthy, in order to exempt them from liability.

In Admiralty. Suit to recover damages for injury to cargo.

Butler, Notman, Joline & Mynderse, for libelants.

Robinson, Biddle & Ward, for respondent.

BROWN, District Judge. On a voyage of the Friesland from Antwerp to New York in October, 1898, four shipments of libelants' goods were damaged by sea water, which gained access through a leak in the valve chest through which one of the steerage closets was discharged. The libel was filed to recover the damages. The evidence shows that the bottom of the valve chest, which was of cast iron and three-eighths of an inch thick, had become worn away by the combined action of corrosion and the play upon it of the valve, so that a circular hole about three-eighths of an inch in diameter was made, through which the sea water came in and did the damage. The chest was made fast to the side of the vessel inboard and had an opening to the sea. The valve inside of the chest, and about four inches inboard, was of brass, oblong in shape, and weighed about eight pounds. It was supported by brass pivots or pintles, which rested in cast iron sockets or pockets near the top of the valve chest. The valve swung outward from the pipe, so as to permit the discharge of the contents of the waste pipe; but at the bottom it swung back against a shoulder or stop, so as to prevent ingress of sea water into the pipe beyond the valve. There was originally about a quarter of an inch of free space between the bottom of the valve and the iron chest. Through the combined effects of corrosion and wear it was found on examination that the pintles had dropped fully half an inch in their original supports, permitting the valve to drop that distance from its original position until a hole was worn through the bottom of the chest, as above stated.

The iron chest was so placed that examination of the interior was difficult. There was a cap upon the top of the chest, which could be easily removed, and through this the valve could be taken out, and

when that was done some examination of the inside of the chest could be made showing the wearing of the pockets and the dropping of the valve; and the bottom of the chest could then be seen through the pipe from the outside of the ship. The chest could also be detached from the side of the vessel. It was the habit of the respondent to make an inspection of all the steerage closets upon each voyage. Once a year there was a general overhauling. The vessel had been running about nine years. The chest and valve are the same that were originally put in. The bill of lading contains the following among its exceptions:

"It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by * * * any latent defect in hull or machinery or appurtenances * * * or by unseaworthiness of the ship at the time of shipment or the commencement of or any period of the voyage, provided the owners have exercised due diligence to make the vessel seaworthy."

Assuming the validity of this stipulation (*The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181) the question presented is, whether the evidence shows the exercise of due diligence by the respondent to make the steamer seaworthy as respects the condition of the valve chest.

The question involved has been several times before this court in different forms. The burden of proof, it has been held, is upon the shipowner. The exemption in the shipowner's favor is in derogation of the shipper's ordinary rights and remedies; it respects losses over which the shipper can exercise no control, but which are to a certain extent within the control of the carrier by the exercise of the requisite care and diligence in inspection. In the case of *The Edwin L. Morrison*, 153 U. S. 199, 215, 14 Sup. Ct. 823, 38 L. Ed. 688, it was held to be the duty of the owner to make such necessary and proper inspection from time to time as might give assurance of the seaworthiness of the vessel; and in *The Phoenicia* (D. C.) 90 Fed. 116, affirmed in 40 C. C. A. 221, 99 Fed. 1005, the absence of a thorough and careful inspection, it was held, made the ship chargeable with the loss. See, also, *The Majestic* (D. C.) 56 Fed. 244, affirmed in 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. Div. 408, 413, 415.

The stipulation in the bill of lading releases the shipowner from responsibility for absolute seaworthiness, provided due diligence is exercised; but it does not release him, nor does it profess to release him in the least from his previous obligation to make such careful inspection as the circumstances require.

In the present case the evidence seems to me not to show such reasonably careful inspection of the interior of the valve chest as was incumbent upon the respondent under his obligation to exercise "due diligence," and to afford a corresponding reasonable protection of the shipper's goods. The special liability of iron to the effects of corrosion in the circumstances of this chest and valve was well known. On account of this liability, the employment of iron chests in British usage had been for many years discarded, and brass required instead. It is evident that the corrosion and wear in this case, in order to have gone through the bottom of the chest three-

eighths of an inch in thickness, must have been in gradual progress for a very considerable time. There was no unusual occurrence on this voyage, no heavy weather or strain, which could have produced any sudden rupture in the bottom of the chest; nor was the hole of that description. The corrosion went on with the lapse of years until the bottom was worn and rusted out. It is evident that this is not consistent with any actual careful inspection of the interior of the chest for some years preceding. The evidence taken by commission as respects the kind of inspection made is brief and unsatisfactory. It does not appear that the chest was ever taken out for examination from the time it was put in some nine years previous to this damage, or that the valve itself was taken out for the purpose of seeing better how great was the wear at the bottom. The removal of the cap alone was sufficient to make visible the very considerable dropping of the pintles in the pockets that supported the valve; and if the difference in the construction of the different chests and valves was such as to make the great depth of the pintles in the pockets no certain indication of unusual wear or dropping from the original position, the necessity of an occasional removal of the chest from the side of the vessel for careful examination is the more evident.

On the whole I cannot resist the conviction that there had long been a failure to make any such real and careful examination of the interior of these chests as their known liability to corrosion reasonably required, and that consequently there was not such "due diligence" exercised as the condition of the bill of lading required.

Decree for the libelants, with costs.

BARBER et al. v. VLASTO.

VLASTO v. BARBER et al.

(District Court, S. D. New York. July 31, 1900.)

1. SHIPPING — LIABILITY OF SHIPPER FOR DEAD FREIGHT—ERROR OF MASTER.

The owners of a vessel cannot recover dead freight from a shipper on account of his failure to load the full quantity of stone contracted to be carried where there were no facilities for weighing the stone, and the shipper accepted the estimate of the master that the full quantity had been loaded.

2. SAME—LIABILITY OF OWNERS FOR ACTS OF MASTER.

Vessel owners cannot be held liable to a shipper for the amount of an overpayment made by him to miners for a cargo of stone furnished him for loading the vessel because the master overestimated the amount loaded and the shipper accepted his estimate as the basis for making such payment, where it does not appear that the master acted fraudulently.

In Admiralty. Libel for freight and cross libel for damages.

Convers & Kirlin and George Whitfield Betts, Jr., for Barber & Co.

Stern & Rushmore and Charles C. Burlingham, for Vlasto.

BROWN, J. The above libel was filed to recover a balance of \$671.90 freight due on 893 tons of white stone brought from Greece by the libelants' chartered steamer Heathfield in October, 1898, and

also for the recovery of about \$1,600 dead freight for not loading some 607 tons more to make up the agreed quantity of 1,500 tons. The answer of the respondent and the cross libel allege the steamer's refusal to carry more than the 893 tons taken on board, and demand certain special damages for the refusal.

By the contract, the ship was to load from 1,500 to 1,800 tons of stone at Kalimaki and/or Kymassi. The 893 tons were taken from lighters at St. Theodore, within the port of Kalimaki, while the ship lay in an open roadstead where the water was so rough that her exact draft could not easily be taken, and there were no facilities for weighing the stone on shore before it was put on the lighters. The officers of the ship, as appears from their testimony, however, easily enough perceived when all the stone at St. Theodore had been loaded, that the ship had on board much less than 1,500 tons. The mate testifies that before leaving St. Theodore he told Mr. Vlasto he thought there was only about 900 tons. Mr. Vlasto denies this, and testifies that the master told him twice that there were about 1,500 tons on board, although he could not be sure about this owing to the difficulty of observing the exact draft in rough water; that he told the master if there were not 1,500 tons aboard the ship he must go to Kymassi for the remainder; that he had to pay the miners 15 francs per ton for mining the stone brought by them to St. Theodore, deducting 5 per cent. for uncertainty in weight; and that the master assured him that the amount laden would not vary 5 per cent. from 1,500 tons; and that the respondent thereupon paid the miners for 1,500 tons less 5 per cent. in the master's presence. The steamer thereupon left St. Theodore, and arrived at Patras, about 350 miles distant, where it was found in still water that her cargo of stone was only about 900 tons; she proceeded homeward, however, taking in other cargo on the way.

Upon the conflicting testimony, as to what was said at St. Theodore in reference to the amount of stone taken on board, I am inclined to give credit substantially to the testimony of Mr. Vlasto, and that the master's statements were such as to lead him to believe that there were 1,500 tons on board or within 5 per cent. of that amount. Otherwise considering that the respondent had a contract in New York obliging him to supply that amount and that he had engaged the Heathfield to bring that quantity, it is not credible that he would have omitted to require the steamer to go to Kymassi where he had thousands of tons in waiting for shipment, as the ship was bound to go if necessary to make up 1,500 tons; and it is equally incredible that he would also have paid the miners so greatly in excess of their dues. He was accustomed to rely for the weight of cargo taken at St. Theodore on the rough computation from the vessel's draft, and I have no doubt he relied on the master's statements of his estimate in this case.

I must hold the master responsible for so gross an error in loading. The evidence makes it clear that the other officers did not share in this error, and I must hold it without excuse. It is possible that the master failed to take account of some 450 tons of water ballast then in the ship, in reckoning the amount of the cargo from the apparent draft. But this in no way relieves the ship or the

charterers, who had contracted to carry at least 1,500 tons; and if he was not aware of the great deficiency when he left St. Theodore, it was because of his own gross negligence in not properly observing his ship or consulting with his chief officer, who knew better. The master knew that the respondent relied on the ship's draft, and on the master's estimate therefrom, in determining the tons loaded, and that he was bound to go to Kymassi for any deficiency. The estimate entered in the bill of lading has no bearing on this question.

The libelants' claim for dead freight cannot, therefore, be allowed. There was no refusal by the respondent to load the full amount agreed on; on the contrary, he was anxious to send the whole amount agreed. That it was not taken, was mainly at least the captain's own fault even if the respondent be considered remiss in not making approximate estimates of weight from the capacity of the lighters, and the number of lighter loads, which were reported to him. The master's neglect is chargeable upon the libelants as his principals.

I do not find, however, that the master's course was fraudulent; and for that reason the respondent cannot charge the libelants for the payment made to the miners. That was no part of the ship's business, and in relying upon the master's estimates of weight for making such payments to the men, the respondent has no legal cause of action against the master, or his principals, except for fraud.

The libelants are entitled to the balance of their freight less only the increased cost to the respondent, if any, of the freight for the transportation of the residue of 607 tons. Should the latter exceed the balance of freight owing, the respondent, as libelant in the cross libel, is entitled to a decree for the excess, and a reference may be taken to compute the amount due, if not agreed on.

THE SOUTHWARK.

(District Court, E. D. Pennsylvania. September 24, 1900.)

SHIPPING—INJURY OF CARGO FROM DEFECTIVE REFRIGERATOR—LIMITATION OF LIABILITY BY BILL OF LADING.

An agreement in a bill of lading for dressed meats to be transported across the Atlantic, that the carrier shall not be responsible for any loss or damage arising from breakdown or injury to the ship's refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage, is one which it is competent for the parties to make, and it relieves the carrier from liability for loss resulting from such causes unless negligence is shown, and the burden as to that issue rests upon the shipper, as the express contract modifies and supercedes the implied warranty of the fitness of the vessel and her apparatus for the service undertaken which would otherwise arise.

In Admiralty. Suit to recover damages for injury to cargo.

Horace L. Cheyney and John F. Lewis, for libelants.

Biddle & Ward and J. Rodman Paul, for respondent.

McPHERSON, District Judge. On July 3, 1894, the libelants shipped a quantity of dressed meat by the steamship Southwark, to

be carried from Philadelphia to Liverpool. The vessel was fitted with a refrigerating compartment known as the "commercial box," and with refrigerating machinery of an approved pattern. The bill of lading contained the following clause:

"It is expressly agreed that the goods shipped hereunder are absolutely at the risk of the owners in every respect, and that the carrier is responsible for no loss, delay, or damage thereto, however arising, including stowage and all risks of breakdown or injury, however caused, either to its refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage."

The refrigerating machinery had been in use for several years, and had always worked satisfactorily. Shortly before the voyage in question, it had been inspected by a competent official, and was apparently in good order. Within two or three hours after leaving port, however, a joint was found to be leaking, and it was necessary to stop the machinery in part so that the needful repair could be made. This was finished on July 5th, and the machinery was again started. On the same day a more serious breakdown occurred, and upon examination it was found that certain bolts and rods in the compression pump were broken or bent, and the piston was cracked. Later the crank shaft also was discovered to be bent, and not until July 8th was the machinery again in full operation. Its efficiency in reducing the temperature of the commercial box had, of course, been either suspended or impaired during the breakdown, and even after the repairs had been completed the temperature was not sufficiently lowered until the last day of the voyage. The injured parts were replaced in Liverpool, and since then the machinery has done its work well. Upon the arrival of the vessel in England, the libelants' meat was found to be injured by the unduly high temperature of the commercial box, the loss in market value being said to exceed \$6,000.

The question presented by these facts is this: What effect should be given to the foregoing clause in the bill of lading? As it seems to me, the answer is furnished by the decision of the court of appeals of the Second circuit in *The Prussia*, 35 C. C. A. 625, 93 Fed. 837, as the following quotation will, I think, make clear:

"It is the duty of the carrier by water, when he offers a vessel for freight, to see that she is in suitable condition to transport her cargo in safety; and he impliedly warrants that this duty has been fulfilled. And when he proposes to transport across the Atlantic a cargo of frozen meat, we agree, as was adjudged in *The Maori King* [1895] 2 Q. B. Div. 550, and *Queensland Nat. Bank v. Peninsular & Oriental Steam Nav. Co.* [1898] 1 Q. B. Div. 567, that he must be taken to stipulate with the shipper that the vessel is provided with suitable apparatus of requisite efficiency to enable him to deliver it in proper order. But it is competent for the parties by express contract to modify the obligations which would otherwise devolve upon the carrier, including even that of providing a seaworthy vessel; and short of any modification which will exempt him from the consequences of his own misconduct or negligence, or those for whom he is responsible, such contracts, though strictly construed against the carrier, are given full effect. Among them, one of the most common is that of exempting carriers from liability for latent defects in the hull or machinery of the vessel. As was said by Mr. Justice Brown in *The Carib Prince*, 170 U. S. 664, 18 Sup. Ct. 757, 42 L. Ed. 1187: 'To exempt a vessel from the consequences of such a defect is neither unreasonable nor unjust, and most of the modern bills of lading contain a stipulation to that effect.'

"In the present case the bill of lading contained a clause especially ad-

dressed to restricting the liability of the carrier in respect to the transportation of dressed meat, and the parties to the instrument agreed that the carrier should not be responsible for any loss or damage to it arising from defects or insufficiencies in any part of the refrigerating apparatus, whether arising before or after the shipment. While this clause would not extend to exempt the carrier for loss or damage caused by his own negligence, we have no doubt it protects him against such as arises in consequence of a latent defect in the apparatus, existing without his knowledge or negligence. The express contract displaces the warranty which would be implied in its absence."

The clause then under consideration was essentially the same as the clause now before the court, and I think the decision must be the same now as then. I see no sufficient evidence of negligence on the part of the vessel, either in supplying unsuitable machinery, or in failing to inspect properly, or in improper management (whatever the scope of the word "management" may be), and without proof of negligence on the part of the ship the libelants' case must fail. It was argued that the machinery could not have been in good condition at the beginning of the voyage, because the breakdown occurred so soon after the vessel set sail; and therefore that, in analogy to the rule of evidence concerning seaworthiness, the burden of proof was on the respondent to explain the causes of the various accidents; but I do not think the conclusion follows where the carrier's liability has been modified by such an agreement as the clause in question. The warranty that a ship in this business is fit at the beginning of a voyage to carry dressed meat safely—which was decided to be implied where the bill of lading is silent (*The Maori King* [1895] 2 Q. B. Div. 550)—cannot be implied if the parties have chosen to contract otherwise; and such a contract is clearly expressed by the language now being considered. The burden of proof is, therefore, not upon the carrier, but upon the shipper; and there must be sufficient evidence of the carrier's negligence before the shipper can be allowed to recover. Much of the testimony is directed to this point, and I have given it careful attention, but without being able to take the libelants' view. No doubt the machinery, for some reason or reasons, did not do its work, and no doubt, also, its failure to reduce the temperature sufficiently was due to the several breakdowns, but I cannot discover sufficient evidence to satisfy my mind that the vessel was to blame for the accidents. Unless negligence is proved, the cause or causes of the accidents are not important; for the libelants' express contract relieved the carrier from liability for the consequences of any breakdown, "however caused."

The libel must be dismissed, with costs.

THE COLUMBIA.

(District Court, N. D. California. August 27, 1900.)

No. 11,501.

1. COLLISION—STEAM AND SAIL VESSELS CROSSING—SPEED IN FOG.

A steamer, which was in the track of coastwise vessels, going at a speed of 13 knots an hour, at which speed she could not be stopped in a less distance than 1,400 feet, in a fog so dense that another vessel could not be seen at a distance of more than one-eighth of a mile, was not going at a moderate speed, within article 16 of the act of August 19, 1890 (26

Stat. 826), which took effect on July 1, 1897 (29 Stat. 893), which provides that "every vessel shall, in a fog, mist, falling snow or heavy rain storm, go at a moderate speed, having careful regard to the existing circumstances and conditions," and must be held in fault for a collision with a schooner which was entitled to the right of way.

2. **SAME—EVIDENCE OF SOUNDING OF FOG SIGNALS.**

The distance at which a fog horn can be heard varies so greatly with the direction and the particular conditions of the fog and atmosphere that the fact that the fog signals of a schooner were not heard by an approaching steamer until two or three minutes before collision, while the whistle of the steamer was heard on board the schooner for half an hour previously, is entitled to little weight in determining whether the horn was sounded at the intervals required by article 15 of the act of August 19, 1890 (26 Stat. 825), which took effect on July 1, 1897 (29 Stat. 893).

3. **SAME—LOOKOUT.**

Where the lookout on a small schooner saw an approaching steamer as soon as she could be seen through the intervening fog, the fact that he was stationed on the after house, instead of at the bow, cannot be held a fault contributing to a collision between the two vessels, nor can the fact that men were not stationed ready to make a change in the sails in case of emergency, where a change of course could not have been made in time to avoid collision after the approaching steamer was seen.

4. **SAME—IMPROPER MANEUVERS—TACKING IN FOG.**

A schooner cannot be held in fault for a collision with a steamer in a fog, the primary cause of which was the excessive speed of the steamer, because half an hour before the collision, and after hearing the whistle of the steamer, she tacked on a course which might bring her across that of the steamer, especially where the tack she was on previously had brought her as near the shore as it was prudent to go.

In Admiralty. Suit for collision.

Andros & Frank, for libelants.

Geo. W. Towle, Jr., for claimant.

DE HAVEN, District Judge. This is an action brought by the owners, master, and crew of the schooner *J. Eppinger* to recover damages on account of a collision between that vessel and the steamer *Columbia*. The collision occurred between 4 and 5 o'clock on the afternoon of July 2, 1898, at a point in the Pacific Ocean about 68 miles north of San Francisco and 7 miles off shore. At the time of the collision there was a light northwesterly breeze, and the *Eppinger* with all her sails set except her fisherman's staysail, and main topsail, was on the offshore tack, going in a direction W. by S. or W. S. W., and making from three to four knots an hour. She had been standing inshore on the port tack, and, having gone as near to the shore as, in the judgment of her master, was safe, she was put upon the offshore or starboard tack about half an hour before the collision. A dense fog was prevailing at the time of the collision, so dense that a vessel could not be seen for a greater distance than one-eighth of a mile. The *Columbia* was going at her usual speed, 13 knots an hour, and her course was N. W. $\frac{1}{2}$ N. When the schooner was sighted, the engines of the *Columbia* were immediately reversed, but the vessels were then so near each other that there was not sufficient time to entirely check the steamer's headway before they were in collision, and the *Eppinger* was struck with such force that her port side, just abaft the fore rigging, was cut entirely through, the bow of the steamer penetrating

the side and deck planking a distance of six feet. The schooner was a vessel of about 89 feet in length and 107 tons register.

1. It is alleged in the libel that the collision was caused by the fault of the Columbia in running "at a dangerously high rate of speed in the dense fog then prevailing," and whether the collision is to be attributed to this alleged cause is the principal question for decision. Article 16 of the act of August 19, 1890 (26 Stat. 326), which took effect on July 1, 1897 (29 Stat. 893), provides:

"Every vessel shall, in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

Article 20 of the same act provides:

"When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

The collision, as above stated, occurred in a fog so dense that a vessel could not be seen for a greater distance than one-eighth of a mile. The speed of the steamer at the time was 13 knots an hour. The evidence shows that when under such headway the Columbia cannot be stopped in a less distance than 1,400 feet. The place where the collision occurred was in the track of coastwise vessels, and where, therefore, it was reasonable to expect that one or more of such vessels might be found. I think it must be held, under all of the authorities, that the speed under which the Columbia was proceeding was not the moderate speed required by the statute. What constitutes moderate speed in a fog will, of course, vary with the special circumstances of the case,—such as the density of the fog, and the place where the vessel is navigating,—a higher rate of speed being permissible when the fog is light than when very thick, and in mid-ocean, where there is less probability of meeting other vessels, than at the entrance of a frequented harbor, or in the track of coastwise vessels. I am unable to give my assent to the proposition contended for by the proctor for claimant that the Columbia had the right to continue her speed of 13 miles an hour in the dense fog upon the assumption that no vessel was near, until the very moment when the fog horn of the Eppinger was first heard. Undoubtedly, the purpose of the statute in requiring a fog horn or whistle to be sounded is that other vessels may, if possible, be warned of the presence of the vessel giving such signal, but, in addition to giving a sound signal, the statute imposes upon every vessel, when navigating in a fog, the imperative duty of proceeding at a moderate rate of speed, and the failure to observe this requirement is a fault. *The City of New York* (D. C.) 15 Fed. 624. The following cases may be cited in support of the conclusion that the Columbia's speed was excessive: *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122, 34 L. Ed. 687; *The Utopia* (D. C.) 1 Fed. 892; *The Marathon v. The Andrew Hicks* (D. C.) 24 Fed. 653; *The Pennsylvania* (D. C.) 12 Fed. 914; *Hood v. The Lehigh* (C. C.) 43 Fed. 597; *The Bolivia*, 49 Fed. 169, 1 C. C. A. 221; *The Columbian* (D. C.) 91 Fed. 801; *The Patria* (D. C.) 92 Fed. 411. In the case last cited the court held that seven knots an hour was not a "moderate speed" for a steamer when

navigating "in a fog so thick that a vessel can be seen only a few hundred feet distant." In the case of *The Bolivia*, above cited, it was said:

"The rule is firmly established in this country, and also in England, that the speed of a steamship is not moderate—at least in localities where there is a likelihood of meeting other vessels—if it is such that she cannot reverse her engines and be brought to a standstill, within the distance at which, in the condition of the fog, she can discover another vessel."

This general rule is the same as that which was approved by the supreme court in the case of *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148. In the case of *The Columbian* (D. C.) 91 Fed. 801, the court held that nine knots was excessive speed for a steamer in a thick fog, saying:

"The only fault alleged against the steamer is excessive speed, and the authorities make it clear that nine or ten knots an hour at any time or place is excessive speed in a fog. In saying this, I have no doubt that the captain of another steamer like the *Columbian* would have gone ahead quite as fast as Capt. Masters did in this case. Had the steamer been an ocean liner, instead of a freight steamer, it would probably have been sent through the same fog at from 15 to 20 knots an hour, and its captain would have been blamed by his company, as well as by his passengers, if he had loitered at half speed. Though this almost universal practice may relieve the captain of a steamer from moral blame, Capt. Masters was none the less a transgressor of the international rules, and I am bound to find the steamer at fault. 'I have often had occasion to say that the owners and masters of steamboats must either comply with the statute or procure its repeal.'"

2. Was the collision caused in any degree by fault upon the part of the *Eppinger*? The *Eppinger* was provided with an "efficient fog horn, sounded by mechanical means," and that for a half hour before the collision it was sounded from time to time is abundantly shown by the evidence, and in fact is not disputed by the claimant; but the claim is made that the fog horn was not sounded "at intervals of not more than one minute," as required by subdivision "c" of article 15 of the act of August 19, 1890 (26 Stat. 325). The argument in support of this contention is that the horn carried by the *Eppinger* could have been heard a distance of about two miles, and that it was not heard on the steamer until two or three minutes before the collision, whereas, if regularly sounded, it would have been heard five or six minutes earlier. In addition to this, one of the seamen on the *Eppinger* testified that her horn was sounded "every minute or second minute," and another that it was blown "about every three or four minutes," and still another that it was blown "almost every minute." On the other hand, the master of the *Eppinger* testified explicitly that the fog horn was sounded "every minute; not to exceed one minute"; and the mate said "it was sounded constantly." The master of the *Eppinger* is an interested party, but he impressed me as an intelligent and truthful witness, and his evidence upon this point is corroborated in some degree by the master of the *Columbia*, who testified that he first heard the *Eppinger's* horn about two minutes before she came in sight, and that during those two minutes he heard three blasts, which would show that during that time, at least, her horn was sounded at proper intervals; and in view of the undisputed fact that the *Columbia's* whistle had

been heard by the Eppinger for at least half an hour before the collision it is reasonable to suppose that during all that time her fog horn was sounded with the same frequency, for the purpose of giving notice of her presence to the approaching steamer. The fact that the fog horn was not heard upon the steamer until two or three minutes before the collision is entitled to but little weight in the consideration of this question, as it is well known that the distance a sound signal can be heard varies with the changing conditions of the atmosphere, and a horn or whistle may at one time be heard a distance of two miles, and at another time not so far. The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148. And in the case of *The Patria* (D. C.) 92 Fed. 411, it was said:

"That neither vessel should hear the fog signals of the other until they were near each other is not uncommon in fogs of variable density. See *The Niagara* (D. C.) 77 Fed. 330, affirmed in 28 C. C. A. 528, 84 Fed. 902; *The Lepanto* (D. C.) 21 Fed. 656, 657."

And in the same case the fact was noticed that the distance a fog horn can be heard by another vessel is affected by the relative position of such vessel to the one upon which the horn is sounded, and the court, in referring to this, said:

"The schooner's fog horn would naturally be heard later than the steamer's whistles, both because it was not so powerful as the steam whistle and also because the blasts of a fog horn, unlike those of a steam whistle, are more specially operative along a particular axis, which much diminishes their penetration outside of the limited arc towards which the horn happens to be directed."

It is further insisted upon the part of the claimant that the Eppinger was in fault—First, in not having her lookout forward, instead of upon the top of the after house; second, in not having a man ready to slacken the head sails of the schooner when the steamer came in sight; and, third, in tacking offshore after the Columbia's whistle was heard. I think it is clear from the evidence that a lookout stationed on the after house of the schooner could see the Columbia from the direction in which she was approaching as quickly as if his station had been forward, and it also satisfactorily appears from all of the evidence that the Columbia was in fact discovered by the Eppinger as soon as she approached near enough to her to be seen through the fog. This being so, even though it should be conceded that on a small schooner like the Eppinger the proper place for a lookout is forward, the failure to have her lookout so stationed did not contribute in any degree to the collision. I am not prepared to say that the master of the Eppinger failed to exercise ordinary care in not having a seaman in position to let go the head sails quickly in case of an emergency requiring the schooner to immediately change her course; and, besides, the time intervening between sighting the steamer and the collision was so short that the collision could not have been avoided by any such maneuver. Nor can any fault be attributed to the Eppinger in tacking offshore when she did. Her master had reasonable cause to believe that to proceed further on the inshore tack would endanger the safety of his vessel. He was as near the shore as it was prudent for him to go in a dense fog and only a light breeze blowing, which, upon coming nearer shore,

might die out, and leave his vessel without steerageway. The fact that he had before heard the whistle of the Columbia to the south did not make it improper for him to tack offshore, or require him to lie to or cast anchor until his vessel could proceed on the offshore tack, without crossing the steamer's course. He did not know, and he was not required to anticipate, that the Columbia was not proceeding under such moderate speed that she would be able to avoid coming in collision if the courses upon which the vessels were proceeding should bring them in sight of each other.

After careful consideration of all the evidence, my conclusion is that the collision was caused solely by the fault of the Columbia in not going, in the fog then prevailing, at a moderate rate of speed, as required by law. The libelants are entitled to a decree for damages, and the case will be referred to United States Commissioner Morse to ascertain and report the damages sustained by libelants.

THE P. H. BIRKHEAD.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 655.

COLLISION—MOORED VESSEL—EVIDENCE CONSIDERED.

While a tug was moored in a proper position at the east and river front of a dock, a coal steamer and her consort unloaded in a slip at the north side of the dock, each in turn being tied up on the outside of the tug, from which direction a fresh wind was blowing, while the other unloaded. Immediately after they had gone, the tug began to list, and, later, sank, and it was found that her timbers had been freshly broken. No other vessels had been at the dock. *Held*, that the circumstantial evidence afforded by such facts, supplemented by the testimony of witnesses who claimed to have seen one or the other of such vessels strike against the tug while being maneuvered, was sufficient to sustain a finding that the injury was caused by the steamer or her tow, either by collision with the tug when approaching or leaving, or by pounding against her while tied up, notwithstanding the contrary testimony of their officers and crews.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In Admiralty.

On September 25, 1897, Henry Rahr, the appellee here, and the owner of the steam tug Agnes C., exhibited his libel in the court below against the steamer P. H. Birkhead in a cause of collision. The appellants here, William F. Warren, Charles K. Pederson, and John Nelson, who were the owners of the P. H. Birkhead, intervened for their interest, and filed their claim and answer denying the collision. The court below pronounced for the libellant, and from the decree awarding damages the owners of the P. H. Birkhead appealed.

The Barkhausen and Hathaway dock, on the west bank of the Fox river at the port of Green Bay, is adjacent to and north of the Walnut Street Bridge, so called, spanning the river. At that point the river is about 800 feet wide, the channel being within 200 feet of the east bank. North of the dock is a slip for the accommodation of vessels loading or discharging at the dock. The water at the north of the slip was about 14 feet in depth. At the south end of the dock the water was quite shallow, and off that point, and in the shallow water, there were spiles,—either the remains of a dock, or driven there as a protection to the bridge. At the river front of this dock,

on the 30th day of October, 1896, the steam tug Agnes C. was lying moored to the dock, with no watch on board, and headed to the northward. This tug was 52 feet in length. On that day the steamer P. H. Birkhead, 156.8 feet in length, and laden with coals, and having in tow the barge Commodore, 176.5 feet in length, also laden with coals, arrived at the port of Green Bay. After passing the Main Street Bridge some considerable distance north of this dock, the steamer let go her consort, and proceeded to the dock in question, going alongside and outside the Agnes C., running her nose into the mud in the shallow water by the spiles, and being moored to the dock, her lines passing over the Agnes C. The consort was taken by a tug into the slip at the north of this dock, and there discharged her cargo. Upon completing discharge of her cargo, and in the afternoon of the day following, she exchanged places with the steamer Birkhead, and was moored to the river front of the dock outside the tug. The Birkhead entered the slip, and discharged her cargo, and on Monday morning, the 2d day of November, went astern into the stream, and thence proceeded alongside the Commodore, to which vessel she was made fast. At this time there was a fresh breeze blowing, either from the northeast or southeast, the evidence leaving the precise direction of the wind in some doubt; but there is not dispute that the wind was from an easterly direction. The steamer undertook to turn, with her consort, to the north. It is not clear from the evidence whether the two vessels went astern, and sought to turn stern foremost, or, going astern a short distance, sought to swing their bows out into the river, and so turn to the north. Whatever the maneuver, the steamer was unable to swing her bow around, and was finally obliged to seek the assistance of a tug to swing the bows of the vessel to the north. Before the arrival of the steamer, the Agnes C. was lying at the dock in fairly good condition, and uninjured, although it subsequently appeared that her frames, or some of them, were partially decayed. On the day after the departure of the Birkhead she appeared to list, and a day or two thereafter sank, was afterwards raised, put upon a dry dock, and examined. All or most of her timbers abaft the pilot house were found to be broken, "some of them cracked square off, and the balance cracked so they were no use to any one." They were broken at about the knuckle of the boat, some broken square off and others splintered; and the breaks appeared to be recent. Three seams in the bilge were open, and the guard rails on both sides the tug were broken. Five witnesses on the part of the libellant, testifying more than a year after the occurrence, claimed to have seen the Birkhead or her consort run into the tug while at the dock; two of them stating the occurrence to have been on the day of the arrival of the steamer, and three of them stating the collision to have occurred on the day of the departure of the steamer and her consort; three of them stating that it was the steamer that was in collision with the tug, one of them that it was the consort while lashed to the steamer, and one was in doubt whether it was the steamer or her consort, while they were lashed together. Seven witnesses on the part of the respondents, and who were officers or seamen on the steamer or her consort, testified that no collision occurred. The evidence was without contradiction that after the departure of the steamer and her consort, and prior to the sinking of the tug, no vessel was moored or came to that dock, or in the vicinity.

Frederick G. Mitchell, for appellants.

George C. Markham, for appellee.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case with which we have to deal presents a question of fact merely, and needs not extended discussion. Prior to the arrival of the steamer and her consort, the Agnes C. was moored at the river front of the wharf, uninjured. The day after the departure of the steamer and her consort the tug was seen to list, and a day or two thereafter went to the bottom. Her frames were found to be broken

or splintered, exhibiting fresh breaks, and three of her seams below the bilge were open. What caused this injury? A few days before the arrival of the Birkhead the tug had been moved from her berth in the slip, and moored to her position at the wharf, in anticipation of the arrival of the steamer and her consort. No other vessel is shown to have been at that dock for some time before the arrival of the steamer. At that time the tug was apparently seaworthy. It is proven that no other vessels were in that vicinity after the departure of the steamer and prior to the sinking of the tug. These facts alone present a strong case of circumstantial evidence against the steamer, fortified by the evidence of five disinterested witnesses, each of whom claims to have been an eyewitness to the pounding or striking of the tug by the steamer or her consort. It is true that these witnesses differ much in their relations of the occurrences testified to. Two of them state the collision to have been on the day of the arrival of the steamer, and three of them on the day of her departure. They testified a year or more after the event, and memory of the date of an event in which neither had an interest might well be faulty. We are far, however, from believing that the memory of either witness was treacherous, even as to time. It seems to us not improbable, considering the extent of the injury, that there was more than one collision and pounding and crushing of the tug between the steamer or her consort and the dock. The two vessels laden with coals were at different times during the three days they were at the dock moored just outside the tug, and in close proximity to her. The evidence as to the manner in which they were respectively moored does not disclose that anything was done which would prevent the larger and heavier vessels, in the easterly wind then prevailing, from being driven against and pounding the tug against the dock. It may well be that part of the injury was caused in this manner and part by contact of the steamer with the tug upon her arrival, and by like contact at the time of her departure. The tug was there of right, and was in a position in which she was at the mercy of the steamer and her consort. It was the duty of the steamer in her maneuvers in close quarters to see to it that the tug suffered no injury. Notwithstanding the denials of those employed upon the steamer or her consort, we are, after a careful review of the evidence, impressed with the conviction that the Agnes C. received her injuries at the hands of the steamer or her consort, or both, and by reason of the faulty management of the steamer.

Upon leaving port, the Birkhead met the steamer Christie and consort coming in, and it is urged that these vessels, being laden, as it is supposed, with coals, may have caused the injury to the Agnes C. There is, however, no evidence that these latter vessels went to or near the dock in question, and no evidence to which bank of the river they went. We cannot assume, in view of the positive statement of the owner of the dock that no vessel was there after the Birkhead, that the Christie and her consort discharged at the dock in question. It could not have been a difficult matter to have shown where these vessels discharged, and under these circumstances it was the duty of the steamer to have shown the fact, and that the injury was caused by them. We are of opinion that the decree should be affirmed.

**MAYOR, ETC., OF THE CITY OF HELENA et al. v. UNITED STATES
ex rel. HELENA WATERWORKS CO.**

(Circuit Court of Appeals, Ninth Circuit. September 4, 1900.)

No. 586.

1. PROCEEDINGS IN ERROR—REVIEW—QUESTIONS NOT RAISED BELOW.

Where a petition for a writ of mandamus to compel a municipal corporation to pay a judgment against it alleged that petitioner was the owner of the judgment, and neither the sufficiency nor truth of such allegation was challenged in the trial court, the question of petitioner's title cannot be raised in the appellate court on a writ of error.

2. MUNICIPAL CORPORATIONS—MANDAMUS TO COMPEL PAYMENT OF JUDGMENT—DEMAND.

Under Pol. Code Mont. § 5037, providing that on the certificate of a justice of the peace or clerk of a court, in which a judgment against a city or town has been rendered, showing the amount and date of such judgment, the council of such city or town shall take steps for its payment, the filing of such a certificate is sufficient demand of payment to support proceedings in mandamus to compel a compliance with the statute.

3. JUDGMENT—CONCLUSIVENESS—COLLATERAL IMPEACHMENT.

A judgment against a city, rendered by a federal court having jurisdiction, where such judgment is not void on its face, cannot be impeached collaterally in proceedings for a writ of mandamus to enforce its payment, which in the federal courts is in the nature of an execution, on the ground that it was entered by consent of the officers of the city which had a valid defense.

4. MUNICIPAL CORPORATIONS—ESTOPPEL BY LACHES.

A city whose officers consent to the rendition of a judgment against it in consideration of the settlement of the amount of its indebtedness, and which levies a tax for the payment of such judgment, and otherwise treats it as valid, is estopped by laches from setting up as an objection to the issuance of an execution or writ of mandamus for the enforcement of the judgment a matter which might have been pleaded in defense to the action.

5. SAME—LIMIT OF TAXATION—LEVY TO PAY JUDGMENT.

Pol. Code Mont. § 4814, limits the amount of taxes which a city or town may levy "for general municipal or administrative purposes," but section 4815 provides that special taxes may also be assessed and levied as provided in that title, and such title contains section 5037, which requires cities or towns to levy and collect a tax sufficient to pay within three years any judgment rendered against the municipality and properly certified, where there is not sufficient money in the general fund, exclusive of the appropriations, for the current fiscal year. *Held*, that the limitation in section 4814 did not apply to a tax levied for payment of a judgment, which constituted a special tax, within the meaning of section 4815.

6. SAME—MANDAMUS.

A city which has levied and collected a special tax for the payment of a judgment, as authorized by statute, cannot defend against a writ of mandamus to compel it to apply the fund so collected upon the judgment.

In Error to the Circuit Court of the United States for the District of Montana.

This cause comes to this court upon the alleged error of the circuit court of the United States for the district of Montana in awarding a peremptory writ of mandate to compel the payment of a judgment recovered in said circuit court by James H. Mills, receiver, against the city of Helena, on the 1st day of December, 1897, for the sum of \$31,319. It appears from the petition of the defendant in error for a writ of mandamus that the defendant in error

is a corporation organized and existing under the laws of the state of New Jersey, and that the city of Helena has a corporate existence under and by virtue of the laws of the state of Montana; that on the 1st day of December, 1897, a judgment was entered in the circuit court in favor of James H. Mills, receiver, against the said city of Helena, for the sum of \$31,319 and interest, and that said judgment is still in force unsatisfied; that there was filed with the city clerk of said city, on the 13th day of May, 1898, a certificate of the clerk of said court, showing the amount and date of entry of said judgment. It is averred that the city council, in 1898, levied a tax of one mill on the dollar for the express purpose of paying and satisfying in part said judgment, and that there was collected, and is now in the treasury of said city, as the proceeds of such levy, the sum of \$10,005.83, placed to the credit of the "Judgment Fund"; that the city has failed, neglected, and refused to appropriate and issue a warrant for or to pay the said sum, or any part thereof, upon said judgment. It is also alleged that on or about July 1, 1899, there was sufficient money to the credit of the general fund in the treasury of said city, exclusive of all appropriations of said city for the current fiscal year, to pay and satisfy said judgment, but the city council has refused to direct, by ordinance or otherwise, that the said judgment, or any part thereof, be paid out of the general fund, or that a warrant issue therefor; and it is alleged that the plaintiffs in error have misappropriated, misapplied, and expended said surplus in violation of their duty and the rights of defendant in error. It is also averred that the defendant in error is beneficially interested in the subject-matter of this proceeding, and in the relief demanded, as a large taxpayer on property within the city of Helena, and as owner and holder of said judgment. The prayer is for a writ of mandate directing the payment of the sum collected by said special tax levy; for a warrant on said general fund for the remainder of said judgment; and, if a portion of the judgment is still unsatisfied, that the city council shall be compelled to levy and collect within three years a tax on all property within the city for its payment. An alternative writ was issued containing the averments of the petition. The return and answer by the plaintiffs in error set up as matter of defense that the special tax levied and collected was wholly void and illegal, and that the whole of said amount and fund is, by reason thereof, due from the city to its taxpayers. The rendition of the judgment in favor of said Mills, receiver, is admitted, but it is averred that there was in fact no indebtedness due from the city to said Mills at that time; that said judgment was rendered on account of water alleged to have been furnished by the said Mills, receiver, and his predecessor in interest, the Helena Consolidated Water Company, and that at all times when the said water was furnished to the city the said city of Helena was, and ever since has been, indebted beyond the constitutional limit, to wit, 3 per cent. of the taxable property therein; that during none of such time has the city's assessed valuation exceeded \$12,656,783, nor the aggregate indebtedness been less than \$559,704. It is further averred that at the time the said judgment was entered the then city council and mayor well knew that the city was so illegally indebted, and that no valid judgment could be obtained against the city, but, for the purpose of evading and avoiding the effect of the constitutional limitation of indebtedness, they entered into an agreement with the said Mills, whereby they agreed not to interpose that or any other defense to such action, and to consent to the entry of a judgment, and in that behalf passed and approved a certain ordinance, pursuant to which the judgment was taken. That part of the ordinance providing for the judgment is as follows: "Ordinance No. 367. Sec. 12. The said city shall and does hereby consent that said receiver may take judgment in a proper court of record within the state of Montana, either state or federal, for all moneys due for water heretofore furnished said city of Helena for fire, sewerage and other municipal purposes, whether the same has been furnished by said receiver or by the Helena Consolidated Water Company. Such judgment shall be at the rate of eighteen thousand dollars per year, with interest at warrant rates from dates when warrants should have been issued and delivered. There shall be deducted from the sum thus found due any and all amounts heretofore paid to the Helena Consolidated Water Company by the city on account; and also the city taxes levied and assessed against said Helena Consolidated Water

Company for the years 1895 and 1896, without interest or penalty, and such deductions shall be made as of the dates when said amounts were paid to said Helena Consolidated Water Company, and when said taxes were due and payable. In the action heretofore commenced by the Helena Consolidated Water Company against said city in the district court of Lewis and Clarke county the judgment entered therein shall be set aside by stipulation of the attorneys for the respective parties, and said cause dismissed contemporaneously with the entry of judgment in favor of the receiver hereinabove provided for. And the adjustment and settlement for amounts due for water heretofore furnished as herein provided is a part consideration for the contract contained herein." The defendant in error demurred to the answer and return, upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained, and the plaintiffs in error were granted further time in which to answer. Upon their failing and refusing to present or file an amended answer or return at the expiration of such time, judgment was rendered directing the issuance of a peremptory writ of mandate, which was accordingly issued.

T. J. Walsh, for plaintiffs in error.

Edward Horsky, City Atty., and Clayberg & Gunn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It is objected that neither the petition nor the alternative writ show title in the relator. The petition alleges the recovery of the judgment in the United States circuit court for the district of Montana in favor of James H. Mills, receiver, but it is not alleged that the judgment has been assigned or transferred to the relator. It is alleged, however, that the petitioner is beneficially interested in the subject-matter of this proceeding and in the relief demanded as a taxpayer on property situate within the city of Helena, and as an owner and holder of said judgment. This allegation appears also in the alternative writ of mandate. No objection to the sufficiency of the petition was taken by demurrer or otherwise in the court below, and the answer of the defendants did not deny the allegation of the petition that the relator was the owner and holder of the judgment. The objection that the relator does not show title by assignment, not having been made in the court below, cannot be taken here. To hold otherwise would involve the exercise of original instead of appellate jurisdiction. This is not permitted to us. *Board of Sup'rs of Wood Co. v. Lackawanna Iron & Coal Co.*, 93 U. S. 619, 624, 23 L. Ed. 989; *Railway Co. v. Henson*, 7 C. C. A. 349, 58 Fed. 531, 532; *Fred J. Kiesel & Co. v. Sun Ins. Office*, 31 C. C. A. 515, 88 Fed. 243, 247; *Board v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 275. Had the objection been taken by demurrer, the petition could have been amended in the lower court, and the assignment alleged. The omission must now be considered as having been waived. *O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669.

The objection that there is no averment in the petition that any demand was ever made upon the city or any of its duly-authorized officers to pay the judgment or to levy a tax for that purpose is met by the allegation that there was filed with the city clerk of said city on the 13th day of May, 1898, a certificate of the clerk of said court showing the amount and date and entry of said judgment. This proceed-

ing was in compliance with the requirement of section 5037 of the Political Code of Montana, which reads:

"Sec. 5037. On the certificate of a justice of the peace or the clerk of the court in which any judgment is rendered, showing the amount of the judgment and the date of its entry, the council must by ordinance direct that the amount of such judgment be paid out of the general fund, and that a warrant issue therefor on the general fund if there is sufficient money therein, exclusive of the appropriations for the current fiscal year, to pay the same, and the council must at the proper times levy and cause to be collected a tax on all the property of the city or town for the payment of such judgment within a period of three years from its presentation, if there is not sufficient money as aforesaid in the general fund to pay the same."

The filing of the certificate of the clerk of the court, showing the amount and date of the judgment, as required by this statute, is clearly a sufficient demand.

It is next contended that the answer to the petition contained a valid defense to the application for the writ. It is admitted by counsel for the plaintiff that it is the established law that the defense which might have been interposed to the original action, that the city was indebted beyond the constitutional limit when the indebtedness arose, cannot now be sustained against the writ. *Cromwell v. Sac Co.*, 94 U. S. 351, 352, 24 L. Ed. 195; *Harshman v. Knox Co.*, 122 U. S. 306, 316, 7 Sup. Ct. 1171, 30 L. Ed. 1152; *Board v. Platt*, 25 C. C. A. 87, 79 Fed. 567, 572; *Ætna Life Ins. Co. v. Lyon Co. (C. C.)* 44 Fed. 329, 344; *Howard v. City of Huron (S. D.)* 59 N. W. 833, 834.

But it is contended that the defense may be made when, in addition to such an allegation, it is further alleged that, for the purpose of evading the provisions of the constitution, the mayor and city council, knowing that the city was indebted beyond the constitutional limit, and that no recovery could be had against it, entered into an agreement with the receiver of the water company whereby they bound themselves not to interpose that or any other defense to the action, consented to an entry of judgment, and passed and approved the ordinance pursuant to which the judgment was taken. The ordinance provided that the judgment was to be taken by consent. The setting aside and dismissal of a prior judgment, and the adjustment and settlement for amounts due for water previously furnished the city, were the considerations for the agreement of consent. The court had jurisdiction to hear and determine the question whether the mayor and city council had authority to pass this ordinance and enter into the agreement therein contained. This was part of the original case, and entered into the judgment; and, the court having determined that question in favor of the plaintiffs, the judgment, whether right or wrong, is not open to impeachment by collateral attack. This would be the rule, even though the allegation of the answer amounted to a charge that the judgment was obtained through fraud or collusion. In 2 *Freem. Judgm.* par. 334, the rule in relation to the impeachment of judgments not void for want of jurisdiction is stated as follows:

"The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained through fraud or collusion. It is their business to see that it is not so obtained. If, with-

out any fault or neglect of one party, his adversary succeeds, by fraud, in obtaining an inequitable and unauthorized judgment, he must take some proceeding prescribed by law to annul the judgment, and cannot, in the absence of such annulment, treat it as invalid."

Again:

"A party to a judgment, feeling himself aggrieved thereby, may, in a proper case, either move that it be vacated, or prosecute an appeal or writ of error, or maintain a suit in equity to enjoin its enforcement. These, unless the judgment is void on its face, are the only remedies open to him; and if he resorts to neither, or, resorting to any or all, he is denied relief, he cannot avoid the judgment, when offered in evidence against him, by proving that it ought not to have been pronounced, and was procured by fraud, mistake, perjury, or collusion, or through some agreement entered into by the prevailing party, and which he neglected or refused to perform."

The same rule is applicable to proceedings by mandamus to enforce a judgment against a municipal corporation, where, as in this case, the writ is in the nature of an execution. Under section 716 of the Revised Statutes of the United States, the writ of mandamus can only be issued by a circuit court of the United States where it is necessary to the exercise of the jurisdiction agreeably to the usages and principles of law. Where such an exigency arises the court may issue it, but when so employed it is neither a prerogative writ nor a new suit. On the contrary, it is a proceeding ancillary to the judgment, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same. *Riggs v. Johnson Co.*, 6 Wall. 166, 198, 18 L. Ed. 768; *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15, 22.

As said by the supreme court of the United States in *Harshman v. Knox Co.*, 122 U. S. 306, 319, 7 Sup. Ct. 1176, 30 L. Ed. 1152:

"As an execution follows the nature of the judgment, and its precept is to carry into effect the rights of the plaintiff as declared by the judgment, with the mode and measure of redress which in such cases the law gives, so the mandamus in a case like the present can be limited in its mandate only by that which the judgment itself declares."

In *Chanute City v. Trader*, 132 U. S. 210, 214, 10 Sup. Ct. 68, 33 L. Ed. 345, the court stated the rule in briefer, but equally decisive, terms, as follows:

"A proceeding by mandamus to compel the levy of a tax to pay a judgment is in the nature of execution. The rights of the parties to the judgment, in respect of its subject-matter, were fixed by its being rendered."

The writ of mandamus was therefore a writ of right in the circuit court in this case, and not a writ to be withheld in the discretion of the court, upon any alleged equitable grounds arising out of the illegality of the original contract. But, if such a claim could be admitted as an objection to the granting of the writ of mandamus to enforce the judgment in this case, it would be sufficiently met by the evidence of laches of the plaintiffs in error in dealing with the judgment. They treated the judgment as valid from December 1, 1897, the date of its entry, to July 28, 1899, when the petition for a writ of mandamus was filed in the circuit court. During this time a special tax was levied and collected by the city for the purpose of paying the first annual installment upon the judgment, and during this time it also

permitted the statutory period to expire for writ of error to this court correcting any error that may have occurred in the proceedings resulting in the judgment. A municipal corporation has no right, any more than any other defendant, to treat a judgment as final and conclusive by an agreement of consent to its entry in the trial court, and by withholding a defense from the appellate tribunal by omitting to prosecute an appeal or writ of error, and then assert this defense as a sufficient objection to a writ of execution or mandamus issued to enforce the judgment.

It is next contended that this proceeding cannot be sustained because it does not appear from the petition that the city has failed to levy taxes for general purposes to the limit prescribed by law. Section 4814 of the Political Code of Montana provides as follows:

"The amount of taxes to be assessed and levied for general municipal or administrative purposes must not exceed one per centum on the assessed value of the taxable property of the city or town, and the council may distribute the money collected into such funds as are prescribed by ordinance."

It will be observed that this section provides taxation for general or administrative purposes, but this is not the limit of the municipal authority in levying taxes for other and special purposes. Section 4815 of the same Code provides as follows:

"The council may also assess and levy the special taxes or assessments provided for in this title."

The title of the Political Code in which these two sections are found is title 3, relating to cities and towns. Section 5037 of the same title provides that when a judgment has been rendered against the city, and a certificate of the proper officer has been produced showing the amount of the judgment and the date of its entry, the council must by ordinance direct that the amount of the judgment be paid out of the general fund, if there is sufficient money in that fund, exclusive of the appropriations for the current fiscal year to pay the same; but, if there is not sufficient money in the general fund for this purpose, then the council must at the proper times levy and cause to be collected a tax on all the property of the city for the payment of such judgment within a period of three years from the date of its presentation. The levy provided in the last paragraph of this section is clearly in the nature of a special tax or assessment, as provided in section 4815, and the limit imposed upon the municipal authority with respect thereto is not in the rate of such a tax, as provided in section 4814, but that the levy shall be sufficient to pay the judgment within a period of three years.

The petition for mandamus alleges, and the answer admits, that in the year 1898 the city council did levy a tax for the express purpose of paying and satisfying this judgment, and as the proceeds of such levy the sum of \$10,005.83 is in the city treasury to the credit of the judgment fund. This levy of an assessment, and the amount derived therefrom, indicates the original purpose of the city to pay this judgment within a period of three years, as provided in section 5037 of the Political Code. The purpose of the city to comply with this statute does not appear to have been resisted by any taxpayer, or in any way

directly contested by the municipal corporation, during the proceedings; and, as no decision of the supreme court of Montana has been called to our attention giving the statute a different construction, we are of the opinion that not only were the assessment and levy of the special tax legal, but that the city is not in a position to resist the writ of mandamus in the payment upon the judgment of the amount collected, and now in the city treasury to the credit of the judgment fund. We are also of the opinion that the writ of mandamus properly provides for the payment of the balance of the judgment in the manner provided by the Code of the state. The judgment of the circuit court is affirmed.

ELLSWORTH v. METHENEY.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

No. 814.

1. MASTER AND SERVANT—RELATIONS OF PARTIES—INJURY OF SERVANT WHEN NOT IN LINE OF DUTY.

A coal miner who, during the noon hour, while not engaged in work, goes to a different part of the mine, for the purpose of visiting with another miner, is not, while so absent, engaged in the line of his duty, so as to impose upon the employer the duty of a master to see that the entry through which he passes from and to the part of the mine where he is employed is kept in a safe condition for his passage.

2. NEGLIGENCE—UNSAFE PREMISES—INJURY OF LICENSEE.

Where the miners in a coal mine, with the knowledge and implied consent of the owner, are accustomed to use the passages or entries in the mine as a place for congregating or passing to and fro during the hours of recreation, it is negligence in the owner to introduce and extend along such an entry an electric wire which is dangerous to the life of those who come in contact therewith, without properly insulating or inclosing the same, or giving notice of the danger to those who, he should reasonably apprehend, are likely to be brought in contact with it, and such negligence will render him liable for the death of a miner who, in the accustomed use of the premises, and without knowledge of the danger or negligence on his own part, is killed by coming in contact with such wire.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

Fred L. Rosemond, for plaintiff in error.

Robert T. Scott, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This action, brought in the state court, and thence removed to the circuit court of the United States, seeks the recovery of damages by the administratrix of John Metheney, deceased, against James W. Ellsworth, an operator of a certain coal mine in which, on or about the 7th day of October, 1896, John Metheney came to his death. Metheney had been for some time employed as a coal miner in one of the mines of plaintiff in error, and, so far as ordinary coal mining is concerned, was a man of sufficient experience to undertake such work. Some three weeks before the

death of Metheney an electrical mining apparatus was placed in the mine in which Metheney was at work, consisting of certain drilling machines connected by wire, and an electrical plant for the operation thereof. After the connecting wire reached the mine, it was strung along brackets set in the wall of the entry, and which stood out a few inches therefrom. While walking along the entry, and near this wire, Metheney came in contact therewith, and almost instantly died. There is contention in the case as to whether his death was due to heart disease, with which he is shown to have been afflicted, or the electrical shock resulting from contact with the wire. The theory of the plaintiff's case was that the wire was improperly insulated, and consequently, when charged with electricity, highly dangerous; that Metheney was a man without experience in the use of electricity; that the entry was dark, or, at least, not well lighted, and under such circumstances Metheney was entitled to notice of the great danger involved in coming into contact with the wire; that the employer was guilty of negligence in thus placing the wire in the mine without adequate insulation or notice to the employés. On the part of the plaintiff in error it was claimed that the mechanism was purchased from a dealer in good repute; that the negligence, if any, was that of a third person, for which plaintiff in error was not responsible; that ordinary care had been used in providing the mechanism; that decedent came to his death by his own contributory negligence, and at a place where he was not required to be in the discharge of his duty as an employé. On this branch of the case there seems to be no conflict of testimony. At least, it is well established that Metheney, at the time of receiving the injury, had left the part of the mine in which he was employed, it being during the noon hour, and proceeded to the room of a fellow workman, and, after some talk with him concerning some of the mining operations, was returning to his room, when, after stopping on two occasions to pick slate from the roof, at the same time calling the attention of a fellow workman to its condition, came in contact with the wire, exactly how is not shown. It thus appears that when the injury was received Metheney was not acting in the course of his employment or performing the duties for which he was engaged. It is equally clear that he voluntarily left the part of the mine in which he was at work, and, after the talk with the fellow miner above referred to, was returning to his room. The court held that the workmen had a right to the use of the passageway during the noon hour, and submitted the case to the jury upon the theory that the deceased came to his death while acting within the scope of his employment. In this view instructions were given to the jury as to the duty of the employer to provide a safe place for his workmen, and the obligation of the servant to observe care upon his part. It was contended by the plaintiff in error at the trial that Metheney was injured outside of the course of his employment. The court, holding the view above indicated, disposed of this proposition by instructing the jury as follows:

"It is claimed, in the second place, that if the death was caused by the current escaping from the wire through the insufficiency of the insulation, yet

the death was not due to the negligence of the defendant, but the negligence of deceased himself—First, because he was not in the line of his duty,—in other words, if he had been where he ought to have been, he would not have been hurt; and, second, that he was picking loose slate from the roof of the entry, and, the suggestion is, slipped and fell against the wire; and that in either case it was his own negligence that caused his death, and not the negligence of the defendant. I do not agree with the view of counsel for the defendant upon these points. The view I take of the law is this: That the men in the mine had a right to the use of this entry as a passageway to and from their work, and while they were going to their work or from their work they were as much in the line of their duty as when they were actually mining coal, and that during the noon hour, a time set apart, not only for the men to eat their dinners, but for rest from labor, they had a right, in the enjoyment of that time of rest, to go out into the open air, or into the room of some friend adjoining, and that, in going or returning to their rooms to resume work, they were in the line of duty within the meaning of the law, and that it was not contributory negligence upon the part of the plaintiff to visit Unklebay in his room during that hour, or to pick the slate from the roof while returning from Unklebay's room; that the mere fact that he stopped for a moment to pick slate from the roof would not be such an interruption of his return to labor as would take him out of the line of duty, and deprive him of the protection afforded him while in the line of duty. It would be, in my judgment, an unreasonable limitation upon the right to rest from labor during the noon hour, if the man should be confined to the one spot where his hours of labor are spent. So that you can dismiss from your consideration the claim that he was guilty of contributory negligence because he had left his own room on his visit to Unklebay, or because he stopped in returning from Unklebay's room to his own to pick a piece of loose slate from the roof."

In other words, the learned judge was of the opinion that when the decedent was injured, under the circumstances above outlined, he was in the discharge of his duty in the course of his employment, and he treated the case as though Metheney had been killed in the part of the mine where he was necessarily employed in the discharge of his duties; and this view was given to the jury as a matter of law, and they were practically told to dismiss from consideration any defense based upon the claim that the decedent was not killed in the performance of the duties of his employment. We cannot concur in this view. No authority has been cited in support of it, and it is opposed to well-considered cases. *Wright v. Rawson*, 52 Iowa, 329, 3 N. W. 106; *Kennedy v. Chase*, 119 Cal. 637, 52 Pac. 33; 1 *Shear. & R. Neg.* § 190. It is to be borne in mind in this connection that Metheney was not going from, or coming to, his work. He was not engaged in the business of his employer at the time of the injury, but came to his death during the noon hour, while returning from a visit undertaken, upon his own volition, outside the part of the mine in which he was employed.

While we think there was error in treating the case as one turning upon the duty owing by the employer to the employé injured in the course of his duty, we think there is an aspect of the case which might properly have been submitted to the jury. There was testimony tending to show that the entry in which Metheney was killed was a place where the miners were accustomed to go at noon for the purpose of eating their dinners and for social intercourse; that this had been the practice in the mine, with the knowledge and without objection from the owner. In such a case, what is the measure of obli-

gation on the part of the employer, and in what relation to him does the employé stand? Certainly not as a mere stranger, to whom no duty is owing. It is shown to be customary to use the entry as a place where the men come from their rooms during the short time of refreshment and rest permitted to them in the course of the day's labor. The master, knowing that the entry was so used, and not objecting thereto, impliedly licenses the men to use the place in this manner. The testimony tended to show that the electric wire, in the condition which it was permitted to be, was highly dangerous to life. The entry in which the men congregated had thus introduced into it an apparatus dangerous to life, but partially disclosed in the darkness of the mine, and strung along the wall, set out therefrom, so that the men using the entry might come into contact therewith. Admitting that, while not engaged in the course of his employment, Metheney was not entitled to the protection of an employé, he was, nevertheless, a licensee using the entry with the implied consent of the employer. Under such circumstances, we do not think the employer can be permitted without responsibility to introduce a highly dangerous apparatus into a place thus used with his consent. We think the case in this particular is ruled by the principles laid down by this court in the case of *Felton v. Aubrey*, 20 C. C. A. 436, 74 Fed. 350. In that case Judge Lurton, giving the opinion, quotes the following language from *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235:

"That the owner or occupant of land, who, by invitation, expressed or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons, they using due care, for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him, and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation."

And the judge goes on to say:

"It seems to us that many of the American cases which we have cited failed to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises, and those who come to harm by reason of subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises, and whom he was bound to anticipate might avail themselves of his license. This distinction seems to be sharply emphasized in the case of *Corby v. Hill*, 4 C. B. (N. S.) 562, and is a distinction which should not be overlooked. If there be any substantial difference between the legal consequence of permitting another to use one's premises and inviting or inducing such use, the distinction lies in the difference between active and the merely passive conduct of such a proprietor. It may be entirely consistent with sound morals and proper regard for the rights of others that the owner of the premises should not be held liable to one who goes upon another's premises for his own uses, and sustains some injury by reason of the unfitness of the premises for such uses, not subsequently brought about by the active interference of the owner. If such person goes there by mere sufferance or naked license, it would seem reasonable that he should pick his way, and accept the grace, subject to the risks which pertain to the situation. But, on the other hand, if, with knowledge that such person will avail himself of the license, the owner actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe

will be traversed by his licensee, sound morals would seem to demand that he should give reasonable warning of the danger to be encountered."

Applying the doctrine herein stated to the facts developed in the present case, we do not perceive why the owner of the mine who actually changes the situation of previous safety by introducing an electric wire insufficiently insulated to prevent injury to those who may come in contact therewith, in a place where he knows or has the means of knowing that the workmen are likely to congregate, is not equally liable with the owner of premises who may "actively change the situation by digging a pitfall, or opening a ditch, or obstructing dangerously the premises which he has reason to believe will be traversed by his licensee." In the case at bar, as well as in the one put by Judge Lurton, we are of opinion that sound morals and just treatment demand that the licensee shall have notice of the new danger which he is likely to encounter in using the premises. In taking this view of the case, we are not undertaking to determine that the facts warrant a recovery on the line herein indicated. That is a question to be developed by testimony upon issue joined with proof directed to a case based upon this theory. Enough is shown to warrant an expression of these conclusions in view of a retrial of the case. What we intend to hold is that if the testimony shall warrant the finding that the electrical apparatus as actually introduced into the mine was dangerous to the life and safety of the employes, and they were ignorant of the dangers thereof, or could not know them in the exercise of ordinary care to avoid injury, and the same was placed in a part of the mine which the men were accustomed to use and occupy during the hour of rest and refreshment when not actively engaged in their duties, with the knowledge and consent of their employer, a duty is imposed upon the employer, in thus introducing into his mine a new and dangerous element, to properly guard and protect the same, or to give notice of the danger to those whom he should reasonably apprehend are likely to be brought into contact therewith. For the error in treating the case as one where an injury happened to one in the course of his employment, and charging the jury upon that theory, the case will be reversed and remanded, for further proceedings consistent with the views herein expressed.

LOUISVILLE & N. R. CO. v. MILLER et al.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

No. 838.

1 MASTER AND SERVANT—ASSUMED RISKS—KNOWLEDGE OF SERVANT'S INEXPERIENCE.

It is the duty of a master who has actual notice that a servant is inexperienced in the work for which he is employed to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duties, and he is not relieved from such duty by the fact that the servant solicited the employment and represented himself to be competent; nor does the servant by reason of such fact assume the risk from dangers of the employment of which he is ignorant, and as to which he has been given no instruction, although they are ordinary hazards of the service, unless they are so obvious that even an inexperienced man would escape them by the exercise of ordinary care.

2 SAME—INJURY TO SWITCHMAN—REPRESENTATION OF COMPETENCY.

Plaintiff applied for employment as a switchman in railroad yards, stating that he had no experience in the work. He was assigned, on his request, without pay, to service under foremen as a "cub" or learner, where he worked five days, at the end of which he induced the foremen to recommend him by letters as competent for service as a regular switchman, upon which he was employed by the yard master, who knew the length of his experience, and assigned to duty without further advice, warning, or instruction. Four days later he was injured in attempting to make a coupling between cars of different construction, which could only be safely coupled in a certain way, of which he was ignorant. There was evidence that not less than four weeks' service as a learner could properly qualify a person to safely handle the various kinds of cars which ordinarily came into the yards. *Held*, that it could not be said, as a matter of law, that plaintiff assumed the risk, it not appearing that the danger in making the coupling was obvious to an inexperienced man, and that a verdict for plaintiff on the ground that the railroad company failed in its duty to give plaintiff proper instruction would not be disturbed.

8. SAME—DELEGATION OF DUTY TO INSTRUCT SERVANT—RESPONSIBILITY OF MASTER.

The duty of qualifying an inexperienced servant for the performance of new and dangerous duties is a personal duty of the master, who is responsible for the proper qualifications of any persons to whom it is delegated, and for their negligence in failing to continue the instruction until it is completed.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

The defendant in error J. E. Miller recovered judgment against the plaintiff in error, the Louisville & Nashville Railroad Company, for an injury sustained while making a coupling. Miller was a switchman who had been in the service of the company but four days when he sustained the injury for which he sued. He had had no experience as a switchman prior to his employment, except five days of what is called "cubbing," by which is meant that he had been assigned, on his own application, and without pay, to a switching crew, as a volunteer who wished to learn and qualify himself for employment as a switchman. By importunity he induced two foremen of switching crews to recommend him by letters to the yard master as competent for service as a regular switchman. The yard master, with full knowledge of this limited experience, employed him as a switchman, and assigned him to duty in a switching crew without any other or further advice, warning, or instruction. Miller testified that, when he presented the letters of the foremen with whom he had cubbed to the yard master, the latter refused him employ-

ment, saying that he would not be qualified with less than a month's service as a cub, but that on the next day he was given the place of a man who had in the meantime been injured and disabled. The yard master denies this view of the matter, and says he accepted the certificates produced by Miller as evidence of his capacity, and employed him in good faith, as capable of fully understanding and appreciating the dangers usual and incident to the occupation. There was evidence tending to show that not less than four weeks' experience as a cub or learner would acquaint one with the hazards and risks of such a position, and give him that degree of skill, judgment, and caution requisite to a full appreciation of the risks to be encountered, and how best to guard against them. The coupling which Miller undertook to make was, as he testifies, new to him, and could only be done safely in a particular way, about which he knew nothing. At the close of the evidence the plaintiff in error moved the court to instruct the jury to find for the defendant. This was overruled, and an exception saved. The court then submitted the case to the jury upon the single question as to whether the railroad company had been negligent in permitting the plaintiff to engage in so dangerous an occupation as that of a yard switchman, in view of the knowledge possessed by its representative, the yard master, as to the experience and training he had had, without further instruction concerning the risks incident to the occupation, and how best to make a coupling such as that he was making when injured. The charge upon this subject was full and clear, and no exception was taken. There were a verdict and a judgment against the railroad company, which has sued out this writ of error.

John W. Judd, for plaintiff in error.

W. H. Washington, for defendants in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The case was submitted to the jury upon the theory that the plaintiff was inexperienced in the work of a switchman, and that this was known to the railroad company; that, having been employed as a switchman, and assigned to work in the general yard of the company, where he was likely to be required to handle foreign cars, with and without bumpers or deadheads, and having coupling apparatus of many styles, the company was bound to qualify him for such service by giving him instruction adequate to the hazards and risks incident to the occupation, and by which he might perform his duties in the way safest for himself. The instructions to the jury in respect to this issue were full and clear, and no exception was taken thereto. The learned counsel for plaintiff in error say, however, that no such issue should have been submitted, and that it was error to deny the request for a peremptory instruction for the defendant. This contention is primarily based upon the proposition that the plaintiff applied for employment as a switchman, and that he must be, therefore, taken to have assumed all the risks incident to the usual duties of a switchman, and that, even if the company knew of his inexperience, he cannot escape the consequences of his own ignorance or inexperience, having voluntarily solicited the particular employment in which he was injured. This view of the law is seemingly supported by the cases of *Dysinger v. Railway Co.*, 93 Mich. 646, 53 N. W. 825, and *McDermott v. Railroad Co.*, 56 Kan. 319, 43 Pac. 248. We do not assent to the reasoning of these cases, nor are they in accordance with the great weight of authority. It is illogical to say that a servant

impliedly assumes the hazards and risks of an occupation which are known to the master, but which the master knows are unknown to the servant, unless the dangers are so obvious that even an inexperienced man could not fail to escape them by the exercise of ordinary care. The law is now well settled that the duty of cautioning and qualifying an inexperienced servant in a dangerous occupation applies as well to one whose disqualification arises from a want of that degree of experience requisite to the cautious and skillful discharge of the duties incident to a dangerous occupation with safety to the operator, as when the disqualification is due to youthfulness, feebleness, or general incapacity. If the master has notice of the dangers likely to be encountered, and notice that the servant is inexperienced, or for any other reason disqualified, he comes under an obligation to use reasonable care in cautioning and instructing such servant in respect to the dangers he will encounter, and how best to discharge his duty. *Shear. & R. Neg.* (5th Ed.) § 219a; *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810, 8 L. R. A. 818; *Whitelaw v. Railroad Co.*, 16 Lea, 391, 397, 1 S. W. 37; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Coombs v. Cordage Co.*, 102 Mass. 572, 597; *O'Connor v. Adams*, 120 Mass. 427; *Reynolds v. Railroad Co.*, 64 Vt. 66, 24 Atl. 134; *Railroad Co. v. Price*, 72 Miss. 862, 18 South. 415; *Hughes v. Railway Co.*, 79 Wis. 264, 48 N. W. 259; *Campbell v. Eveleth*, 83 Me. 50, 21 Atl. 784; *Hull v. Hull*, 78 Me. 114, 3 Atl. 38; *Railway Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *Felton v. Girardy* (decided by this court at this term) 104 Fed. 127.

Undoubtedly, when one of apparent maturity and of average capacity solicits a particular line of work, the master has the right, in the absence of information, to assume that the applicant is qualified for the particular work applied for. It is only where such facts are brought to his notice of the disqualification of the servant to safely encounter dangers known to him, and presumptively unknown to the servant, that the duty of cautioning and instructing the servant arises. In the case at bar the plaintiff below gave notice that he had had no experience as a switchman. The yard master then undertook his instruction, and assigned him, as a learner, to a switching crew. In less than five days the foremen of these crews certified that he was qualified. The yard master, with full notice of this brief tutelage, assigned him to duty without further instruction. There was evidence from which the jury might infer that such an experience was wholly inadequate to fit him to encounter the dangers he was likely to meet. The particular coupling he undertook was one which he was likely to have to make, and was a risk which an experienced servant would assume as an ordinary hazard of the service. *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150. Yet the plaintiff testified that he had had no instruction, and no caution in respect to such cars and such diverse coupling arrangements. The duty of qualifying a green or inexperienced servant for the safe performance of a new and dangerous duty is a personal duty of the master, and, if it be delegated, the delegate must be qualified, and should not discontinu• the

instruction until it is completed. The negligence of the servants who undertook to qualify Miller was the negligence of the master. *Railroad Co. v. Fort*, 17 Wall. 553, 21 L. Ed. 739; *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810, 8 L. R. A. 818.

We have carefully considered the entire evidence found in this transcript. It is enough to say that, while the case was a close one upon the facts as to the instruction received by Miller, yet there was such a conflict between his testimony and that of the other witnesses that we are content to hold that there was no error in refusing an instruction to find a verdict for the plaintiff in error. Neither are we prepared to say that the special dangers incident to the peculiar coupling which Miller undertook were so obvious as to constitute an assumption of the risk. That he could see that each car was supplied with a bumper or deadwood, and that one car was equipped with an automatic coupler and the other with a skeleton drawhead, is conceded. Still, it was a coupling which could be made safely if done in the right way. What the right way was, was not so obvious a matter as to justify the court in holding as matter of law that it was a situation about which Miller needed no caution and no instruction.

The error assigned upon the admission of Fitzgerald's evidence is not well taken. The exception was too broad, and the ruling made subject to further consideration. The court's attention was not again called to the matter. Aside from this, Fitzgerald testified to the same facts, and that which had possibly been subject in part to objection as hearsay became harmless. It was also harmless for the further reason that the court distinctly instructed the jury that the yard master, Yates, alone represented the company in the employment of Miller, and "that the defendant is not affected by what any of the other employés did." The judgment is accordingly affirmed.

FELTON v. GIRARDY.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

No. 787.

1. MASTER AND SERVANT—ASSUMED RISKS—DUTY TO INSTRUCT INEXPERIENCED SERVANT.

A servant impliedly assumes the risks incident to the service he contracts to perform, and, in the absence of knowledge to the contrary, the employer may assume, as between them, that one applying for a particular employment possesses the skill and judgment requisite to the safe and proper performance of his duty; but if the employment be dangerous, as known to the master, who has also reason to know that the servant, from his youth, feebleness, incapacity, or inexperience, does not appreciate the dangers, the servant cannot, even with his own consent, be required to assume the risk therefrom, unless he is cautioned and instructed sufficiently to enable him to comprehend them, and to do the work safely, with proper care on his own part; and the same rule applies where a servant is directed to do a temporary work outside of his regular employment, the danger from which is not obvious.

2. SAME—ACTION FOR DEATH OF SERVANT—EVIDENCE OF ASSUMPTION OF RISK.

Plaintiff's intestate was employed as a boiler maker's helper in the repair shops of defendant railroad company. During a holiday, when most

of the other employes were absent, he was directed by the foreman of the shops to go into the fire box of a locomotive engine, which had steam up, and tighten the plug in a leaking flue of the boiler. The plug was a screw plug, and in attempting to drive it with a hammer he broke the threads so that the plug was forced out by the pressure, and he was scalded to death by the escaping steam and water. It was shown that two kinds of plugs were used in leaky flues, one being screwed into the flue, and the other driven; but it did not appear that deceased knew such fact, and there was evidence tending to show that the repairing of such plugs was the work of an experienced boiler maker, who could have told which kind the one to be repaired was, and that it should have been tightened with a wrench. There was also testimony that deceased objected to doing the work while the boiler was hot, saying he did not know what to do, or how to do it, but that he was ordered back without instructions. *Held*, that on such evidence a motion to direct a verdict for defendant was properly overruled.

8. SAME—REPRESENTATION OF COMPETENCY.

A statement by one applying for work in the boiler maker's department of railroad repair shops that he "had had experience in that kind of work," where he was employed only as a helper, did not justify the foreman in requiring him to do work which required the skill and knowledge of an experienced boiler maker to do with safety to himself, without giving him proper instructions, and he cannot be held, as matter of law, to have assumed the risk in doing such work.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Action by administratrix of Charles Beckert for the negligent death of the intestate while in the service of the plaintiff in error. Judgment for the plaintiff below, and defendant sued out writ of error. Charles Beckert was employed in the repair shops of the railroad company. A locomotive engine was reported as having a leaky plug. By order of one James E. Feeney, who was general foreman of the roundhouse and repair shop, Beckert was directed to go into the fire box and remedy the leak. Though the fire had been drawn from the fire box, it was still very warm, and the steam gauge showed a pressure of 16 pounds inside the boiler. Beckert undertook to stop the leak by driving the flue plug tighter, using a hammer for the purpose. The leaky plug was a screw plug. Hammering upon it for the purpose of driving it tighter broke or crushed the threads which held it in place to such an extent that it was driven out by the steam pressure in the flue, and Beckert and his helper were scalded to death by the escaping steam and hot water. The evidence established that leaky boiler flues are often plugged to prevent escape of steam and water into the fire box. Sometimes the end of such a flue is threaded, and a brass screw plug then screwed tightly in, so as to fill and close the end of the flue. But another and common method was to close the flue by driving a tapering iron plug, adapted to the size of the flue, into the open ends, thus closing it. Both methods were then in use in the engines of the plaintiff in error. When such a flue plug leaks it is first necessary to determine whether it is a screw or driven plug. If a screw plug, the leak is often stopped, if the plug was not defective, by tightening it up with a wrench. A driven plug is ordinarily tightened by driving it in with the hammer. An experienced mechanic can readily tell from the metal and from the appearance of the exposed end of such a plug whether it is of the one kind or the other, and whether it should be tightened with a wrench or hammer. But the appearance of the exposed ends of such plugs in the fire box is likely to be much affected by the smoke and flames to which they are exposed; but in such case it is shown that an experienced mechanic can determine the metal of the plug by the sound when tapped with a hammer, and thereby know whether it is a screw plug or driven plug. To drive a screw plug in with a hammer is manifestly dangerous, as the threads are liable to be crushed, and, if there is steam in the boiler, it is quite liable to be blown out. This was just what occurred in the case of Beckert. For some reason he used

a hammer instead of a wrench, and undertook to tighten a screw plug by driving it in. The threads were thereby crushed, the plug driven out, and he lost his life as a result of doing the work in a wrong way.

Charles R. Head, for plaintiff in error.

Wm. T. Murray, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The theory upon which the plaintiff's suit was predicated, as set out in the third count of the declaration, was that the deceased was inexperienced in the repairing he was set to do; that he was only a boiler maker's helper, and that the work he was ordered to do was the proper work of an experienced boiler maker, and required a degree of skill and knowledge which deceased did not have; and that his inexperience in such work, and the great danger encountered in performing it, were known to Feeney, the foreman who directed him to do the work, and that he was not cautioned or instructed as he should have been. At the conclusion of all the evidence the defendant moved for a peremptory instruction. This was denied, and the case put to the jury upon the single question as to whether the defendant had been negligent in requiring the deceased to do the job at which he met his death, under all the circumstances of the case.

There was no error in refusing to instruct the jury to find for the plaintiff in error. There was evidence from which the jury might reasonably infer that Beckert was only a boiler maker's helper, and that the work he was ordered to do was boiler maker's work, and not within the scope of the skill and experience of a mere boiler maker's helper. There was also evidence to show that deceased had had little or no experience in doing or assisting in any such job, and that it was a more dangerous work than anything within his experience, and required a degree of skill and caution which he had had no occasion or opportunity to acquire. The day was a holiday, and the skilled boiler makers were off duty, which in part accounts for the order directing the deceased to do this emergency work. It was also in evidence that after Beckert went into the fire box he came out, and asked the foreman, Feeney, if he could not let the engine cool down a little, saying it was too hot in there to work. To this, the witness Fonda says, Feeney, with an oath, replied: "Go back in there. It won't take you two minutes. We can't keep the engine out of service twelve hours to cool her down." Fonda then says that deceased said: "Well, I don't know what to do in there, and I don't know how to do it." To this, witness says, Feeney replied, "Go back in there and tighten up the plug; it won't take you two minutes;" and gave him a shove. The account given of the matter by Feeney wears a more pleasant face, but the question of credibility was for the jury. If Fonda's evidence was credited, the jury could well infer that Beckert objected to this work upon the ground that he did not have the skill and judgment requisite to its proper performance, and thus gave notice to his superior of his inexperience and disqualification.

A servant impliedly assumes the risks and hazards incident to the

service he contracts to render, and, in the absence of knowledge to the contrary, an employer may assume, as between the master and the servant, that one applying for a particular employment possesses the skill and judgment requisite to the safe and proper performance of his duty. But if the employment be one of a dangerous character, requiring skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that from his youthfulness, feebleness, incapacity, or inexperience does not appreciate them, the servant cannot, even with his own consent, be exposed to such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and, with proper care on his own part, do his work safely. *Railroad Co. v. Miller* (decided at this term) 104 Fed. 124; *Reynolds v. Railroad Co.*, 64 Vt. 66, 24 Atl. 134; *Shear. & R. Neg.* (5th Ed.) 219a; *Brennan v. Gordon*, 118 N. Y. 489, 23 N. E. 810, 8 L. R. A. 818; *Sullivan v. Manufacturing Co.*, 113 Mass. 399; *O'Connor v. Adams*, 120 Mass. 427; *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115; *Whitelaw v. Railroad Co.*, 16 Lea, 391, 1 S. W. 37; *Railway Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84; *Hughes v. Railway Co.*, 79 Wis. 264, 48 N. W. 259; *Railway Co. v. Brick*, 83 Tex. 598, 20 S. W. 511; *Railroad Co. v. Price*, 72 Miss. 862, 18 South. 415.

The rule is not materially different in principle when a servant is directed to do a temporary work outside of the work which he has engaged to do. If there is nothing peculiarly dangerous in the new work, and the master has no reasonable ground for believing that the servant is unaware of the dangers he will encounter, or has not the requisite skill and experience to do the work with safety to himself, the servant may well be regarded, if he obey, with having assumed the usual and ordinary risks incident to the employment. *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84; *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115; *Railroad Co. v. Fort*, 17 Wall. 553, 21 L. Ed. 739. In the case last cited the defendant's liability was rested upon the apparent youthfulness and inexperience of the lad injured, which was held by the court to be so evident as to prevent his assent to the order from operating as an assumption of the risks incurred.

But when a servant is ordered by one having authority over him to do a temporary work beyond the work which he had engaged to do, and the superior knows, or ought to know, from all the circumstances of the case, that the work which the subordinate is directed to do is of a peculiarly dangerous character, and is aware, or under all the circumstances should be aware, that the risks and hazards of the work, or the proper mode of doing the work to avoid the incident risks, are not obvious or known and appreciated by the subordinate, by reason of his youth, incapacity, or inexperience, it is the duty of the superior to caution and instruct such disqualified servant sufficiently to enable him to understand the dangers he will encounter, and how to do the work with safety if he exercise due care himself. *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115; *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84.

The duty of qualifying the servant in such a situation depends upon the circumstances, as is also the case in an original employment, where the direction is to do a work within the legitimate scope of the original contract of service. The principle is that if an employer knows that the servant will be exposed to risks and dangers in any labor to which he assigns him, and is aware that the servant is from any cause disqualified to know, appreciate, and avoid such dangers, the dangers not being obvious, the master is guilty of a breach of duty, unless he gives such reasonable cautions and instructions as should reasonably enable the servant, exercising due care, to do the work with safety to himself.

In determining the question of obviousness, every reasonable inference must be drawn in favor of the party against whom a peremptory instruction is asked. In view of this principle, we are not prepared to say that the dangers incident to the work which Beckert was called upon to do, and the proper mode of encountering them, were sufficiently obvious to justify the court in taking the case from the jury. If he had never repaired such a leak, or worked in a situation so confining and uncomfortable as the hot fire box of an engine whose boiler was full of steam; if he, from inexperience, supposed such boiler flues to be always plugged with the driven plug, or, in the heat and discomfort of his place for working, mistook, from inexperience, a screw plug for a driven plug,—we are not prepared to say that the master is relieved from responsibility, even though very slight knowledge of this particular kind of repairing might have enabled this servant to have done this work in safety, using due care.

There was evidence tending to show that the deceased applied for employment in the "boiler maker's department" of the railroad company's shops at Chattanooga, and that he represented that he "had had experience in that kind of work," and that he was thereupon employed either as a boiler maker or boiler maker's helper. In view of this evidence, a number of special requests were presented, which, in substance, sought to induce a charge that, if such representations were made, this absolved the plaintiff in error from any duty of cautioning or instructing the deceased concerning any of the duties coming within the scope of an employé in the boiler-repairing department of the Chattanooga shops. The court gave these requests, after modifying them so as to apply only if the jury should find that the deceased was employed as a boiler maker. The court also instructed the jury, in meaning and effect, that if deceased was not employed as a boiler maker, but only as a helper, and was put to the proper work of a helper, such representations, if made, would be only a circumstance to which the jury might look in determining how far Feeney was aware of the qualifications of deceased for safely performing the work he set him to do on the occasion of Beckert's death.

The fifth, sixth, and seventh assignments of error cover the supposed error of the court in modifying these requests, so that such representations should not be conclusive, but only a circumstance, in case Beckert's employment was that of a helper only. A prime objection to all these special requests was that they singled out a part

only of the evidence, and attempted to have the case turn upon that part. The alleged representations of Beckert were not specific. If he said what is claimed he said to the witness Chadwell, it was a general representation of familiarity with the work of the boiler maker's department. This department covered a wide range. The distinction between the knowledge of a mere apprentice, or of a helper, and that of a boiler maker, was very wide, and all that was said to Chadwell might be said by one who had had some experience as an apprentice or helper in such a department. There was also evidence that whatever his representations to Chadwell, and assuming that Chadwell repeated all he said to the master mechanic who employed him, he was employed originally in firing an engine. After that, and but about eight months before his death, he was put in the boiler makers' department. Whether he was then employed as a boiler maker or a mere helper was a matter of some dispute, though there was much evidence tending to show that, whatever his nominal employment, he was in fact but a helper, getting a helper's pay, and doing only helper's work. There was also evidence that the repairing of the plugs of a leaky flue was boiler maker's work, requiring a degree of skill and experience only acquired after long service as a helper. There was also evidence that when ordered to do this work he declared that he "did not know what to do or how to do it." Undoubtedly, an employer, in the absence of other evidence, would be justified in assuming that one who represented himself as competent for a particular line of work did not need cautioning and instructing in that line. But if an employer know that a servant, to whom he assigns a particular work involving peculiar dangers, and requiring experience and skill to avoid the danger which he knows the servant will encounter, has not had the experience necessary to enable him to comprehend and avoid such dangers, he cannot absolve himself from the duty of cautioning and instructing such servant, although the servant represent himself as altogether qualified. It is the knowledge of the master of the inexperience and disqualification of the servant of dangers known to the master which fastens upon the latter the duty of taking reasonable care that the servant shall not sustain an injury through such known inexperience. This was the view of this question which we took in the case of *Railroad Co. v. Miller* (decided at this term) 104 Fed. 124.

The plaintiff in error has no reason to complain of the action of the court upon its special requests, taken as a whole, so far as they relate to the general question of the effect of the representations alleged to have been made by Beckert when he originally sought service. Whatever they were, they were not an estoppel; for, if the master learned that he was not qualified to safely do the dangerous work he was ordered to do, it was his duty to give him reasonable cautions and necessary instruction to enable him to do safely the work he undertook. No error is assigned for which the cause should be reversed, and the judgment is accordingly affirmed.

WAGNER v. UNITED STATES et al.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

No. 759.

1. BANKRUPTCY — STAY OF PROCEEDINGS IN STATE COURT — POWERS OF COURT OF BANKRUPTCY.

Under Bankr. Act 1898, § 11, which authorizes a court of bankruptcy to stay proceedings in any suit against the bankrupt which is founded upon a claim from which a discharge would be a release, the bankruptcy court has exclusive jurisdiction to determine, for the purpose of an application for an order staying proceedings in a state court, whether or not the claim upon which such proceedings are founded is one provable in bankruptcy, and which would be released by a discharge, and its determination is conclusive until reversed.

2. SAME — VIOLATION OF STAY ORDER — CONTEMPT PROCEEDINGS TO ENFORCE PAYMENT OF ALIMONY.

A court of bankruptcy issued an order, under Bankr. Act 1898, § 11, staying further proceedings against a bankrupt in a state court to enforce the payment of installments of alimony which had matured under a prior decree of the state court. After the service of such order the state court adjudged the bankrupt in contempt for a failure to pay such matured installments, or to show cause for such failure, and committed him to jail. *Held*, that as the purpose of such commitment was merely to coerce the payment of the alimony, and not to punish a criminal contempt, it was in violation of the order of the bankruptcy court, whose jurisdiction in the matter was supreme, and that the bankrupt was entitled to be discharged on habeas corpus, without regard to the question whether the claim for alimony was one against the enforcement of which a restraining order should have been granted.

Appeal from the District Court of the United States for the District of Kentucky.

Habeas corpus. On May 1, 1899, Charles S. Houston, a bankrupt, filed a petition in bankruptcy in the district court of the United States for the district of Kentucky. In his schedule of debts, attached to his petition, it is stated: That the Campbell circuit court on January 14, 1899, rendered a decree of divorce in favor of Patti W. Houston, wife of the bankrupt, and also then, and again on January 27, 1899, entered a judgment or decree granting her an allowance of \$5 per week as alimony, payable weekly. Of this alimony, 4 weeks, including that due May 1, 1899, has matured and is unpaid. That said Patti W. Houston is now about 22 years of age. That, according to the life expectancy tables, she will probably live 40 years, or 2,080 weeks, and that the alimony pendente lite unpaid is for the period of 10 weeks. On the 3d day of May, 1899, said Charles S. Houston was adjudicated a bankrupt. On the 9th of May, 1899, said bankrupt filed his petition and motion, asking an injunction and stay of proceedings in the action wherein the payment of alimony was adjudged as aforesaid. In the petition filed it is alleged that 4 weeks of said weekly allowance have matured and are unpaid; that said claim is one in which a discharge in bankruptcy will operate as a release; that said Patti W. Houston is endeavoring to collect the matured alimony under rule for contempt, and that said prisoner is threatened with imprisonment unless he pays same, which he asserts he is unable to do; and that unless a proper order be made, staying further proceedings in said case in the Campbell circuit court, he will be imprisoned before the time shall have elapsed after which he can file his petition for a discharge. Upon hearing said petition on said 9th day of May, the bankruptcy court ordered that further proceedings in said Campbell circuit court for the enforcement of the claim of said Patti W. Houston for installments of alimony matured be restrained until further order of court. The restraining order was issued, and on the same day served on the judge of the Campbell circuit court. Said Patti W. Houston ap-

peared, and moved to dismiss the motion and petition on May 10, 1899, and to dissolve the restraining order. She averred that the only proceeding in said court pending against said bankrupt was a suit instituted in said court sua sponte to punish said Houston for contempt, for nonpayment of installments of alimony. She also averred that said decree in alimony was not a provable debt in bankruptcy, and that it could not be affected by a discharge in bankruptcy, or any proceedings therein. On the 11th day of May, 1899, while said order was in full force, the following order was made in the state court in said alimony suit: "The rule issued in this case required the defendant to show cause why, on the several Wednesdays he was directed to perform orders of this court, he has not obeyed same. To this rule he responds that he has no money at the date of the response,—a time subsequent to any of the times mentioned in the order. No showing is made of his inability to so obey this court at those times. Although informed of this defect in his response, he still stands mute. As to the plain requirements of this rule being, therefore, in contempt, it is therefore ordered that he be conveyed to jail, and there to remain until he purge himself of such contempt aforesaid." The same day a supplemental order was made as follows: "The former order herein is so modified that the defendant will remain in jail until Monday next, when he will be returned to this court for further proceedings." Having been committed to jail under this order of the state circuit court, said bankrupt filed his petition before the district judge of the United States for the district of Kentucky, showing his detention under such order, reciting the decree for alimony and proceedings in bankruptcy, and the issuing of an injunction, as aforesaid. Thereupon the United States district judge issued a writ of habeas corpus ordering the said Charles S. Houston to be brought before him on the 13th day of May, 1899. This order having been served upon the appellant, the jailer having said Houston in custody in Campbell county, Ky., he made answer on the return day that the facts stated in the application for the writ were true, attaching the copies of the orders of the court committing said Houston to his custody. After argument the court found that said Houston was restrained of his liberty in violation of the constitution and laws of the United States, and ordered him to be discharged from custody, from which order the appeal in this case is taken.

Charles J. Helm, for appellant.

C. S. Furber, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

There can be no question that, under the constitution and laws of the United States, exclusive power is given to the courts of the United States in matters of bankruptcy. By section 11 of the "act of 1898, to establish a uniform system of bankruptcy throughout the United States," it is provided that a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, then such action may be further stayed until 12 months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined. From the statement of this case it appears that Houston, having been adjudicated a bankrupt, filed an application for a restraining order against the opposing party to restrain further proceedings for the collection of alimony under the decree awarding alimony to his wife. The district court, acting upon the belief and understanding that this claim was one for

which a discharge, when granted, would be a release, exercised the power conferred by the statute, and granted the restraining order, which was duly served before the order punishing the bankrupt for contempt was made by the state court. After the service thereof, and acting with knowledge thereof, as appears in the record, the state court made the order recited in the statement of facts, committing the bankrupt to jail for nonpayment of the alimony theretofore decreed. It is said that this was a punishment in the state court for acts theretofore committed in violation of orders of the court, and for which the state court had the power and jurisdiction to punish the bankrupt notwithstanding the proceedings in bankruptcy and the restraining order which had been granted in the case. Upon examination, we are constrained to take a different view of this order. It does not purport to be a punishment for a criminal contempt, but a committal of the bankrupt for the nonpayment of the alimony in question. It is a punishment for civil contempt, the object of the order being to coerce payment of the sums of alimony theretofore ordered to be paid. The restraining order in the bankruptcy court had distinctly directed that no further proceedings be had for the collection of other sums of alimony pending the bankruptcy proceedings. In other words, it seems to us quite clear that the state court undertook to punish the bankrupt for nonperformance of the very things which the bankrupt court, exercising the power granted by law, had restrained the party in interest from compelling the bankrupt to do. The question therefore presented is whether the bankrupt, having been committed in violation of the restraining order theretofore made by the bankruptcy court, exercising its plenary power, can be released from imprisonment under proceedings in habeas corpus. The question elaborately argued, but which we deem unnecessary to decide, is whether a decree for alimony is a provable debt under the bankrupt law. The real issue to be determined here is as to the force and effect of the order made within the jurisdiction conferred by law upon the bankruptcy court. It seems to us it is immaterial whether the court's view of the provability of the alimony claim in bankruptcy is sound or unsound. Jurisdiction is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. As jurisdiction is thus given to the bankruptcy court when an application is presented to it for a restraining order under this power to determine whether the claim is thus provable, an erroneous decision does not make void the judgment of the court. It is unnecessary to cite authorities to the proposition that an order within the jurisdiction of the court, until reversed, is binding and conclusive upon all parties. The question is not whether the discharge, when granted, will be a bar to an action for the recovery of alimony, but whether the orders of the court were within its jurisdiction under the power granted by law. The court, in passing upon applications under this section of the bankrupt law, is given the right to determine the question of the provability of debts. This is necessarily so in the execution of the power conferred by statute. This order, then, being within the jurisdiction of the court, is valid and binding upon all parties. There can be no question that the imprison-

ment and punishment of the bankrupt in violation of this order is such a deprivation of his liberty as justifies his release upon an order in habeas corpus. In the administration of justice the courts of the United States, by all proper means, should endeavor to avoid conflict of jurisdiction with the state courts, and a similar obligation rests upon the latter in reference to matters committed by law to the jurisdiction of the former. In the enforcement of the powers conferred by the constitution and laws in bankruptcy matters, so long as the district court acts in the matter within its powers, its jurisdiction is exclusive and supreme. Finding that the bankruptcy court was acting within its jurisdiction in issuing a restraining order, and that the bankrupt was committed in violation thereof, we think the conclusion reached by the district court proper. The order of the court will be affirmed

DAVIS et al. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

Nos. 810, 811.

COMMERCE—OFFENSES AGAINST INTERSTATE COMMERCE LAW—PLACE OF COMMISSION.

Section 10, par. 3, of the interstate commerce law (1 Supp. Rev. St. p. 687), makes it a misdemeanor for any person, for himself, or as officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier, subject to the provisions of the act, or for whom as consignor or consignee any such carrier shall transport property, to obtain transportation for such property at less than the regular rates, by means of false billing, classification, or weighing, or false representation of the contents of the package, etc., and provides for the prosecution of the offense in any court of the United States of competent jurisdiction "within the district in which such offense was committed." *Held*, that such offense is not one which requires the transportation of the property to its destination before it is complete, and which may therefore, under Rev. St. § 731, be prosecuted either in the district where the shipment is made or in that where it terminates, but that the gist of the offense is the fraudulent act by means of which the lower rate is obtained, and the offense is complete where such act has been committed, the property delivered for transportation, and the contract for the illegal rate secured, and can only be prosecuted in that district.

Appeals from the Circuit Court of the United States for the Southern District of Ohio.

These cases are of a similar nature, and will be considered together. They involve the right to issue a warrant under the Revised Statutes of the United States (section 1014) for the purpose of removing appellants from the Southern district of Ohio to the Northern district of Texas for trial under certain indictments alleging violation of section 10, par. 3, of the act to regulate commerce (1 Supp. Rev. St. p. 687). The one case is an appeal from an order made in the district court of the United States for the Southern district of Ohio, directing the removal of the appellants for trial to the Northern district of Texas. The other is a proceeding in habeas corpus, whereby the appellants sought to be discharged from custody under said order, which was refused. Appellants were indicted in the district court of the United States for the Northern district of Texas. The indictment contains two counts. The first charges, in substance, that the appellants, under the name of the Ault Woodenware Company, of the city of Cincinnati, county of Hamilton, and state of Ohio, did, on or about March 15, 1899, deliver woodenware of the weight of 15,000

pounds, tin sifters of the weight of 750 pounds, also tin sieves of the weight of 124 pounds, for continuous carriage and shipment from Cincinnati to Dallas, Tex., by certain carriers, who did then and there carry and transport the said woodenware, tin sifters, and tin sieves from Cincinnati to Dallas, over the route formed by them, the carriers being subject to the said act; said goods were then and there delivered to the carriers, and the defendants then and there, by the false and fraudulent representation of same unto said carriers, and by then and there falsely reporting same as being 15,000 pounds of woodenware, whereas, in truth, they, at the time of delivery, well knew that the merchandise consisted of three kinds above mentioned; that the defendants, by means of such billing, false and fraudulent representations, and false reporting of the property as aforesaid, in violation of the act of congress and the several supplements and amendments thereof, obtained transportation for the same at less than the regular freight rates then duly established under the said act to regulate commerce, then legally in force, for said continuous carriage and shipment. The second count recites the freight rates established for the different kinds of merchandise, but contains the same averments as to appellants being of Cincinnati, Ohio, and charges the offense in the same terms as then and there committed. It also charges the delivery of the goods by the carriers at Dallas, as well as their transportation over said route, whereby the appellants, in the county of Dallas, state of Texas, were then and there, in the manner aforesaid, guilty of violation of said acts. In the bill of exceptions it is agreed that appellants are and have continuously been residents of Ohio, residing and doing business at Cincinnati, and that everything connected with the shipment of the goods mentioned, except the carriage and delivery, took place in the city of Cincinnati, state of Ohio.

Judson Harmon and Phillip Roettinger, for appellants.

William E. Bundy, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

The question presented is, was such a charge and showing made of the commission of an offense against the laws of the United States in the Northern district of Texas as to warrant an order directing the appellants to be taken to that district for trial? The statute under cover of which the indictment is drawn reads as follows:

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine not exceeding \$5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court."

This act undertakes to define the crime, and provide for the punishment of certain persons who shall, by means of the fraudulent practices described in the act, obtain transportation for property at less than the regular rates. The act defines certain classes of persons who are amenable to its provisions, and they are: (1) Any person,

officer, or agent of any corporation or company who shall deliver property for transportation; (2) any person, officer, or agent of any corporation or company for whom, as consignor or consignee, any such carrier shall transport property. If either of these classes of persons shall knowingly and willfully, by false billing, etc., obtain transportation for such property at less than the regular rates, they shall be deemed guilty of fraud.

The acts charged against the appellants in both counts are misrepresentations by false billing and classification of the property described, delivered by them to the railroad company at Cincinnati for transportation from that city to the city of Dallas, Tex., by which means transportation between said cities was obtained at less than the regular established rates. It is apparent from the reading of the act that the object thereof is to prevent shippers from obtaining undue advantage by procuring transportation for their property over interstate lines at less than the regular rates which are charged others similarly engaged. The shipper is to be punished whether he acts with or without the consent or connivance of the carrier or its agents. The reading of the indictment, as well as the fact stated in the bill of exceptions, shows that the acts alleged to have been committed by appellants were all done and performed in the city of Cincinnati, in the Southern district of Ohio. The false representation of the character of the goods, the delivery for transportation, and every act directly alleged to have been done by appellants took place in that jurisdiction. It is claimed on the part of the government that, while this may be true, the crime was not completed in the Southern district of Ohio, but that it required transportation of the goods, and that the term "transportation" is to be taken, in its ordinary signification, as meaning the carriage of the goods, and that this carriage was not completed until the goods reached their destination at Dallas; that, therefore, the offense would be committed only when this transportation beyond state lines is completed; and the case then comes within the provisions of section 731 of the Revised Statutes of the United States, which provides;

"When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined or punished in either district, in the same manner as if it had been actually and wholly committed therein."

This section was intended to provide for that class of cases where the crime is not completed in one district, but a separate and distinct act of commission essential to the crime is committed in another district, in which case the statute provides that prosecution may be had in either district. That class of cases is illustrated in the case of *In re Palliser*, 136 U. S. 257, 10 Sup. Ct. 1034, 35 L. Ed. 514, in which the offense charged was an offer of money contained in a letter mailed in New York and addressed to a postmaster in Connecticut, and where the supreme court held that the offense continued to be committed in Connecticut. It was there that the act of the accused operated upon the mind of the postmaster. There it was that he received the proposal, and the criminal act became effective. Horner

v. U. S., 143 U. S. 207, 12 Sup. Ct. 522, 36 L. Ed. 126, is of the same nature; the offense being delivery of mail containing lottery circulars. The delivery actually occurred in Illinois, to which state the circular had been mailed. The offense was held to be triable there. In order to sustain the government's contention, it is apparent it must be held that only after the transportation of the goods to their destination is the crime complete. In other words, that part only of the offense has been committed in the district where the participants in the offense were at the time when their acts of fraud and misrepresentation were committed.

This brings us to consider what is the nature of the offense and where does it become complete. The thing aimed at in this section of the act is to prevent undue advantage which will accrue to a shipper who obtains lowered rates by means of false classification, billing, etc. This rate is manifestly obtained where the goods are billed by the carrier for transportation. It is not the transportation of the goods which is prohibited and punished, but the obtaining of the transportation by means of false and fraudulent conduct, which is the gist of the offense. What is it, then, to obtain transportation in the sense of this statute? We think that false billing or other misrepresentation of the goods, as stated in the act, which results in their being received by the carrier under a contract of carriage thus fraudulently obtained, is the obtaining of transportation within the meaning of the statute. Then the fraudulent conduct of the shipper has borne its fruit, and every act and intent which constitutes the offense is complete. It is urged that transportation of the goods to the full measure contracted for is necessary to constitute the crime. This argument ignores the fact that the punishment is not so much on account of the transportation as for the wrongful conduct which has obtained it. Ordinarily, a delivery to the carrier is a delivery to the consignee. Every act which the consignor can do about the goods, all representations which he can make concerning them, the weight and classification thereof, are complete, and the goods turned over to the carrier for the consignee. Then the crime has been accomplished which the statute seeks to punish, namely, obtaining by the shipper of transportation at rates which others in a similar business, who pay the regular rates, do not secure. If the transportation must be to the point of destination, then an unforeseen accident, which might prevent the carrying of the goods through, would condone the offense, although the accused had committed every act and obtained everything the statute requires in order to make out the offense. If such is the transportation contemplated in the act, then the discovery of the fraud by the carrier, after carriage partially completed, with consequent refusal to take the goods to their destination, will render the crime incomplete. If the goods are accidentally lost, is the crime any the less committed when all the acts of the accused, with the intent and purpose to defraud, have concurred to complete the offense? We do not think such was the intent and purpose of congress in enacting this law. Its purpose was to reach and punish the person guilty of the things named in the statute who should thereby obtain transportation for his goods. This conclusion is in harmony

with the provision of the statute which requires that the person guilty of such fraud shall, upon conviction thereof, in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine and imprisonment. This provision shows the intention of congress to punish a crime which is committed in a district wherein jurisdiction is given for its punishment. In passing this act congress was regulating interstate commerce. It had power to legislate upon this subject only on interstate lines, and, recognizing this, it is set forth in the act that its provision shall not apply to transportation of passengers or property wholly within one state, and not shipped to or from a foreign country, state, or district. Such transportation may be through a number of districts, but congress has given jurisdiction for punishment of the crime in the district in which the offense is committed. It must have been in the contemplation of congress that the fraudulent representations may be made in one place, and the transportation, in the sense of actual carriage, obtained as a result thereof, may be to a state or district remote from the place of delivery, and through a number of districts of the United States. If it was contemplated that the crime could only be committed when the carriage contracted for was concluded, quite a different provision would have been inserted than the one requiring punishment in the district where committed. Congress, in passing this act, and providing for the place of trial and punishment in a single district, evidently contemplated the consummation of the offense at the place where the goods are billed by the shipper and the delivery for transportation takes place. It is said this part of the statute providing for the place of trial is nothing more than an enactment of the constitutional provision which requires that in criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury in the district where the crime was committed. We are unable to see the purpose which congress could have had in thus undertaking to re-enact this constitutional provision. Nothing can be added to the force of the statute by repeating a provision which no statute can ignore, and a constitutional requirement with which congress must be assumed to have been familiar. If the construction of this statute can be regarded as doubtful,—and eminent judges in this circuit have reached different conclusions concerning it,—we should strongly incline to that interpretation which is in harmony with the common law and constitutional requirements deemed essential to the rights of persons accused of crime. This construction is in harmony with the common law, wherein it was required that the jury should be from the vicinage, and with the constitutional requirement that trial shall be by jury and in the state where the crime shall have been committed. True, this constitutional provision only undertakes to secure the right of trial where the crime has been committed, and, if the offense in this case has been committed in the remote district to which the goods were transported, then no constitutional right is infringed by requiring the offenders to be tried in such district. We think it entitled to weight, however, in construing this statute, that the interpretation here given

provides for a trial at the scene where the criminal acts were committed, where the witnesses must necessarily live, where the accused can be tried without removal to great distances, and where good character may benefit the accused. If the carriage of the goods was the thing aimed at in this statute, and such was to have been deemed fraudulent per se, the crime might be regarded as a continuing one. As we have already said, it is the obtaining of the transportation by the acts denounced in the statute which is the gist of the offense. Other cases of offenses commenced in one district and completed in another are referred to by counsel, but they do not seem to us to assist in the determination of the case at bar.

For the reasons herein stated, we think the offense charged was committed within the Southern district of Ohio, and that the learned court erred in ordering the appellants into custody of the marshal to be transported to the Northern district of Texas, and in refusing to discharge the appellants in the proceeding in habeas corpus. Both judgments will be reversed, and the appellants discharged from further custody.

FULLER v. HUFF et al.

(Circuit Court of Appeals, Second Circuit. July 5, 1900.)

No. 157.

1. TRADE-NAMES—DESCRIPTIVE TERMS—PROTECTION AGAINST UNFAIR COMPETITION.

The long-continued exclusive use of a trade-name, although primarily intended to be descriptive of the quality of a product, entitles the user to protection against its unnecessary adoption and use by another which is calculated to deceive purchasers; the use having been retained for that purpose.

2. SAME.

The complainant had for 18 years made and sold food products under the name "Health Food Company," which had during such time become widely known and identified with his products, when another manufacturer of similar products adopted the name "Sanitarium Health Food Company." *Held*, that although the use of the latter was accompanied by no simulation of packages, and the place of manufacture shown thereon was different, it was calculated to deceive purchasers and constituted unfair competition, there being no necessity for its adoption.¹

3. SAME—SUIT FOR INJUNCTION—PROOF OF ACTUAL DECEPTION.

Where the simulation of a complainant's trade-name by defendant is manifestly liable to deceive, it is not necessary for complainant to show that purchasers have actually been deceived, to entitle him to relief.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Charles G. Coe, for appellant.
Thomas B. Kerr, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

SHIPMAN, Circuit Judge. The complainant, Frank Fuller, a citizen of New Jersey, commenced in the year 1875, under the name of "Health Food Company," to sell in the city of New York cereal products prepared for food, and has continued to the present time in that business and in the use of the same name, under which he has extensively advertised his goods by circulars, and in newspapers and magazines, at a cost of from \$75,000 to \$100,000. He has established agencies in Brooklyn, Chicago, Boston, Washington, Philadelphia, St. Louis, and Oakland. The name "Health Food Company" is displayed prominently upon the packages in which the various articles are presented to the consumers. About 50 different articles have been thus placed upon the market. The business has become large, and the name is unquestionably valuable to the complainant. In October, 1876, John H. Kellogg took charge, and has continued to be in charge, of the institution popularly known as the "Battle Creek Sanitarium," but incorporated in pursuance of the laws of the state of Michigan, in 1867, under the name of the "Health Reform Institute." This corporation is the owner of a large sanitarium, having branch institutions at various places, and has established in this country and elsewhere suborganizations for the promotion of charitable and missionary work. The Battle Creek Sanitarium recommended to its patients particular kinds of cereal foods, and entered upon the business of manufacturing and selling these articles under the name of "Sanitarium Foods." In 1881 19 different articles were made. In 1888 the business of food manufacture was made a separate department, under the name of "Sanitarium Food Company," which advertised itself in April, 1893, as "Sanitarium Health Food Company." The reason for this, and a subsequent change of name, which preserved the words "Health Food Company," is stated by Kellogg in his deposition as follows:

"In April, 1893, our advertisement appears in Good Health, over the business name of 'Sanitarium Health Food Company.' This name we were led to adopt by the action of one of our old employes, who, leaving the institution, set up in business in the same town, advertising himself under the name of the 'Battle Creek Health Food Company.' As quite a large proportion of our mail had for years been addressed to us as the 'Battle Creek Health Food Company,' we found this action a serious annoyance, and objected to it, with the result that an arbitration was agreed upon, the result of which was that the party referred to was required to change his name, which he did, adopting the title the 'Battle Creek Bakery Company.' We then added the word 'Health' to our business announcement, making it 'Sanitarium Health Food Company.' Our salesmen, however, in introducing our foods, so constantly made use of the term 'Battle Creek Sanitarium' in describing our foods, to distinguish between our institution and numerous other sanitariums, we finally, some two or more years ago, still further extended the business title of our food department to its present form,—the 'Battle Creek Sanitarium Health Food Company.' Our purpose in adopting the words 'Health Food' in our name was to protect ourselves against parties who sought to pirate the extensive business which we had built up, by assuming a name similar to ours, and making similar goods in the same town."

Their packages and cartons have the name "Health Food Co." in conspicuous type, prefixed by the word "Sanitarium," and in smaller type the words "Battle Creek, Michigan," under the name. The pack-

ages do not imitate or resemble in external appearance the dress of the packages of the complainant.

In October, 1896, a retail grocers' food exhibition was held at the Grand Central Palace in New York City. The complainant exhibited his products at a booth, under the prominently displayed name, "Health Food Company." About 15 or 20 feet distant the defendant Barton Huff, a citizen of the state of New York, as agent of the Health Reform Institute, exhibited its wares, and upon its booth was a placard containing the words "Health Food Company," in large letters, under the words "Battle Creek Sanitarium." The complainant remonstrated with Huff against the use of "Health Food Company" as an infringement of the complainant's right, and threatened a suit. Huff said that he would bring the representation to the attention of the officers of the Health Food Department, but the use of the name did not cease. The food business of the defendant under its last name is extensively advertised, and, when the testimony was being taken, was said to amount to from \$260,000 to \$300,000 annually. The circuit court dismissed the bill upon the ground that the defendant's name was clearly distinguishable from the complainant's business name, and was not an unlawful appropriation. 99 Fed. 439.

The term "Health Food" means healthy food, or health-producing food, and is therefore descriptive of quality, and cannot be a technical trade-mark, either with or without the word "Company," any more than the words "Nutritious Wine" could be a valid trade-mark. If a case against the defendant exists, it is one of unfair competition; and the law upon the subject of the adoption by a competitor of names or words descriptive of quality, which have previously become trade-names, and which adoption will constitute unfair competition, is correctly stated by the counsel for the defendant as follows:

"When such a mark, name, or phrase has been so used by a person in connection with his business or articles of merchandise as to become identified therewith, and indicate to the public that such articles emanate from him, the law will prohibit others from so using it as to lead purchasers to believe that the articles they sell are his, or as to obtain the benefit of the market he has built up thereunder."

The same statement of the law is contained in the case of Reddaway v. Banham, App. Cas. 199, decided by the house of lords in 1896, in which it was held that "one person was not entitled to pass off his goods as those of another by selling them under a name likely to deceive purchasers, whether immediate or ultimate, into the belief that they were buying the goods of the former, although the name was, in its primary sense, merely a true description of the goods." The subject of the unlawful use by competitors of the name under which a rival has previously presented himself to the public and has gained a business reputation, although the name is not strictly a trade-mark, and is either geographical or descriptive of quality, has been frequently of late before the courts, which have demanded a high order of commercial integrity, and have frowned upon all filching attempts to obtain the reputation of another. *Lee v. Haley*, 5 Ch. App. 155; *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.* [1899]

App. Cas. 83; *City of Carlsbad v. Kutnow*, 18 C. C. A. 24, 71 Fed. 167; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826; *Block v. Distributing Co.* (C. C.) 95 Fed. 978.

The question, therefore, is, is the real defendant's use (for it is manifest that the Michigan corporation is the real defendant) of the words "Health Food Company," in connection with the words used as a prefix and suffix, such a use as is likely to deceive consumers into the belief that they were buying the complainant's goods? It is to be observed that the frequent insignia of an intent to deceive, viz. the copy or the imitation, more or less close, of the dress of the competitor's packages, are absent in this case; but if a trade-name has been so identified with the business of a manufacturer as to inform the public that the name upon goods means that they are the product of that person, and another subsequently adopts and displays the name, it is not material that he has not also adopted the particular dress in which his predecessor has presented his goods. *Hier v. Abrahams*, 82 N. Y. 519. The complainant had used the name for 18 years before the defendant assumed it, had acquired an extensive business under it, and had established agencies for his goods in six or seven Eastern and Western cities, while all that the consumer knew of the complainant's goods was that they were presented to him as the products of the Health Food Company. The defendant announced its goods in 1881 as "Sanitarium Foods," advertised them also as "Invalid Foods," and waited until 1893 before they were presented as the products of the Sanitarium Health Food Company. The reason for the adoption of this name was a desire to forestall its use by any one else, thus recognizing the benefit from the name and the advantage from priority in its use. Three years after, it knew that it had long been prominently used by, and was the sole business name of, the complainant. The defendant now so coveted the name as to determine not to relinquish it, and continued its use despite remonstrance. The benefit to the corporation was derived from the familiarity with the name on the part of that portion of the public which used this class of goods. It is said, however (and the circuit court yielded to the defense) that the name is presented to the public with such accompanying assertions in regard to the manufacturer of the goods and the place of the manufacture that the consumer need not be deceived. In the class of cases in which a manufacturer is using his own name, or the name of another person which has become generic, this defense is of great value, because it is the duty of the user to make any inevitable harm as light as possible. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. The question in this case is, however, whether the simple use of the name, although with prefixes or suffixes, is not "likely to deceive purchasers." The history is significant in regard both to the motive of the Michigan corporation in retaining its occupancy of the name and the probable effect of a permanent retention. After it had presented its goods to the public for years under the name "Sanitarium Foods" and "Invalid Foods," there was no necessity for an abandon-

ment of the former names, under which it had confessedly obtained success, and by which it was well and favorably known by its customers. The adherence to the new name to the extent of guarantying productions to its purchasers against suits indicates the pecuniary benefit which was expected to ensue from the adoption of a name to which consumers had long been accustomed, and the persistence in the use also indicates the pecuniary injury which was liable to come upon the complainant. The case is not one where the Michigan corporation must use to a certain extent the name of the complainant, and it is not, therefore, one of *damnum absque injuria*. It is the case of an unnecessary use of a name long previously used by another in the same business, and in the recent decisions, by courts of last resort, upon the right to the use of trade-names, although geographical or descriptive in their primary meaning, great importance is given to mere long-continued and exclusive priority of use. *North Cheshire & M. Brewery Co. v. Manchester Brewery Co.*, *supra*; *American Waltham Watch Co. v. United States Watch Co.*, *supra*. It was not necessary for the complainant to attempt to discover whether a purchaser had been actually deceived, for a manifest liability to deception exists. *Taendsticksfabriks Akticbolagat Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Biscuit Co. v. Baker* (C. C.) 95 Fed. 135. Although the intent of the defendant's principal when it commenced to use the name "Health Food" may have been innocent, the continuance, after it had learned of the complainant's prior use, indicates its deliberate intention to use the name without reference to the complainant's possible prior rights. *Orr v. Johnston*, 13 Ch. Div. 434. The decree of the circuit court is reversed, with costs, and the cause is remanded to that court with instructions to enter a decree for injunction against the defendant Barton Huff in accordance with the prayer of the bill, with costs.

THE MANITOBA.

PUTNAM v. THE MANITOBA et al. (two cases).

(District Court, S. D. New York. September 20, 1900.)

1. SHIPPING—DAMAGE TO CARGO—HARTER ACT—EFFICIENT CAUSE OF LOSS.

To entitle the shipowner to exemption from liability under the third section of the Harter act, the damage must have "resulted" from the causes therein specified. If the causes of the loss are several, one of which is negligence of the carrier not within that section, and that negligence, and not the sea peril, would, under the settled rules of construction as between ship and shipper, be deemed the efficient cause of the loss, then the exemption of the statute does not apply.

2. SAME—DAMAGE TO CARGO—UNFASTENED PORTHOLE—SEAWORTHINESS.

The steamer M. carried case goods in a between-decks compartment in which was a port 8 or 10 feet above the water line. While on a voyage from New York to London this port was found open, having let in sea water which damaged the cargo, as the port had been unfastened at the inception of the voyage. The compartment was filled with case goods,

so that in order to close the port from the inside during the voyage it would have been necessary to open a hatch that was battened down and remove cargo in order to get to the port. Evidence was given that the port had been once closed by the carpenter when the loading began, and the cause of its being afterwards opened during loading did not satisfactorily appear; the most probable surmise being that it was done by workmen engaged in stowing the cargo, who afterwards forgot to re-fasten the port. *Held*, that the open port at the beginning of the voyage, the condition of which was unknown to the officers of the ship, made the ship unseaworthy as to cargo stowed in that compartment, since knowledge that such a port is open is one of the indispensable requisites and conditions for closing it when necessary during the voyage.

3. SAME.

The failure of the owner to maintain a watch on the ports during loading, and the negligence by which the port was suffered to remain open when the ship sailed, *held* a failure "in proper stowage, care and custody" within the first section of the Harter act.

4. SAME—HARTER ACT—"MANAGEMENT OF THE SHIP."

Held, that whether the term "management of the ship," within the third section of the Harter act does or does not include the care of the ports in the immediate preparation for the voyage, negligence in the care of the ports, so far as necessary to seaworthiness, is not excused by that section, because the shipowner is himself made answerable by that section for due diligence in the fitness of the cargo compartments, including the closing of the ports or other acts necessary to seaworthiness of the vessel, so that he is answerable for a failure by any of his servants in that regard.

5. SAME—BILL OF LADING—EXEMPTION OF "ROBBERIES" AND "BARRATRY."

It was urged that the port had been opened feloniously in an attempt at theft; *held*, (1) that there was no sufficient evidence of such acts, and (2) *quære*, whether in any event the exemption of "robberies" and "barratry" could be extended beyond the direct and proximate consequences of accomplished acts of theft or robbery or to mere incidents of such attempts unaccomplished, which diligence would have avoided.

6. SAME—BILL OF LADING—EXEMPTION FOR LATENT DEFECTS.

The bill of lading exempted the carrier for "latent defects even existing before shipment or sailing on the voyage; *held*, that an open port, though unknown to the master before sailing, was not such a "latent defect."

7. SAME—DAMAGE TO CARGO—BILL OF LADING—EXEMPTIONS TO APPLY "DURING LOADING"—HARTER ACT.

A bill of lading provided that the exemptions therein "shall apply not only during the loading and voyage, but during the discharge and until the goods are actually delivered to the consignee"; *held*, that the shipowners' exemptions were not thereby extended in this case, since the bill of lading in adopting only the Harter act exemptions in these respects, expressly excluded all losses resulting from negligence in regard to seaworthy conditions.

In Admiralty.

Conway & Westbrook (Harrington Putnam, of counsel), for libellant.
Convers & Kirlin, for claimant.

BROWN, District Judge. On a voyage of the steamship Manitoba from New York to London in June, 1896, some cases of cigarettes belonging to the libellant, stowed in compartments Nos. 3 and 4, between-decks, were damaged by sea water, which came in through an unfastened port. The libel was filed to recover the damages, alleging negligence and unseaworthiness, which the answer denies, averring that the port was properly closed and fastened, but afterwards wrong-

fully opened by the servants of the stevedores (who were brought in as defendants under the fifty-ninth rule), and setting up exemptions under the bill of lading and also under the Harter act.

The Manitoba is a first-class twin screw steel steamer, built in 1892, 445 feet long, by 49 feet beam, with four decks, 5,672 tons gross register, and engaged in carrying passengers and freight between New York and London.

Compartments 3 and 4 in the between-decks were not separated. In those compartments there were two hatches, and on each side four portholes. The second port forward of the aft bulkhead on the starboard side was the port through which the water entered. It was from 8 to 10 feet above the water line, about 2 feet below the deck above, and was abreast of hatch No. 4. It was provided with a glass door swinging horizontally, and an inside cast-iron door, or dummy, or dead-light, as it is variously called, swinging downwards from the top; each door when properly closed was water-tight. A room in the between-decks about 8 feet by 10, nearly under hatch No. 3, was partitioned off and partly filled with passengers' luggage. Two days before the steamer reached London, when off the Scillys, the floor of that room was found wet, as well as the deck adjoining. As the cargo was stowed up to the beams or nearly so, the examination of the ports for the purpose of discovering the cause of the leak, was made from the outside of the ship, when it was found that the port in question, though apparently closed, could be pushed inwards about four inches. The port being so much above the water line, and the sea being then smooth and the weather mild, it was not deemed necessary to fasten the port for the rest of the voyage, and it was left as it was until arrival at London on the 24th, when upon an inside examination it was found that the lugs of the glass door and of the iron dummy of the port were unfastened and hanging loose.

On the second day out the vessel had met high head winds and a heavy sea, causing her to roll and pitch heavily for about 24 hours, and to take in great quantities of water forward. There are numerous entries in the log to this effect. The rolling of the ship in that rough weather would no doubt force sea water through the unfastened port, and it is conceded that this was the cause of the damage. The vessel on arrival had a list to port; both scuppers on that side in compartments 3 and 4 of the between-decks were stopped up, and there was a foot of water above the dunnage on the port side. The flow of water through the port, and its swashing back and forth in the rolling of the steamer, are sufficient to account for the damage.

I think it must be found upon the evidence, that this port was duly closed with the other ports at the time when the loading of cargo commenced in compartments 3 and 4 of the between-decks, at about 4 or 5 o'clock in the afternoon of Friday, June 12th. The loading of all the holds was completed by the stevedores at midnight of that day, and the vessel sailed at 9 o'clock the next day, after taking some cattle on board that morning. The ordinary practice is, that before loading a compartment the ship's carpenter or his mate shall carefully inspect the ports and see that they are properly fastened. The evi-

dence shows that when the stevedore's men began to load compartments 3 and 4 in the between-decks, the carpenter was called on to close the ports, but that being busy with caulking the bridge, he sent his mate, Mitchell, an experienced man, to close them, in company with Muirhead, the third officer. Mitchell testifies that when he began to close the ports between-decks, the stevedores were still engaged in loading the lower hold of No. 4 compartment. The testimony is most explicit that Mitchell examined every port and properly fastened every one with a spanner. The third officer testifies that he went along with Mitchell and with his own hands tried every port and found every one screwed up fast. The carpenter testifies that before 6 o'clock he himself went down and examined them all again except the aft port, which was then blocked up by cargo, and found them tight. The third officer reported to Luckhurst, the chief officer, that the ports had been properly fastened, and the chief officer himself also went into the compartments and saw that the ports were closed. The fourth officer testifies that at about 4 p. m. he casually went into No. 3, and tried all the ports with his hand, before any cargo was stowed there, and found the ports all closed (this was probably on his second visit, not the first); that afterwards at supper time between 5 and 6 o'clock he went there again, and saw the carpenter come in and examine the ports and that he then told the carpenter that they were all closed. Two of the stevedore's men testify to seeing both the carpenter and his mate trying the different ports. No stronger direct evidence could well be produced of the due closing of the port in question, and that it was seen to be closed as late as about 6 p. m. of the evening before sailing, and after the cargo had been partly stowed in the after part of compartments 3 and 4.

The libelant's counsel cites passages in the testimony indicating that some goods were stowed in place in the between-decks near the aft bulkhead before the ports were closed. But these passages do not prove that the port in question or any of the ports were blocked by cargo before being closed as stated by the witnesses above referred to; nor do they prove any substantial departure from the custom to close the ports before loading a compartment. The aft port near the bulkhead, which was blocked when the carpenter tried them, was in fact closed. The port in question, the one next forward of it, was situated 23 feet forward of the aft bulkhead in that compartment, i. e. about one-third the whole length of Nos. 3 and 4 compartments, and it was high up near the beams above; so that it is clear from the evidence that at the time when the ports were closed and examined by the different witnesses, no such amount of cargo could have been taken into the between-decks as to obstruct access to this port, or a perfect observation of its condition. The fourth officer says that when the last examination was made by the carpenter, only about 8 feet of space at the rear was filled up with cargo. While it is possible that this port might have been missed by all these witnesses, it is in the highest degree improbable; and it is scarcely credible that the two nuts of the port could have been off and the lugs left hanging

down unfastened, without attracting attention upon even the most casual inspection, or that they could have escaped the notice of the third officer and the carpenter's mate and afterwards of the carpenter himself, when each of them made it his special business to see that the ports were closed; and their testimony is corroborated by four other witnesses.

The respondent contends that the port was afterwards, during loading, wrongfully unfastened, either by some one of the stevedore's men for air and ventilation, as set up in the answer, or by some person unknown for the purpose of pilfering cigarettes from the boxes and passing them through the port to a confederate outside. This last theory, which was suggested at the trial, is based upon the fact that at about the same time complaints were received of cigarettes missing from similar cases shipped on other steamers of this line, and upon the further fact that the situation of the port in question was such as would be likely to be availed of by persons of thievish intent, as it was above the string piece of the wharf where the steamer lay, and beneath the gangway planks leading off the ship, so that operations through that port would be partly screened from observation. The third officer also says that on arrival at London one of the cases near the port was found out of place, "right on top of the others," suggesting an interrupted attempt at pilfering after the loading around that port was completed. Whatever the circumstance referred to by him may have been, it might arise from various causes, and standing alone is not sufficient evidence of intended theft. But I do not comprehend his testimony on this point. As the space was filled up with boxes as high as they would go in, I do not understand how any one box could be put "right on top of the others." There could be no such displacement in the top tier; and the port was so high up that only the top tier of boxes prevented the glass port from being shoved in more than four inches when discovered; while the fact that the port could be opened no further, shows that the top box was in place next to the port. This fact is further inconsistent with the theory of intended theft; since when the top tier was in place, there were only four inches of dunnage space between the box and the port, and that was insufficient for opening the port either with a spanner, a cargo hook, or a piece of dunnage as suggested.

However opened and by whomsoever done, the port must have been opened early in the loading of compartments 3 and 4, before the upper tier of boxes was in place about that port, and before the box that afterwards prevented opening further was put in position. I do not find any actual fact or circumstance in the evidence distinctly sustaining the theory of intended theft, though that may be possible. No cigarettes were missing; no box was opened; none of the sailor men were seen in that compartment; no stranger was found there, nor any suspicious characters outside; the loading was completed by midnight and the hatches at once battened down; and after that, it was practically impossible for a thief to reach the port. I cannot give this theory, therefore, any higher status than an unproved possibility.

There is no direct evidence implicating any of the stevedore's workmen. In compartments 3 and 4 amidships there were four at work on each side. The four from the starboard side, where this port was, were called as witnesses, and they all say that they did not touch the port or see it open while loading, though two testify that they saw the carpenter's mate and the third officer at work closing the ports. All the stevedore's men knew that they had no right to touch the ports after they were closed and would be liable to discharge if they did. The four who worked on the port side were not called.

On the other hand, no persons other than the stevedore's men and the ship's officers were seen or known to be in compartments 3 and 4 between 4 p. m. and midnight. The evidence seems to exclude the probability of any outsider being there. None of the crew had any business there and none of them were seen there. It was a night in June, hot and stifling; grain in bulk was loading in the lower hold of No. 4 compartment by a spout, making a suffocating dust, as Tribe says, in the between-decks; and one of the stevedore's men engaged in that work complained of the dust and heat, and objected to the closing of the ports on that account. *Mitch. Mar. Reg.* pp. 72, 73, 85, 86, 96. The officers assigned to the watch there were more or less absent, and, as is evident from their testimony, they did not maintain a strict watch on the men or the ports. There was opportunity, therefore, which the officers admit, for any of the workmen wishing to open the port to do so unobserved. The most probable surmise, therefore, is that the port was opened by some of the workmen for relief from the heat and dust at about the time of their return from supper at 7 p. m. with the intent, likely enough, to close the port before leaving, but afterwards forgetting to do so. In the absence of all direct evidence against the workmen, however, these circumstances, though highly suspicious, are not sufficient, I think, in view of other possible explanations, to warrant a decree against them. I can only find, therefore, that while this port may possibly have been originally passed by the officers as apparently securely fastened when it was not, it is more probable that it was duly fastened before loading, and afterwards opened during loading by some person not ascertained.

2. The ship as a common carrier, is liable for the cargo damage unless it was caused by sea perils without the ship's fault, or unless she is exempted by some provision of the bill of lading, or by the Harter act (Act Feb. 13, 1893). The bills of lading put in evidence except—

(a) "Loss or damage occasioned * * * by barratry of the master or crew; by robbers; by latent defects in hull even existing before shipment or sailing on the voyage, provided the owners have used due diligence to make the vessel seaworthy."

(b) Both also provide that the shipment "is subject to all the terms and provisions of and all the exemptions from liability contained in the Harter act."

(c) One only of the bills of lading contains the following:

"The exceptions and conditions enumerated in this bill of lading shall apply not only during the loading and voyage, but during the discharge and until

the goods are actually delivered to the consignee; and the persons handling the goods or grain in the ship * * * shall be deemed the servants of the shipowner."

The open port, though unknown to the master on sailing, was not a "latent defect." The *Phœnicia* (D. C.) 90 Fed. 118. If it was the result of an attempt at theft by some of the crew, though theft might have been a barratrous act (*Insurance Co. v. Bryan*, 26 Wend. 563; *Spinetti v. Steamship Co.*, 80 N. Y. 71), still, inasmuch as no theft was accomplished, there was in fact no actual barratry; and the exception of "damage occasioned by barratry" does not seem to extend to a mere incident of an attempted act of barratry which was not accomplished. And even if the term "robbers" in these bills of lading, in the absence of the usual term "thieves," could be construed as used in its most broad and general sense and as including theft (Cent. Dict. 7), as used in Shakespeare's lines,

"Thieves for their robbery have authority when
Judges steal themselves,"

—rather than in the limited technical sense of a taking by open violence only, still it is doubtful, I think, whether the phrase "loss or damage occasioned by robbers" could be extended beyond the direct and proximate consequences of accomplished acts of theft or robbery, or so as to include ultimate consequences which the ship's diligence would have avoided and dependent upon subsequent navigation in heavy weather.

3. The claim to exemption must, therefore, rest, I think, upon the provisions of the Harter act, which by reference are expressly adopted in the bills of lading. Such a reference, it has been held, is equivalent to a recital in them of all the provisions and exemptions of that statute (*Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. Div. 408); so that these provisions and exemptions have here the force both of statute and of contract.

The recent decisions of the supreme court in the cases of *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771; *The Silvia*, 171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241; and *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234,—have cleared away some previous doubts as to the construction and extent of this statute.

In *The Carib Prince* it was contended that the former general rule of law which made the owner answerable for the seaworthiness of his ship on sailing, was superseded by the obligation of due diligence only to make her so. But the supreme court in that case overruled that contention; and it appearing that the damage there resulted from a defective rivet in a ballast tank,—a latent defect in construction,—and not from any danger of the seas or from any fault or error in the navigation or management of the ship, which are the only exempted causes designated in the third section, the court held in that case (and the same rule no doubt applies to all cases not specifically included in the third section), that the responsibility of the owner for absolute seaworthiness remained as before.

In *The Delaware*, the act was held not intended to affect the mutual rights and obligations of vessels in cases of negligent collisions; and similarly in *The Irrawaddy*, it was held that the act should not be construed as effecting any change in the owner's previous inability to recover in general average his sacrifices in rescuing ship and cargo from sea perils caused by the ship's negligence, merely because his exemption by the act from liability for that negligence might seem logically to give him a right of recovery; since the subject of general average was not apparently within the contemplation of the act.

In *The Silvia*, where an inside iron shutter to the port in a compartment having no cargo and easily accessible, but which ought to have been closed in stormy weather, was knowingly left open by the officers before sailing, and no attempt was made to shut it on the approach of bad weather, it was held that the vessel was seaworthy on sailing, and that the damage from sea water, which came in on the breaking of the glass port, resulted from "fault or error in the management of the vessel," for which the ship and owner were not liable.

In *The G. R. Booth*, the phrase "danger or peril of the seas" was critically considered, and held not to include a damage to cargo by the immediate inflow of water upon it through a hole made in the side of the ship below the water line by an explosion without any fault of the ship, inasmuch as the damage was there the immediate, direct and necessary result of the explosion, without the intervention of any new or other agency disconnected from the explosion, as the primary cause. *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256.

The supposition that the supreme court has held that in cases where the damage results from the specific causes named in the third section of the Harter act, the owner is still responsible for the absolute seaworthiness of the ship as before, is I think mistaken. I do not find any such adjudication; and the terms of the third section as respects damages "resulting" from the causes named in it, are explicit to the contrary. See, also, *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, at page 192, 171 U. S., page 833, 18 Sup. Ct., and page 132, 43 L. Ed., per Mr. Justice Shiras. The question has not in fact been presented to the supreme court; not in *The Carib Prince*, because there the cause of damage was not within the third section at all; and the Harter act as Mr. Justice Brown there said, "cut no figure in the case" (170 U. S. 655, 664, 18 Sup. Ct. 753, 757, 42 L. Ed. 1181, 1187); not in *The Silvia*, because the ship was there held to be seaworthy, so that the question did not arise. As respects general expressions having reference to a different state of facts, the admonition of Mr. Justice Gray is pertinent, given in a still more recent case (*Bardes v. Bank*, 178 U. S. 524, 534, 4 Am. Bankr. R. 163, 172, 20 Sup. Ct. 1000, 1004, 44 L. Ed. 1175), quoting the language of Mr. Justice Curtis in *Carroll v. Carroll's Lessee*, 16 How. 275, 287, 14 L. Ed. 936, 941, that "any opinion given here or elsewhere, cannot be relied upon as a binding authority, unless the case called for its expression."

In cases where the damage must be deemed to have "resulted," not from any defect in the ship or the condition of the compartments as the efficient cause of the loss, but from some one or more of the

causes specified in the third section as the real and efficient cause, the ship and owner are by the express terms of the act made answerable only for the exercise of due diligence to make the ship seaworthy. Such cases, though perhaps rare as compared with those in which negligence is present as an efficient factor, may occasionally arise, as indicated by Mr. Justice Shiras in *The Irrawaddy*, supra, through strictly latent defects not avoidable or discoverable by the highest diligence or care, either in construction or in subsequent inspection or management. The causes for exemption specified in section 3, are five, viz.:

(a) Fault in the navigation of the vessel; (b) fault in the management; (c) error in her navigation; (d) error in her management; (e) "danger of the seas or other navigable waters."

According to the criteria stated in *The G. R. Booth*, supra, the direct and immediate cause of the damage in this case was a "danger of the seas," viz. the excessive rolling of the ship in heavy weather, which caused sea water to be injected through the unfastened port. The rolling of a ship in heavy weather is a sea peril. Whether the damage in this case is to be treated as having "resulted" from that cause, so as to make the third section govern the case, is a different question. There were numerous causes contributing to the result:

First, the wrongful opening of the port; second, remissness of the watch in not observing and again closing it before sailing, as I find hereafter; third, the failure of the officers to close the port on the approach of bad weather after the vessel sailed; fourth, a high wind and heavy sea and consequent heavy rolling which forced water through the port; and, fifth, the clogging of the port scuppers, which prevented the water from draining off and thereby caused an accumulation of water a foot in depth above the dunnage, by the swashing of which a large part of the damage to the between-decks cargo was probably done. These were each new and independent agencies; the last two were long subsequent to the wrongful opening of the port or omission to close it, and disconnected therefrom. Any such rolling moreover, as would reach a port 10 feet above the water line, was not a necessary incident of the voyage. Voyages with less rolling in the month of June, when this trip was made, are not infrequent. If the question arose upon a marine policy of insurance, there would be no doubt I think that such a damage would be held within the terms, "danger or peril of the seas," though the open port if held to render the condition of those compartments unseaworthy, might prevent the policy from attaching at all. That circumstance, however, does not affect the scope of the phrase "danger of the seas"; and from the language of the opinion of Mr. Justice Gray in *The G. R. Booth*, I understand the supreme court to approve of the recent English decisions, holding, as respects that phrase, that in the absence of negligence there is no difference of construction to be given to those words themselves, whether they occur in a bill of lading or a policy of insurance; but that where the owner's negligence has made that danger operative, the exception of "danger of the seas," or "sea perils" in a bill of lading will not avail the owner, because he remains liable

for that negligence as the efficient cause, or *causa causans*, producing the loss. *Hamilton v. Pandorf*, 12 App. Cas. 518, 525, 528; *The Xantho*, Id. 510, 513, 514, 517; *The Southgate* [1893] Prob. Div. 329; *The G. R. Booth*, 171 U. S. 450, 459, 462, 19 Sup. Ct. 9, 43 L. Ed. 234; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 438, 9 Sup. Ct. 469, 32 L. Ed. 788; *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644.

The officers' failure to close the port on the approach of bad weather through their ignorance that it was open and needed closing, may also be within the words "error" or "fault" in management. Those words are not synonymous. They signify different causes or circumstances of loss. Fault imports blame; error may arise from ignorance or mistake alone. Had the officers known, at any time before bad weather came on, that the port was open and needed closing, it would have been speedily closed. For a cargo port, it was favorably situated for access. It was but a few feet from the hatch and abreast of it. It extended only about two feet below the beams above, and was even with the top tier of boxes, which were of moderate size, the average of the tobacco cases in the bill of lading being less than six cubic feet each; so that a removal of a dozen of them, more or less, which would have been probably not more than 15 or 30 minutes work in pleasant weather, would have given access to the port. Mitchell testifies that an inside examination could have been made "by opening up a hatch and just clearing a little way from the hatch"; and the first officer says when the port was discovered open but was left as it was for the remaining two days of the voyage, that "if there had been the slightest indication of rough weather we should have broken cargo out (and) or secured it right away."

There were, therefore, such easy means for closing the port within a reasonable time when necessary on the voyage, that if the officers had known it was open, I should not have felt at liberty, under the ruling in *The Silvia*, to regard the compartments as being in an unseaworthy condition on sailing, nor should I so hold except for their lack of information as to this fact. In the leading case of *Steel v. Steamship Co.*, 3 App. Cas. 72, the leaky cargo port was about two feet only above the water line and was covered up with grain in bulk, making access to it difficult; yet the case was sent back for a new trial that a jury might find whether this constituted unseaworthiness or not. As respects ease of access to the port, that case was very different from the present.

It was the general duty of the officers to keep all ports closed in rough weather. They did not close this one on the voyage, because they were ignorant that it had been wrongfully opened and that it needed closing again. The failure to close the port might be considered "error in management" through ignorance of its condition; just as running upon an unknown or uncharted reef would be error in navigation through ignorance, though not a fault. If the officers' ignorance was in part attributable to remissness in their watch of the ports during loading, as I think it was, the error would be blameable and a fault. In this respect the case is somewhat analogous to *The Silvia*,

171 U. S. 462, 19 Sup. Ct. 7, 43 L. Ed. 241. For in that case, though the officers knew that the iron shutter was open, they did not know, according to their testimony, that it needed closing. They all testified that closing it was not necessary, and ascribed the accident to wreckage. That iron shutter had not been closed for five years. Other similar shutters were not closed. It was about eight feet above the water line. The port had been deliberately adjusted and left as it was for the whole voyage. The shutter was deliberately left open and was not intended to be closed at all; and the only reason why it was not closed on the approach of bad weather was, that the officers did not know, or consider, that it needed to be closed. The supreme court held that it ought to have been closed; but that nevertheless the vessel was seaworthy on sailing as the port was easy of access and caused no present danger, and that the officers' failure to close it when it became necessary was "error or fault in management," without saying which; if their ignorance was not blameable, the failure to close the shutter must have been "error" only; if blameable, it was both error and fault. In that case the officers knew that the shutter was open; here they did not know that fact; and this, as stated below, is in my judgment an essential difference as respects seaworthiness of condition at the start. This, as I understand, was essentially the ground of the decision in *Farr & Bailey Mfg. Co. v. International Nav. Co.*, 39 C. C. A. 197, 98 Fed. 636.

Some recent English decisions which are cited with apparent approval by the supreme court in *The Silvia*, giving a construction to the phrase "improper navigation," though having some pertinency here, seem to me too broad in construction to fit the phrases of the Harter act. I refer to the cases of *Good v. Association*, L. R. 6 C. P. 563 (leaving a sea-cock open); *Carmichael v. Association*, 19 Q. B. Div. 242 (a cargo port insufficiently fastened while loading); *Canada Shipping Co. v. British Shipowners' Mut. Protection Ass'n*, 23 Q. B. Div. 342. These cases hold that any navigation of a vessel when she is not in a fit condition to be navigated with safety to herself or her cargo, is "improper navigation," and that any damage from such navigation is damage "occasioned by improper navigation." It is claimed that this is the same thing as "fault or error in navigation" under section 3 of the Harter act.

To entitle the ship and owner, however, to exemption under the third section of the Harter act, it is not enough to show that some of the several causes therein named contributed to the loss. To exempt the shipowner, the statute requires that the damage must have "resulted" from one or more of those causes; and this requires that some one or more of those causes must have been the real, substantial or efficient cause of the loss. But if the causes of the loss are several, and one of them is negligence of the carrier not within section 3 and a sea peril has become operative and produced damage not by itself per se, but only in consequence of the carrier's negligence, which has made it operative, then the rule long applied as between ship and shipper in the construction of bills of lading (and the same rule must be applied here), is that the negligence, and not the sea peril, is to be

deemed the efficient and proximate cause of the loss. In *Insurance Co. v. Sherwood*, 14 How. 351, 364, 14 L. Ed. 452, 457, Mr. Justice Curtis observes:

"It is true that an expense, attached by the law maritime to the subject insured, solely as a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril per se is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause. In such a case the real cause is the negligence."

To the same effect are the citations from *The Portsmouth*, 9 Wall. 682, 684, 19 L. Ed. 754, and from other cases in *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. In such cases the damage does not properly "result" so much from the sea peril as from the negligence that has given opportunity for the operation of that peril; so that if the particular kind of negligence which is the substantial and efficient cause of the damage is not itself among the exempted causes named in the third section, the exemptions of that section do not apply. That section does, indeed, exempt from certain kinds of negligence, viz. from fault or negligence in navigation or management of the vessel, but not from any other kinds of negligence. It does not exempt from liability for negligence as respects unseaworthiness at the beginning of the voyage, or as respects the unfitness of cargo compartments for the goods stowed in them; so that whenever general or partial unseaworthiness of the vessel, or unfitness in the condition of particular cargo compartments, through negligence, must be deemed, under the rules of construction heretofore applied, to be the real, the substantial, the efficient, or the proximate cause of the loss, there is no exemption, unless this unfit condition, or the very negligence that causes it, arises in the course of the "management of the vessel" within the meaning of the act; and negligence as respects seaworthiness at the beginning of the voyage, is not of that kind, as held below. See *The Frey*, 92 Fed. 667, 669.

Whether an unfastened port on sailing renders a vessel unseaworthy or not, evidently depends on the situation of the port, its relation to the cargo or passengers, and the means provided for closing it on the voyage when necessary. If its situation is such that it is safe in moderate weather, and all the requisite means and conditions are provided for closing it on the voyage when necessary, the vessel is not unseaworthy; and if when closing it becomes necessary those means are not made use of, the case is one of neglect or error in management. *Steel v. Steamship Co.*, 3 App. Cas. 72. But knowledge that a cargo port is open, is one of the indispensable requisites and conditions for securing the closing of it when necessary on the voyage. Without that information, all other provisions are useless; so that where no further inspection is expected or ordinarily required to be made, and no knowledge that the port is open can be expected to be acquired by the officers on the voyage, a port supposed to be closed but in fact open and blocked by cargo and not likely to be discovered to be open, must be considered unseaworthiness on sailing,

in so far as it is likely to imperil ship and cargo, though no further. Here the situation of the port was such that it was not in fact any menace to the accomplishment of this summer voyage, or to the safety of ship or cargo as a whole, i. e. to the safety of the adventure, but only to the particular cargo stowed in the midships of compartments 3 and 4. Although the ship as a whole, therefore, might not be deemed unseaworthy, and the insurance on ship and general cargo might not be affected by the open port, yet those compartments, as respects the cargo stowed in them, were not in a fit condition for the voyage when the vessel sailed, because in the absence of information to the officers that the port was open, the requisite and necessary provision for having it closed on the approach of bad weather, was not made. There was a defective or unfit condition of those compartments, as a lack of necessary cleanness or any other requisite to safe carriage would have been, constituting at least partial or limited unseaworthiness,—unseaworthiness *quoad hoc*, i. e. as respects the cargo stowed in those compartments only.

The obligation of the owner, however, as respects the cargo damaged, is precisely the same as if the defect constituted general unseaworthiness imperiling the whole adventure. If this unfit condition arose through negligence chargeable against the owner, i. e. through the negligence or misconduct of his own agents or servants as respects the seaworthy condition of compartments 3 and 4, the first clause of section 3 would exclude him from its benefits, since that requires due diligence to make the ship in all respects seaworthy; and inasmuch as the open port, left open through this negligence, chargeable against the owner, would also be deemed the real, efficient and true cause of the loss, although a sea peril or error in management was also a contributory cause, the case would also be excluded from the subsequent clauses of section 3, because the causes named in section 3 could not in that case be regarded as the real and substantial causes that produced the damage.

4. If the port was not originally closed at all, the negligence would be clear. Assuming, however, as I think most probable, that it was originally closed, the case, as I regard it, turns, therefore, upon the question whether such diligence was exercised in the watch upon the ports during loading as the circumstances reasonably required. In my judgment this is not shown. The burden of proof is upon the ship and owner. The *Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688. The testimony of the first, third and fourth officers shows that a watch upon the ports and the men was necessary and was intended to be maintained. Muirhead says that opening the ports by the workmen with a cargo hook in hot weather for ventilation was a frequent occurrence. Hatch testified that No. 4 was also the "special goods hatch," which it is said required more attention; while the heat and the suffocating dust of the grain from the lower hold, as Tribe describes it, and the objection of one of the men on this account to having the ports closed during loading, indicated the need of more special watch than usual. Under such circumstances reasonable care required at least some further notice or examination

of the ports before they were finally blocked up with boxes or other cargo. The compartments were lighted in the evening by electric lights, and such an examination would have been extremely easy and simple. The very fact that the officer on watch was occasionally absent from his post, giving opportunity for meddling, was an additional reason for examination just before the ports were finally blocked up. The fact that the lugs of this port were found hanging down, shows that no attention was given to the ports after they were first closed, since the most cursory notice of them would have discovered that fact. My conclusion is that the port was open on sailing in consequence of insufficient care during loading, and that the open port, and the negligent watch by which it was suffered to remain open until it was blocked up with cargo, and until the hatches were closed and the vessel sailed, must be held, as between ship and shipper, to be the real, substantial and efficient cause of the damage, for which ship and owner are therefore liable.

5. The same negligence has a direct and important relation also to the first section of the Harter act, and to the owner's liability therein recognized and emphasized, "for any failure in the proper loading, stowage, custody, or care * * * of any and all lawful merchandise."

The insertion of stipulations in bills of lading seeking to exempt the ship and owners from liability of this description, is by section 1 forbidden; and if inserted, they are by section 2 declared void. There is no question that before the passage of the Harter act the ship and owner, except for some such stipulations, would be liable by the general law maritime for all such losses as the present, not merely from the point of view of the lack of seaworthy condition of the compartments, but also as respects the proper stowage, care, and custody of the goods. It is plainly not proper stowage and care of goods, but extremely improper stowage and a great want of care, to put them in a compartment where they are liable to be damaged by the inroad of the seas through an unfastened port, without full information to the officers of the condition of the port, and of the necessity of closing it on the voyage in time to avoid damage. Nor is it proper "care" of goods already stowed in a compartment, to allow the goods to be imperiled through a reopening of the ports during loading, whether by stevedores or thieves, through an insufficient watch against this known liability. This would never be allowed knowingly; and when it happens through remissness in the watch, it becomes negligence in the stowage and care of the goods. There is nothing in the Harter act that in the least diminishes the shipowner's previous obligations in this regard. As respects goods stowed before as well as after the port was wrongfully opened, if it was originally fastened, there was, therefore, a "failure in the proper stowage and care of the goods," within the first section.

The circumstances in the case of *The Carron Park* (15 Prob. Div. 203) were somewhat different, so that that case does not apply. It has also been held that the specific requirements of section 1 as respects the care, custody and delivery of cargo, prevail over the more

general provisions of section 3 in case of conflict between them. *The Glenochil* [1896] Prob. Div. 10, 15; *Worsted Mills v. Knott* (D. C.) 76 Fed. 582, 584; *The Colima* (D. C.) 82 Fed. 665, 668; *The Whittleburn* (D. C.) 89 Fed. 526, 528.

6. It is urged, however, that the care of the ports in immediate preparation for sailing, is so peculiarly a duty of the officers of the ship that the term "management of the ship" should be held to include this duty, and not be restricted to the period of actual navigation. I recognize the force of this argument and its analogy to the case of *The Glenochil* [1896] Prob. Div. 10; *The Rotherfield*, 8 Int. Rev. Dr. Mar. 102, 104. But howsoever this view may be applied to other species of negligence or management, it cannot be applied to negligence as respects any of the elements of seaworthiness or of seaworthy conditions on sailing. For in so far as the closing of the ports, or any other acts of management, are necessary to seaworthiness, either general or partial, or to the fitness of cargo compartments at the time of sailing, the owner, by the express provision of the first clause of section 3, is made answerable for due diligence in all those particulars. Due diligence "to make the ship in all respects seaworthy" includes diligence to secure the fitness of all cargo compartments, and every other element of initial seaworthiness. The owner is himself thus made answerable for due diligence in respect to that duty by the first clause of section 3 as a preliminary condition of any application of the subsequent provisions of the third section; so that a failure in that regard by any of the owner's agents or servants, whether officers, crew or other persons, is legally attributable to the owner (*The Flamborough* [D. C.] 69 Fed. 470; *The Niagara* [D. C.] 77 Fed. 329, 334; *The Colima* [D. C.] 82 Fed. 665, 678; *The Frey*, 92 Fed. 667; *Dobell v. Steamship Rossmore Co.* [1895] 2 Q. B. Div. 414, 417), and this failure by the terms of the first clause excludes him from the benefits of the subsequent provisions of that section. Nor does the provision of the bill of lading that the enumerated exceptions and conditions shall "apply during loading" in this case extend the shipowner's exemption in this regard; since there is no other exception enumerated in the bill of lading that touches negligence of this kind, except that which adopts the Harter act itself, and this by its own terms excludes all cases of loss resulting from negligence in regard to seaworthy conditions.

Decree for the libelant against the Manitoba with costs, and for the dismissal of the libel as against the stevedores without costs.

THE NARANJA.

(District Court, S. D. New York. September 18, 1900.)

SHIPPING—DELIVERY OF CARGO—SHORTAGE.

A bill of lading for a shipment of almonds in bags required the consignees to receive the goods as delivered over the ship's side, and further provided that notice of any claim should be given within 24 hours after discharge. Although having due notice, the consignees did not appear until three days after the discharge had commenced, and on the day it was completed, and did not count the bags until four days later. Several weeks afterwards a claim was made of a shortage of several bags. *Held*, that under the terms of the contract and the facts shown the vessel was not liable for the shortage, it being shown that all the bags shipped were delivered on the dock.

In Admiralty. Suit to recover for shortage in delivery of cargo.

Ritch, Woodford, Bovee & Wallace, for libelants.

Convers & Kirlin, for respondent.

BROWN, District Judge. By the agreement in the bill of lading, the consignees were to appear and receive delivery of the goods as they were put over the ship's side. They had ample means of knowing the time and place of discharge. They did not appear at the dock until three days after the discharge began, and on the day the discharge was completed. From that time at least the delivery of the goods is to be deemed made to them and subject to the libelants' risk. The object of the stipulation was to require the consignees to take the care and risk of their goods from the time they went over the ship's side, and to relieve the ship of that burden. The further proviso that no claim should be made unless notice thereof was given within 24 hours after discharge, with particulars in 10 days, was that the ship might have early and contemporaneous notice of the claim in order to protect herself. This bound the consignees to examine their goods at once so far as practicable. As to the number of bags, this was entirely practicable. The consignees, however, made no examination apparently in their own behalf, but merely took the footing up of the number that was taken away by them during four days subsequent up to the 18th, and now claim for 48 bags which they did not find. To sustain this claim would be to place the whole burden and risk of the care of the bags upon the vessel during these four days, when the goods were in legal effect in the possession of the consignees subject only to the detention by the custom-house authorities for the purpose of weighing. The proof shows that all the bags shipped were landed on the dock. How or when 48 bags got astray, whether mistakenly rode away by other cartmen during the four days, or stolen, does not appear; and no "claim" was made until several weeks after the stipulated time for doing so had expired. The vessel sailed shortly after the discharge was completed. The libelants' contention rests on so substantial a departure from the stipulations of the bill of lading that I cannot sustain it; and I must, therefore, dismiss the libel; but under the circumstances, without costs.

YARNELL v. FELTON et al.¹

(Circuit Court, E. D. Tennessee, S. D. June 12, 1900.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION—STATE STATUTE—JUDICIAL NOTICE.

On consideration of a motion to remand a cause to the state court because the petition for removal was not filed in time, the federal court cannot take judicial notice of a rule of the state court by which the time in which pleadings may be filed is extended beyond the date fixed by the general statute of the state.

2. SAME—PETITION BY ONE OF SEVERAL DEFENDANTS.

Under Act Cong. 1887-88, providing for the removal of causes from the state to the federal courts where the controversy is between citizens of different states, an application by one only of two defendants of different citizenship from the plaintiff will not entitle the petitioning party to a removal.

3. SAME—FEDERAL QUESTION INVOLVED.

The objection, to a petition for the removal of a cause, that all of the defendants have not united in asking for the removal, is valid as well where the removal is sought on the ground that a federal question is involved as where the application is based on diversity of citizenship.

4. SAME.

Whether an action in a state court against a receiver to recover damages for a personal injury resulting from alleged negligence in the operation of a railway, and involving only a question of liability for negligence, is removable, as a case arising under the constitution or laws of the United States, solely on the ground that the receiver was appointed by a federal court, is reserved.²

W. T. Murray, for plaintiff.

Head & Anderson, for defendant.

CLARK, District Judge. This case is now before the court on motion to remand to the state court. The action is against the Cincinnati, New Orleans & Texas Pacific Railway Company, a corporation organized under the laws of the state of Ohio, and defendant Felton, as receiver, appointed by the circuit court of the United States for the Southern district of Ohio. The action is to recover damages, presumably for personal injury resulting from negligence, although the declaration had not been filed at the time of the order of removal. The petition for removal was on behalf of Felton, the receiver, alone. The jurisdiction of this court is objected to—First, upon the ground that the application for removal was not made at or before the time within which the defendant is required to plead by general statute of the state upon the subject; and, second, upon the ground that one of the two defendants does not join in the application for removal.

For the defendant it is insisted that by a general rule of practice adopted by the state circuit court under statutory authority the time in which the pleadings may be filed was extended beyond the date fixed by general statute, which would apply only in the absence of a regular rule of practice established by the state circuit court. The further contention by the defendant is that it is not necessary, under Act

¹ Corrected opinion. For original opinion, see 102 Fed. 369.

² Jurisdiction of federal courts in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

Cong. 1887-88, for a co-defendant or defendants to unite in the application for removal. The rule of practice adopted by the state circuit court extending the time for filing a declaration or plea, if it were effective to extend the time in which to apply for removal, is no part of the record, and this court cannot judicially know such a rule. *Harris v. Burris*, 1 Tenn. Cas. 80. But the omission to prove the rule in the court below, and incorporate the same in a bill of exceptions, does not change the result in the case at bar. The removal in this case was applied for on the sole ground of diverse citizenship. But the application for removal is on behalf of only one of the two defendants sued. It should be remarked that it is not insisted, and, indeed, could not be, that there is in the suit a separable controversy. *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528. Under the various acts of congress for the removal of causes on the sole ground of diverse citizenship it has been uniformly held that, where there is a plurality of plaintiffs or defendants, every necessary party on the one side of the controversy must be a citizen of a different state from every necessary party on the other side of such controversy. *Gage v. Carraher*, 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. Ed. 989; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195; *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685; *California v. Southern Pac. Co.*, 157 U. S. 260, 15 Sup. Ct. 591, 39 L. Ed. 683; 18 Enc. Pl. & Prac. 193, and cases there cited.

Under removal acts prior to that of 1875 as well as under that act, the rule was that, where diversity of citizenship was relied on as ground for removal, it was necessary for all defendants brought before the court by service of process to unite in the petition or application for removal. *Hanrick v. Hanrick*, 153 U. S. 195, 14 Sup. Ct. 835, 38 L. Ed. 685; *Wilson v. Oswego Tp.*, 151 U. S. 63, 14 Sup. Ct. 259, 38 L. Ed. 70; *Fletcher v. Hamlet*, 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679; *California v. Southern Pac. Co.*, 157 U. S. 260, 15 Sup. Ct. 591, 39 L. Ed. 683.

And it is not to be seriously doubted that it is necessary for all defendants duly served to join in the application to remove under the act of 1887-88, although the question is one upon which there have been conflicting decisions in the circuit courts, and the question was reserved in *Hanrick v. Hanrick*, 153 U. S. 197, 14 Sup. Ct. 835, 38 L. Ed. 685, and again in *California v. Southern Pac. Co.*, 157 U. S. 260, 15 Sup. Ct. 591, 39 L. Ed. 683. *Smelting Co. v. Cowenhoven (C. C.)* 41 Fed. 450, and *Thompson v. Railway Co. (C. C.)* 60 Fed. 773, are cases supporting the view that it is necessary, in the absence of a separable controversy, for all material defendants before the court to join in the application for removal. *Thompson v. Railway Co.* was referred to with approval in *Whitcomb v. Smithson*, 175 U. S. 637, 20 Sup. Ct. 243, Adv. S. U. S. 248, 44 L. Ed. 303. In *Railway Co. v. Martin*, 20 Sup. Ct. 854, Adv. S. U. S. 854, 44 L. Ed. 1055, this question must be regarded as determined, although the removal under consideration was on the ground that the case arose under the constitution and laws of the United States, and not on the ground of diverse citizenship, the

petition for removal in that case, as in the one at bar, having been presented by the receivers, in which their co-defendants did not join. The opinion, in view of the grounds on which it proceeded, is just as applicable to the one case as the other. The proper construction of both the second and third clauses of section 2 of the act of 1887-88, was both discussed and determined; the court, through Mr. Chief Justice Fuller, saying:

"And, in view of the language of the statute, we think the proper conclusion is that all the defendants must join in the application under either clause."

It is insisted by the defendant that, although removal was sought on the ground of diverse citizenship, the suit being against the removing defendant, Felton, in his official character as receiver, the record discloses a federal question, and that in such case it is not necessary that other defendants sued should join in the petition for removal. If it were permissible to sustain jurisdiction upon grounds other than those stated in the petition for removal, the objection that the other defendant does not unite in the petition for removal is applicable to a case in which removal is sought on the ground of a federal question equally with a case in which diversity of citizenship is the ground of removal. This somewhat vexed question has just been finally settled by the supreme court of the United States in *Railway Co. v. Martin*, supra. Furthermore, no federal question is presented here, unless the fact that the suit is against a receiver appointed by the circuit court of the United States constitutes a federal question which would authorize removal.

It has been decided by the circuit court of appeals for the Seventh circuit that an action in a state court against a receiver to recover damages for a personal injury resulting from alleged negligence in the operation of a railway, and involving only a question of liability for negligence, is not removable as a case arising under the constitution or laws of the United States, solely on the ground that the receiver was appointed by a federal court. *Gableman v. Railway Co.*, 41 C. C. A. 160, 101 Fed. 1. However, precisely this question was suggested and reserved in *Railway Co. v. Martin*, and, as the case at bar is satisfactorily disposed of on the ground that one of the two defendants properly before the court did not join in the application for removal, it is not now material to consider or determine this point in the case. The motion to remand is accordingly granted.

HOUSTON et al. v. FILER & STOWELL CO., Limited.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1900.)

No. 706.

APPEAL—REVERSAL—FAILURE OF DECLARATION TO SHOW JURISDICTIONAL FACTS.

The judgment of a circuit court will be reversed on writ of error, when the record fails to show the diversity of citizenship necessary to give that court jurisdiction; but the plaintiff, on payment of the costs of the trial had, will be permitted to amend his declaration to show such jurisdictional facts.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Daniel V. Samuels, for plaintiff in error.

Newton A. Partridge, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. The diverse citizenship necessary to the jurisdiction of the circuit court is not shown in this record, and for that reason, without regard to other questions, the judgment rendered must be reversed, but it will be with leave to the defendant in error to amend the declaration so as to show the necessary jurisdictional facts. *Hotel Co. v. Jones*, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842. It is therefore ordered that the judgment be reversed, and the cause remanded, with direction that, on payment of the costs of the trial had, the plaintiff be allowed to amend the declaration, and that, in default of an amendment showing a case within the jurisdiction of the circuit court, the cause shall be dismissed, at the cost of the plaintiff, without prejudice to another action in a court of competent jurisdiction. The plaintiff in error shall recover the costs of the appeal.

VICKREY v. CITY OF SIOUX CITY et al.

(Circuit Court, N. D. Iowa, W. D. October 16, 1900.)

1. MUNICIPAL BONDS—STREET IMPROVEMENT—APPLICATION—CITY'S DUTY—DIVISION OF PROCEEDS.

Acts 20th Gen. Assem. Iowa, c. 20, § 1, declares that cities may improve streets, etc., and assess the cost on abutting property, and provides that such assessment shall constitute a sinking fund for the payment of the improvement of the street on which the property abuts, "and should be used and appropriated for no other purpose," and, to provide for defraying the cost of such improvements in the first instance, the city may issue bonds, all of which shall express on their face the name of the street to defray the cost of which they were issued, and that the proceeds of such bonds shall be used for no other purpose than the payment of the cost of improving the particular street therein named. *Held*, that a city, having issued such bonds, was charged, as a trustee, with the duty of collecting and applying thereon the assessments on the property abutting on the particular street therein named.

2. SAME—TRUSTS—APPRAISEMENT—EQUITY JURISDICTION.

Where a bill against a city having issued bonds for a street improvement under Acts 20th Gen. Assem. Iowa, c. 20, § 4, charged that the city had misappropriated assessments collected to other streets, in violation of the act, and to the payment of other bonds, and that other assessments were still uncollected, which the city would also misappropriate unless restrained, a court of equity had jurisdiction to compel the city to perform its duty, as trustee, to collect and properly apply such assessments, notwithstanding the city, by the terms of the bonds, had incurred an absolute liability for their payment, which would sustain an action at law.

In Equity. On demurrer to bill.

Wright, Call & Hubbard, for complainant.

J. N. Weaver, for defendants.

SHIRAS, District Judge. In the bill herein filed, and the amendments thereto, it is averred that the complainant is the owner of \$19,400 of district improvement bonds issued by the city of Sioux City in the years 1888, 1889, 1890, and 1891; the same having been issued under the provisions of the act of the 20th general assembly of the state of Iowa approved March 15, 1884, and the ordinance of the city approved April 18, 1887, both of which are printed upon the back of the bonds. It is further averred that these bonds are wholly unpaid; that under the provisions of the act of the 20th general assembly it was the duty of the city to assess the proper special tax against the several properties in the bill described, abutting on the streets and alleys which were paved and improved under the resolutions of the city council, and to apply the several assessments, when collected, to the payment of the bonds issued for that particular improvement; that, by resolutions duly adopted, the city council from time to time ordered improvements to be made upon the streets and alleys named in the resolutions, and issued improvement bonds therefor, and levied special assessments upon the abutting property in order to create the sinking fund required to pay the bonds issued as the same matured, and provided for in section 4 of the act of the 20th general assembly; that instead of applying the several special assessments, when collected, to the payment of the bonds issued for the improvement of the abutting property liable to the special assessment, the city, without right or authority so to do, created three so-called improvement districts in the city, and paid out and applied the assessments collected within the several improvement districts to the payment of the bonds as they matured, without reference to the rights of the holders of the bonds yet to mature, thus diverting the special assessments levied for the improvement of particular streets and alleys to the payment of bonds issued upon wholly different improvements; that, through the misconduct of the city in this and other ways alleged in the bill, the sinking fund provided for in the act of the general assembly has been depleted and misapplied; that there now remains in the city treasury an aggregate of \$28,983.98 received and collected from the special assessments levied upon the property abutting on the several streets and alleys, and portions thereof, upon which improvements have been made under the resolutions of the city council adopted from time to time; that there remains unpaid of the improvement bonds issued by the city some \$274,554, including those owned by complainant; that the bondholders are equitably the owners of the money in the city treasury collected from the special assessments; that owing to the wrongful mingling of the moneys received from the several special assessments by the city, and the misapplication of a large part of the moneys thus derived, it is now impossible to separate out the particular moneys properly applicable to the several bonds remaining unpaid, and equity can only be done by holding the money now in the treasury, and all amounts hereafter received from the special assessments, as a common trust fund for the benefit of all the holders of the improvement bonds remaining unpaid, and to that end this suit is brought, not only for the benefit of the complainant, but also for the benefit of the other holders of improve-

ment bonds who may wish to join in the proceedings, it being prayed that a proper accounting be had; that the complainant be awarded his proper share of the special assessment funds in the city treasury, with a judgment for the balance left unpaid of the bonds and coupons against the city. And an injunction is asked, restraining the city and its treasurer from paying out any portion of the special assessment funds until the rights of the complainant have been duly awarded and decreed. To this bill a demurrer has been interposed on behalf of the city, and in support thereof it is urged that upon the face of the bill it appears that complainant has a sufficient remedy at law, and therefore a court of equity will not entertain a bill in his behalf. It cannot be well questioned that the bonds sued on contain an absolute promise on behalf of the city to pay the amounts thereof to the payee or bearer, and therefore it is true that in an action at law the holders of the bonds could recover judgment for the sums due thereon against the city. It is equally true that, under the provisions of the act of the general assembly authorizing the issuance of the bonds, the city assumed the duty of creating and properly applying the sinking fund provided for in the act, and to that end was charged with the duty of levying the special assessments called for by the act, collecting the same, and making proper payment thereof to the bondholders. In these particulars the city is charged with a duty amounting to a trust. The inducement held out to the purchasers of the bonds was that payment thereof would be provided for by the levy and collection of the special assessments upon the property abutting on the improved streets and alleys, and the bondholders have the right to call the city to account for the manner in which this trust duty has been performed. Thus, in *Taylor v. Benham*, 5 How. 232-274, 12 L. Ed. 130, it is said:

"Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or, in equity, as a trustee, for a breach of trust."

In the bill filed herein it is averred that the city has failed to properly collect and apply the special assessments levied, and that it now has on hand several thousand dollars, the proceeds of the special assessments levied for the payment of the bonds in the bill described; and one object of the suit is to reach this fund, and compel its proper application in the payment of the bonds yet outstanding,—a purpose which cannot be accomplished in an action at law, but which demands the more efficient power of a court of equity. The fact, therefore, that the bondholders can obtain a judgment at law against the city for the amounts due upon the bonds does not oust the jurisdiction in equity, for the reason that the judgment at law would not enable the bondholders to control the fund in the possession of the city, nor to control the action of the city with respect to the funds that may hereafter be collected from the special assessments; and therefore the legal remedy is not adequate and effectual to settle and protect the rights of the bondholders. Upon the general question of the trust relation assumed by the city with respect to the assessment, collection, and application of the special assessments necessary to

create the sinking fund provided for in the act authorizing the issuance of the bonds, see *Warner v. City of New Orleans*, 167 U. S. 467, 17 Sup. Ct. 892, 42 L. Ed. 239; *Id.*, 175 U. S. 120-135, 20 Sup. Ct. 44, 44 L. Ed. 96; and *Allen v. City of Davenport*, 107 Iowa, 92, 77 N. W. 532.

The nature of the duty imposed upon the city with respect to these special assessments more clearly appears when we consider the next question presented by the demurrer, and that is whether, under the provisions of the act of the general assembly, and the terms of the bonds, the assessments, when collected, should be applied in payment of the particular bond issued for the improvement upon which the assessment is based. It is averred in the bill that the city created three improvement districts, covering the entire area of the corporation, and that the sums realized from the special assessments in the several districts were applied indiscriminately to the payment of the bonds representing an improvement upon any of the streets or alleys embraced within the district, and as a result thereof bonds issued for improvements upon streets, or portions thereof, where the assessment upon the abutting property has not been paid, and the property is insufficient in value to realize the assessment thereon, have been paid in full out of moneys collected on assessments on the more valuable property, while the bonds issued to pay for the latter improvements remained unpaid; and the question presented by the demurrer is whether the city had the right to thus apply the moneys paid in on the special assessments levied upon the abutting property. In section 1, c. 20, of the Acts of the 20th General Assembly, it is enacted that the city shall have power to improve the streets, avenues, alleys, and highways, or portions thereof, and to "levy a special tax, as hereinafter provided, on the lots and lands fronting and abutting on such street, highway, avenue or alley, and, where said improvements are proposed to be made, to pay the expenses of the same." In section 3 it is provided that the city "shall, for the purpose of effectuating the objects enumerated in section one hereof, have power, by ordinance, to create improvement districts, which shall be consecutively numbered." It is further provided that the cost of improving any street or highway within the improvement district "shall be assessed upon the lots and lands abutting the same in proportion to the front feet so abutting upon such street, highway, avenue or alley, where said improvements are proposed to be made." In the same section, after providing for the method of payment of the assessments, it is further enacted that "said taxes shall constitute a sinking fund for the payment of the costs of the opening, extending, widening, grading, or any other improvements herein specified, of the street, highway, avenue, or alley, on which the property abuts, upon which the same are levied, and shall be used and appropriated to no other purpose, than the payment of the costs of said improvements, and any bonds which may be issued as hereinafter provided." In section 4 it is provided that "for the purpose of paying the costs of the improvements mentioned and specified in section three hereof, and which costs are to be assessed and levied as aforesaid upon the lots and lands as aforesaid, the council of any such city shall have power, and

may by ordinance, cause to be issued bonds of said city, * * * all of said bonds * * * to express on their face the name of the street, highway, avenue or alley to defray the cost of which they are issued. * * * The proceeds arising from said bonds shall be applied exclusively to and appropriated and used for no other purpose than the liquidation of the costs of the improvements as aforesaid to and upon the particular street, highway, avenue, or alley, to defray the cost of which said bonds are issued." These provisions of the statute clearly show that, in undertaking street improvements, it is expected that the city council will define the particular street, highway, or alley, or part thereof, that it is proposed to improve, and the cost of this particular improvement will then be assessed upon the property abutting thereon, and the money derived from such special assessment will constitute a sinking fund to pay the cost thereof, or, if bonds have been issued to meet the expense in the first instance, then the sinking fund is to be applied to the payment of the bonds issued for that particular improvement. It is only property abutting on the particular street or part thereof that it is proposed to improve that can be assessed for the cost thereof. The assessment provided for in the act is upon the basis of the frontage of the property abutting on the street that is improved, and under its provisions the city cannot impose a frontage assessment upon property that does not abut on the improvement, but which may be situated a mile or more therefrom, and upon a different street or highway. To secure the proper application of the moneys derived from the special assessments, the act, as already stated, expressly declares that each improvement bond issued must "express on its face the name of the street, highway, avenue or alley to defray the cost of which they are issued"; and the several bonds sued on expressly recite that they are issued "for the purpose of defraying the cost of improvements on [a named street, or part thereof, as, for instance, Douglas street from Fourteenth to Twenty-First street], in said district No. ———, which is chargeable to the property abutting thereon; and the last four installments of the special taxes and assessments assessed and levied, or to be assessed and levied, as authorized by the aforesaid statute, on the lots and lands abutting on the aforesaid street, shall be and constitute a sinking fund for the payment of this bond, and interest thereon, and to be used and appropriated to no other purpose until this bond, and interest thereon, shall have been paid and fully discharged." When the city issued improvement bonds in pursuance of the authority conferred by the act of the 20th general assembly, and placed therein the recitals just quoted, it certainly represented to the purchasers of the several bonds that a sinking fund consisting of the proceeds of the special assessments levied upon the property abutting on the street or portion thereof named in the bond would be created, and applied to the payment of the particular bond issued to pay for the specified improvement. The duty of creating this sinking fund and properly applying the same was assumed by the city, which thereby became a trustee; and as the bill charges past failures in the proper performance of its duties as trustee, in that the city has collected assessments that should have been applied only to the payment

of the bonds held by complainant, and has otherwise used the same, and also charges that there is in the city treasury some \$28,983 collected from special assessments, and that there are other special assessments remaining yet uncollected, and that the city, unless restrained from so doing, will continue to misapply the moneys constituting the sinking fund, which should be applied only in the mode pointed out in the statute, there is good and sufficient ground for holding that the suit is one within the equitable jurisdiction of the court, in that the purpose is to call the trustee to an account for past misfeasances, and to control the action of the trustee in the future in making disposition of the special assessment funds now in the treasury, or which may hereafter be collected on the special assessments described in the bill. Relief of this character is not obtainable in an action at law, and therefore the equitable jurisdiction cannot be defeated on the ground that complainant has a complete and adequate remedy at law. Demurrer overruled, with leave to defendant to answer by December rule day.

COPELAND et al. v. BRUNING.

(Circuit Court, D. Indiana. October 19, 1900.)

No. 8,912.

1. BILL OF REVIEW—OBJECTION TO TIME OF FILING—PRACTICE.

Where a bill of review affirmatively shows that it was not filed in time under the law and the practice of the court, the objection may be taken by demurrer; otherwise it should be made by answer.

2. SAME—EFFECT OF LEAVE TO FILE.

The fact that a bill of review for error of law apparent on the face of the record was filed by leave of court is no defense to the objection that it was filed out of time, since such a bill may be filed without leave as a matter of right, and the leave granted gave no additional rights.

3. SAME—LIMITATION OF TIME FOR FILING—APPLICATION OF STATUTE REGULATING APPEALS.

There being no statute fixing the time within which bills of review must be filed, federal courts of equity extend the provisions limiting the time for suing out an appeal or writ of error by analogy to bills of review for error appearing on the face of the record; and, where the time for taking an appeal from a decree is limited by the statute to six months, a bill of review on that ground will not be entertained after the expiration of that time.

In Equity. On motion to dismiss bill of review.

Chambers, Pickens & Moores, for complainants.

Ferdinand Winter, for defendant.

BAKER, District Judge. The respondent, Bruning, has filed a motion to dismiss the bill of review because the same was not filed within the time limited by law and the practice of the court therefor. The bill is strictly a bill of review for error of law apparent on the face of the record. No objection has been made to the respondent's right to raise the question by motion to dismiss. The appropriate practice is by demurrer when the objection is distinctly shown on the face of the bill, and by answer when it does not so appear. The case

of *Hyde v. Lamberson*, 1 Idaho, 542, holds that advantage cannot be taken on demurrer of failure to file a bill of review in time. This is true only where the bill fails to disclose on its face that it was not filed in time, but where the failure to file in time is affirmatively shown on the face of the bill the question may be raised on demurrer. *Jenkins v. Prewitt*, 5 Blackf. 7; *Maxwell v. Kennedy*, 8 How. 210, 221, 12 L. Ed. 1051; *Bank v. Carpenter*, 101 U. S. 569, 25 L. Ed. 815. But, as no objection has been made to the consideration of the motion, the court, while disapproving the practice, will determine the question presented. A petition or bill for rehearing in the nature of a bill of review lies before the enrollment of the decree; a bill of review after the enrollment. According to the equity practice in this country, a final decree is deemed to be enrolled at the close of the term in which it was passed. *Whiting v. Bank*, 13 Pet. 6, 13, 10 L. Ed. 33. The fact that the present bill was filed with the leave of the court is immaterial, as a bill of review for error of law apparent on the face of the record may be filed as of right without leave, so that the leave granted gave no additional right. Leave is only required where the bill seeks a review for newly-discovered facts dehors the record. *Ricker v. Powell*, 100 U. S. 104, 109, 25 L. Ed. 527. There is no statute prescribing the time within which a bill of review for error of law apparent on the face of the record or for newly-discovered evidence must be filed. Where the bill is brought for error of law apparent on the face of the record, courts of equity have uniformly held that the statute which limits the time of suing out an appeal or writ of error must, by analogy, be extended to bills of review. One of the earliest cases is that of *Smith v. Clay*, Amb. 645, decided by Lord Chancellor Camden in 1767. The decree sought to be reviewed for error of law apparent on the face of the record was passed on February 5, 1731. The decree was not enrolled until March 5, 1764. The bill of review was filed in 1766. The court held that the time within which the bill could be brought began to run from the time when the decree was entered, and that the enrollment related back to the date of the decree. The court further held that, as the act of parliament limited the time of suing out a writ of error to 20 years, a bill of review for error of law apparent on the face of the record must be brought within the same time. He said that, as the court had no legislative power, it could not limit the time, but, as soon as the parliament had limited the time of bringing actions at law, courts of equity adopted the rule, and applied it to equity causes. A fuller and more accurate report of this case is found in a note to the case of *Earl of Deloraine v. Browne*, 3 Brown, Ch. Cas. 632, 638. The first case in the supreme court of the United States where the question was presented as to the time within which a bill of review for error of law apparent upon the face of the record must be brought is *Thomas v. Brockenbrough*, 10 Wheat. 146, 6 L. Ed. 287. It was there held that, although bills of review are not strictly within the statute of limitations, yet courts of equity will adopt the analogy of the statute in prescribing the time within which they shall be brought; and, as appeals in equity causes are limited to five years after the decree, the same period of limitation will be applied to bills of review.

The court said that this rule seemed to apply with "peculiar strength to bills of review in the courts of the United States from the circumstance that congress has thought proper to limit the time within which appeals may be taken in equity causes, thus creating an analogy between the two remedies by appeal and bill of review so apparent that the court is constrained to consider the latter as necessarily comprehended within the equity of the provision respecting the former; for it is obvious that, if a bill of review to reverse a decree on the ground of error apparent on its face may be filed at any period of time beyond the five years limited for an appeal, it will follow that an original decree may, in effect, be brought before the supreme court for re-examination after the period prescribed by law for an immediate appeal from such decree by appealing from the decree of the circuit court upon a bill of review." The same principle is affirmed in *Whiting v. Bank*, 13 Pet. 6, 13, 10 L. Ed. 33; *Kennedy v. Bank*, 8 How. 586, 614, 12 L. Ed. 1209; *Clark v. Killian*, 103 U. S. 766, 26 L. Ed. 607; *Ensminger v. Powers*, 108 U. S. 292, 302, 2 Sup. Ct. 746, 27 L. Ed. 732; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 226, 10 Sup. Ct. 736, 34 L. Ed. 97. See, also, the numerous cases cited in note 1, 3 Enc. Pl. & Prac. 584.

Since the case of *Smith v. Clay*, supra, a bill of review for error of law apparent upon the face of the record has always been regarded and treated as in the nature of a writ of error. The courts of the United States have always followed the analogy of the statute limiting the time of suing out an appeal or writ of error in determining the time within which a bill of review for error of law apparent upon the face of the record must be brought. An appeal from the decree here sought to be reviewed was limited to the period of six months from the time of its entry on April 15, 1899. The bill of review was not brought until April 10, 1900. It has been suggested, while the rule announced by the supreme court might be properly applied when the time limited for appeal was five years, as it was prior to 1872, or two years, as it was from 1872 to 1891, that the right to bring a bill of review ought not to be limited to the period of six months within which an appeal could have been taken. The reason of the rule, however, applies with the same cogency under the present statute as it did under the prior statutes. When a party has slept on his rights until he has lost his right of appeal, why should he be permitted to disturb the decree by a bill brought in the court of original jurisdiction? If the period of six months is regarded as sufficient for suing out and perfecting an appeal, why should it not be regarded as ample for bringing a bill of review? "*Interest rei publicæ ut sit finis litium.*" Failure to file the bill within the time allowed for an appeal constitutes such negligence as will toll the right to bring it. When the right of appeal from a final decree of the vice chancellor was limited by the statute of New York to the period of six months, it was held by Walworth, Ch., in *Boyd v. Vanderkemp*, 1 Barb. Ch. 273, that the vice chancellor had no power to grant a rehearing unless it was applied for within six months from the entry of the decree, and before the same had been enrolled; and it was further held that a bill of review for error of law apparent upon the face of the record

must be brought within the six-months period allowed by law for appealing from the decree. The case of *Reed v. Stanly* (C. C.) 89 Fed. 430, holds that, where a decree of a court of the United States is required by the act of 1891 to be appealed within six months, a bill to review the decree for error of law apparent on its face will be dismissed unless brought within the period of six months from the time of its entry. In the present case the bill was brought five days before the expiration of the year after the entry of the decree, and no excuse is offered for the delay, if any excuse would have been available. The bill is dismissed, at the costs of the complainants.

COLUMBIA WIRE CO. v. BOYCE.

(Circuit Court of Appeals, Seventh Circuit. October 13, 1900.)

No. 731.

1. STATUTES—AMENDATORY ACTS—VALIDITY.

In the absence of constitutional restriction, an amendatory statute will be upheld though it purports to amend a statute which has previously been amended, or which was for any reason invalid.

2. SAME—AMENDMENT OF JUDICIARY ACT.

26 Stat. 828, § 7, creating the circuit courts of appeals, which authorized an appeal to that court from an interlocutory order granting or continuing an injunction, was amended by Act Feb. 18, 1895 (28 Stat. 666), "to read as follows: * * *." By Act June 6, 1900 (Stat. 1899-1900, p. 660), the original section was again amended, without any express reference to the prior amendment, "to read as follows: * * *." *Held*, that the later act was valid, and operated to repeal the amendatory act of 1895.

3. APPEAL—ORDER DENYING PRELIMINARY INJUNCTION.

26 Stat. 828, § 7, creating the circuit courts of appeals, as amended by Act June 6, 1900 (Stat. 1899-1900, p. 660), contains no provision authorizing appeals from interlocutory orders denying an injunction, and since said amendment an appeal from such an order will not lie.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

John R. Bennett, for appellant.

Geo. S. House and C. E. Pickard, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. This appeal is from an order entered on August 6, 1900, denying a preliminary injunction, and the motion of the appellee to dismiss must be sustained. The right of appeal is statutory. The seventh section of the judiciary act of 1891 provided "that where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, * * * an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals." 26 Stat. 828. By the act of February 16, 1895 (2 Supp. Rev. St. p. 376), that section was "amended to read as follows: That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or

an application to dissolve an injunction shall be refused, * * * an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction to the circuit court of appeals." By an act approved June 6, 1900 (Stat. 1899-1900, p. 660), it was provided, without express reference to the act of 1895, that the seventh section of the act of 1891 "be amended to read as follows: Sec. 7. That where, upon a hearing in equity in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed, by an interlocutory order or decree, * * * an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals." This act, it will be observed, omits of the act of 1895 all that was not contained in the original section, and, besides adding the phrase "or by a judge thereof in vacation," gives a right of appeal from any order or decree appointing a receiver.

Two questions are presented: First, is the last act invalid because it purports to amend a section of the original act which had already been amended? and, second, if the last act be valid, did its enactment operate to repeal the act of 1895?

In some of the states, by reason of constitutional provisions prescribing how amendments should be enacted, and requiring that the subject of an act be stated in the title thereof, it has been held that an amendatory act, to be valid, must relate to an existing and valid statute, and not to one which has been repealed or declared unconstitutional. 23 Am. & Eng. Enc. Law, 276; *Igoe v. State*, 14 Ind. 239; *Blakemore v. Dolan*, 50 Ind. 194; *Hall v. Craig*, 125 Ind. 529, 25 N. E. 538; *State v. Benton*, 33 Neb. 823, 833, 51 N. W. 140, 144; *Wall v. Garrison*, 11 Colo. 515, 19 Pac. 469. In the absence of constitutional restriction, the reasonable rule would seem to be, as it has been several times declared, that an amendatory statute will be upheld though it purport to amend a statute which had already been amended, or which was for any reason invalid. *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761; *Jones v. Commissioner*, 21 Mich. 236; *State v. Brewster*, 39 Ohio St. 653; *Basnett v. City of Jacksonville*, 19 Fla. 664; *Greer v. State*, 22 Tex. 588; *State v. Warford*, 84 Ala. 15, 3 South. 911; *Blake v. Brackett*, 47 Me. 28.

In the Massachusetts case referred to, as here, the original statute had been twice amended, "so as to read as follows," and, giving effect to the evident intention of the legislature, the court held that the second amendatory act, though it purported to amend the original statute and contained no express reference to the first amendment, was valid, and that the second act, or first amendment, had been repealed by implication. In the Maine case it was held that the repeal of a section of the Revised Statutes repealed the section as it had been amended. The ruling in Alabama was that a statute, amending a statute which had previously been amended, was constitutional, although the former amendment had been enacted under a constitutional provision that any section of a statute which is amended is thereby repealed. The syllabus of the Ohio case is this:

"Where a section of the Revised Statutes is repealed, and re-enacted in a changed form, a subsequent statute, which, in terms, again repeals and re-

enacts the original section in still another form, is, as a general rule, to be regarded as a repeal of the section in its amended form, and the section in its last form will take its place in the revision as part of the Revised Statutes."

In *Jones v. Commissioner*, Judge Cooley, writing the opinion, in response to the argument that an amendatory act which refers to a repealed or nonexisting act must be invalid, said:

"This reasoning seems to us too refined for practical value. Under our constitution, the mode of amending a section of a statute is by enacting that the section in question 'shall read as follows.' The position of the section in the original statute is not changed, and there is no reason why subsequent amendments of the same section should not be made by reference to its number in the original statutes."

The other cases cited are equally in point.

It is clear that the act of 1900 repealed that of 1895, and contains all the law on the subject. No other conclusion would accord with the settled principles of statutory construction, or could be reconciled with the decisions of the supreme court of the United States. *U. S. v. Tynen*, 11 Wall. 88, 95, 20 L. Ed. 153; *Murdock v. City of Memphis*, 20 Wall. 617, 22 L. Ed. 429; *Railroad Co. v. Grant*, 98 U. S. 398, 25 L. Ed. 231; *Tracy v. Tuffy*, 134 U. S. 206, 223, 10 Sup. Ct. 527, 33 L. Ed. 879; *Fisk v. Henarie*, 142 U. S. 459, 467, 12 Sup. Ct. 207, 35 L. Ed. 1080; *Hanrick v. Hanrick*, 153 U. S. 192, 197, 14 Sup. Ct. 835, 38 L. Ed. 685; *Railroad Co. v. Davidson*, 157 U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672; *Suth. St. Const. pars. 133, 154, et passim*. Like any other legislative body, congress must be presumed by the courts to be acquainted with the existing law in respect to subjects upon which it legislates (*Suth. St. Const. pars. 226, 287, 333*); and there can, therefore, be no argument founded upon the supposition advanced that the act of 1900 was framed in ignorance of the earlier act. The appeal is dismissed.

JOHNSON v. TRUST COMPANY OF AMERICA.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

No. 1342.

1. EQUITY—SEPARATE APPEAL.

All parties interested in a decree must be given an opportunity to be heard, before an appellate court will consider it. One of several defendants who desires to appeal must give notice to his co-defendants to join him, and they must refuse, before his separate appeal is maintainable; but no formal notice is required, and, if it fairly appears from the record that the co-defendants were notified of the appeal and declined to join in it, the separate appeal may stand. The facts that one of several co-defendants took her appeal in open court in the presence of all the parties at the time the decree was rendered, and that they all appeared by counsel in the appellate court, are sufficient evidence that the co-defendants received notice of, and declined to join in, the appeal.

2. BONA FIDE CREDITOR MAY SECURE UNASSAILABLE LIEN FROM FRAUDULENT VENDEE.

A creditor who is aware that his debtor has conveyed his property to a third party for the purpose of defrauding his creditors, but who has no intent to aid him in his fraud, may, with his consent, procure from the fraudulent vendee payment of his just claim from the property fraudulently conveyed, or a lien upon that property to secure his just claim, which will be unassailable by the other creditors of his debtor.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Kansas.

This suit involved a controversy between a judgment creditor and a mortgagee of real estate over the priority of their respective liens. The appellee, the Trust Company of America, obtained a judgment on September 16, 1893, for \$11,502.20, in the district court of Shawnee county, in the state of Kansas, against Erasmus Bennett and Edwin R. Bennett, upon a debt which they incurred in the year 1891. On or about January 3, 1893, Erasmus Bennett and Edwin R. Bennett conveyed the real estate in controversy, which was situated in Shawnee county, Kan., and which they then owned, to Clara E. Bennett, the wife of Erasmus Bennett; and the deeds which evidenced this conveyance were filed for record in the office of the register of deeds of Shawnee county on March 12, 1894. During all the time between the year 1890 and August 9, 1895, Erasmus Bennett and Edwin R. Bennett were indebted to John P. Johnson in the sum of more than \$20,465.08. This indebtedness was evidenced by their promissory notes. Upon one of these notes, which amounted to more than \$26,000, Clara E. Bennett was either a joint maker or a surety. On or about August 10, 1894, in order to secure the payment of some of this indebtedness, Clara E. Bennett made her individual note for \$20,465.08, dated August 8, 1894, payable to John P. Johnson, and with her husband, Erasmus Bennett, made a mortgage upon the real estate in controversy to secure the payment of this note. This mortgage was filed for record in Shawnee county on August 10, 1894. On February 13, 1895, the Trust Company filed a creditors' bill in which it set forth the facts above recited, and averred that the deeds from Erasmus Bennett and Edwin R. Bennett, dated January 3, 1893, were not made until within 30 days prior to March 12, 1894; that they were without consideration, and were made for the purpose of defrauding the complainant and the other creditors of the grantors named therein; that the mortgage to Johnson was without consideration, and made to aid and assist the Bennetts in covering up their property and defrauding their creditors,—and prayed that the deeds to Clara E. Bennett and the mortgage to John P. Johnson might be set aside and decreed to be void, and that the real estate therein described might be sold, and the proceeds thereof applied to the payment of the judgment of the Trust Company. The defendant, Johnson, answered that Erasmus Bennett and Edwin R. Bennett were indebted to him in amounts largely in excess of the \$20,465.08 secured by his mortgage; that the note and mortgage made by Clara E. Bennett were given to secure a bona fide indebtedness of the said Bennetts to him,—and denied that he had ever been a party to any scheme to cover up or withdraw from the reach of their creditors any of the property of the Bennetts, or to in any way defraud them. A replication was filed, and testimony was taken upon the issues presented by these pleadings. John P. Johnson died, and the suit was revived against Virginia M. Johnson, as executrix of his last will and testament. A final hearing was had, and on October 3, 1899, a decree was rendered in favor of the complainant for the relief demanded in its bill. On the same day, in open court, and in the presence of all the parties to the suit, Virginia M. Johnson, as executrix, prayed and was allowed an appeal from this decree, and it is by this appeal that the questions presented in this case are raised.

E. F. Ware (Charles S. Gleed, James W. Gleed, D. E. Palmer, and J. L. Hunt, on the brief), for appellant.

George H. Whitcomb (Frederic D. Fuller, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

A motion is made to dismiss the appeal on the ground that the co-defendants of the appellant have not joined in it, and there was no summons and severance. But a summons and severance are not in-

dispensable to the maintenance of an appeal by one of the parties to a decree, if it fairly appears from the record that the parties who might have joined have been notified to do so and have refused. *Trust Co. v. McClure*, 78 Fed. 211, 213, 24 C. C. A. 66, 68, 49 U. S. App. 46, 51; *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953. The rule is that all parties who appear to have an interest in the decree must be given an opportunity to be heard, before an appellate court will enter upon its consideration. The purpose of this rule is to avoid repeated hearings upon the same decree and record, and to enable the successful party to enforce his decree against those who do not desire to have it reviewed. In the case at bar that purpose has been fully accomplished. This appeal was taken by and allowed to the appellant alone, in open court, in the presence of the parties, at the same time that the decree was rendered, and all the parties to the suit have appeared by counsel in this court upon the appeal. These facts constitute sufficient evidence that the defendants to this suit who did not join in it had notice of the appeal and declined to join, and, as all the parties to the suit are now represented by counsel in this court, the motion to dismiss the appeal is denied.

Turning to the merits of the case, the record establishes these facts: The judgment of the Trust Company against Erasmus Bennett and Edwin R. Bennett was rendered in the district court of Shawnee county on September 16, 1893, and evidenced a just indebtedness incurred by them in the year 1891. The deeds of the property in controversy from Erasmus Bennett and Edwin R. Bennett to Clara E. Bennett were executed and delivered to the grantee on or about January 3, 1893, so that the judgment of the Trust Company constituted no lien upon the real estate in question. These deeds were made for the purpose of covering up the property of the grantors, and were fraudulent and voidable as against their creditors. The note for \$20,465.08, dated August 8, 1894, made by Clara E. Bennett, and payable to John P. Johnson, was given to secure a portion of a bona fide indebtedness of Erasmus Bennett and Edwin R. Bennett to John P. Johnson for an amount in excess of \$21,000, for more than \$21,000 of which Clara E. Bennett was a surety. The mortgage upon the real estate in controversy made by Clara E. Bennett and her husband, Erasmus Bennett, on August 10, 1894, was made to secure that portion of this indebtedness evidenced by the note of Clara E. Bennett, dated August 8, 1894. John P. Johnson procured this note and mortgage to secure a portion of a bona fide indebtedness of the Bennetts to him, and he did not take this note and mortgage for the purpose or with the intent to aid the Bennetts in defrauding or cheating any of their creditors, or in placing their property beyond the reach of the process of the courts. There is a spirited contest in the evidence over the question whether or not Johnson knew, or had such notice as would charge him with knowledge, that the deeds of January 3, 1893, to Clara E. Bennett, were made with intent to defraud the creditors of the grantors. In view of the facts which have already been recited and found to be established in this case, it is unnecessary to determine this question. Conceding, but not deciding, that Johnson had notice or knowledge of the fact that the deeds to Clara E. Bennett were made to

defraud the creditors of the grantors, how could that fact deprive him of the right to secure the just claim which they owed him? If those deeds were fraudulent as to creditors, they were not void; they were merely voidable; and until some creditor attacked them the title to the property stood unchallenged in the grantee. That title had passed to her before the judgment of the Trust Company was entered. That judgment was no lien upon that title. Johnson had the right to sue the Bennetts upon his claim, to issue and levy a writ of attachment upon this real estate, and in this way to fasten a lien upon it superior to the judgment of the Trust Company. He had the right to sue the Bennetts, to take judgment against them, and then to file his creditors' bill to set aside these conveyances, and in that way to fasten upon these lands a lien superior to that of the claim of the appellee. But there was no rule of law or of morals which required him to acquire his lien by involuntary proceedings. He had the same right to procure that lien by the consent of the fraudulent grantors, and by a mortgage from the fraudulent grantee, that he had to obtain it by writ of attachment or creditors' bill. He pursued the latter course. He presented his claim to his debtors, Erasmus Bennett and Edwin R. Bennett, and to their surety upon a portion of their obligations, Clara E. Bennett, and he demanded payment or security. They consented that the fraudulent grantee, who held the title to the real estate, as yet unassailed by any creditor, and not void, but merely voidable, should mortgage that property to secure the just debt they owed. Johnson took the mortgage, and recorded it in the office of the register of deeds of the county in which the land was situated. He filed his mortgage for record on August 10, 1894, and it was not until February 13, 1895, that the Trust Company filed its creditors' bill, and first fastened the lien of its claim upon the real estate in question. Here was nothing but a race of diligence between two bona fide creditors, and he who was first in time was first in right. A creditor who is aware that his debtor has conveyed his property to a third party for the purpose of defrauding his creditors, but who has no intent to aid him in his fraud, may, with his consent, procure from the fraudulent vendee payment of his just claim from the property fraudulently conveyed, or a lien upon that property to secure his just claim, which will be unassailable by the other creditors of his debtor. *Butler v. White*, 25 Minn. 432, 438; *Dolan v. Van Demark*, 35 Kan. 304, 309, 10 Pac. 848; *Boyd v. Brown*, 17 Pick. 453; *Murphy v. Moore*, 23 Hun, 95; *Stark v. Ward*, 3 Pa. St. 328; *Webb v. Brown*, 3 Ohio St. 246. The mortgage of Johnson constituted a superior lien to that fastened upon the property by the bill in equity of the Trust Company. The decree below is accordingly reversed, and the case is remanded to the court below, with directions to enter a decree in accordance with the views expressed in this opinion.

LOHMANN et al. v. HELMER et al.

(Circuit Court, D. Oregon. October 9, 1900.)

No. 2,627.

1. MINING CLAIMS—RIGHT OF ALIEN TO INHERIT.

The right of an alien to inherit a mining claim located upon government land, as against every person but the United States, is determined by the laws of the state in which the claim is located.

2. SAME—DESCENT AS REAL ESTATE—OREGON STATUTE.

Laws Or. 1899, p. 62, providing that all mining claims shall be real estate, and the owner of the possessory right shall have a legal estate therein, applies to a mining claim which, at the time of the passage of the act, was property of the estate of a decedent; and such claim, not being held or required for any purpose of administration, passed at once by inheritance to the heirs as real estate, and they became entitled to maintain a suit, in any court of competent jurisdiction, to set aside an alleged collusive and fraudulent conveyance of the claim by the administrator.

In Equity. On demurrer to bill.

Davis, Gantenbein & Veazie, for complainants.

J. C. Moreland, for defendants.

BELLINGER, District Judge. The complainants bring this suit, as the heirs at law of Hermanne Lohmann, to set aside conveyances made of certain mining property belonging to said Hermanne Lohmann at the time of his death, situated in Grant county, Or., by Fred Yorgensen, as administrator of said Hermanne Lohmann's estate, to the other defendants, and for an accounting. It is alleged that Hermanne Lohmann died in Canyon City, Grant county, on the 18th day of March, 1896; that at the time of his death he was possessed of, and entitled to, two mining claims, described in the complaint; that upon his death Yorgensen was appointed administrator of his estate, and ever since has been, and now is, the duly qualified and acting administrator of such estate; that about the 1st of November, 1898, Yorgensen and the defendants Helmer and Hines conspired together to cheat, wrong, and defraud the complainants of their right in said mining property, and to obtain possession of the same for their own private use and benefit; that, in pursuance of such conspiracy, Yorgensen, on or about said date, made a pretended sale of said mining properties to the defendant Helmer, and delivered to said Helmer a pretended deed of conveyance of said mining property. It is alleged that no petition for the sale of the said mining property was ever presented to the county court of Grant county, where such estate was being administered, and that no showing was ever made by the said administrator that it was necessary to sell such property, or any part of it, for the purpose of paying funeral charges, expenses of administration, or claims against the estate, or for distribution, and no order by the county court was ever made authorizing the sale of such properties; that since such sale the defendants Helmer and Hines have been in possession of the property and mining claims, and are engaged in working the same and taking ore there-

from; that they have taken and removed from such mines a large amount of ore, and appropriated the gold taken therefrom to their own use, the amount of which the complainants have no means of knowing, but they allege, on information and belief, that it is of the value of not less than \$10,000; that the defendants Helmer and Hines have posted and filed notices of location of the said mining claims in their own names, since coming into possession thereof, and are endeavoring by means of their possession to acquire title adverse to the complainants as heirs of the said Hermanne Lohmann; that the defendant Yorgensen, administrator as aforesaid, is acting in collusion with the defendants Helmer and Hines, against the rights of the complainants, and they are now endeavoring to sell such mining property, whereby the rights of the complainants will become wholly lost. The complainants are subjects of the empire of Germany.

To this complaint the defendants demur, and the following questions are presented: (1) The complainants being aliens and citizens of Germany, have they a right of possession of these claims? (2) If the complainants have such right of possession, has not the county court of Grant county exclusive jurisdiction in the premises? (3) Does it appear from the allegations in the bill that the sale to Helmer and Hines is not a valid sale?

Section 2319 of the Revised Statutes provides that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The contention of the defendants is that under this statute, in order to maintain an action for the right of possession to mining claims, the complaint must show that the complainants are citizens of the United States, or have declared their intention to become such. The case principally relied upon is that of *Lee Doon v. Tesh* (Cal.) 8 Pac. 621. In that case the defendants had applied to the United States land office for a patent to a placer mine. The plaintiffs, who claimed to own adversely, filed a protest and adverse claim in the land office, claiming a part of the land applied for. Thereupon the register and receiver stayed proceedings in the land office, and suit was thereafter brought, under section 2326 of the Revised Statutes, to determine the question of the right of possession to the disputed ground. Section 2326 provides for such a stay "until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived"; and it provides that:

"It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-gen-

eral, * * * and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess."

The case of *Lee Doon v. Tesh* was therefore brought for the purpose of obtaining a patent. The suit was a means of determining the contest instituted in the land department, and the court held that in such a case the complaint must show in the plaintiffs qualifications necessary to entitle them to purchase, including an allegation that the plaintiffs are citizens of the United States, or have declared their intention to become such. The court says:

"We must not be understood as holding that in all actions in relation to mining claims it is necessary for plaintiffs to aver citizenship. We are discussing the requirements of a complaint in the special case provided by the act of congress to determine the right of possession of a mining claim, under the laws of congress, in which the successful party becomes entitled on the judgment roll to apply for a patent,—a case in which the parties must connect themselves with the title of the government, and show compliance with the acts of congress,—and our conclusions are limited to such action."

The court distinguishes that case from the case of *Ferguson v. Neville*, 61 Cal. 356, in which it is held that an alien may purchase land or take it by devise, and his claim will be good against every person but the state. That case was a case where a location of mining land was made by citizens of the United States, who went into the possession and occupancy thereof, and whose rights passed by mesne conveyances to Wing Hung and others, aliens and natives of China, who thereafter conveyed to the plaintiff, Ferguson, who brought his action to quiet title to the mining ground. The court says:

"It is very clear, therefore, that Wing Hung and his co-grantees were capable of taking by purchase the mining ground in controversy, and their grantors, having acquired the title of the United States to such mining ground, had a full and complete right to convey the same. But [the court goes on to say] we might concede that Wing Hung and his associates had no right to take and hold the fee by purchase, and the result, so far as the present decision is concerned, would be the same. They could take and hold until 'office found.'"

And the opinion quotes from Kent's Commentaries, to the effect that "though an alien may purchase land, or take it by demise, yet he is exposed to the danger of being divested of the fee, and of having his lands forfeited to the state, upon an inquest of office found. His title will be good against every person but the state."

The defendants also rely upon the case of *Tibbitts v. Ah Tong* (decided in the supreme court of Montana) 2 Pac. 759, where it is held that:

"The right to locate and the right to possess a mining claim go together. They are part of the same grant, and neither can exist without the other. If, therefore, the grant by assignment or conveyance falls upon an alien, incapable of making a location, his possession is of no consequence; the possession being transferred to one who, under the statutes, is incapable of becoming a purchaser from the government. Such possession, being part and parcel of the purchase, is illegal, and is equivalent to an abandonment, and opens the ground to location and possession by any qualified person. The alien cannot become the government's grantee, and cannot become so in a roundabout way, by being the grantee of the government's grantee."

The case of *Chapman v. Toy Long*, 4 Sawy. 28, Fed. Cas. No. 2,610, is to the same effect, and is cited, and relied upon as an authority, in

the case last referred to. On the other hand, it is held in *Billings v. Smelting Co.*, by the circuit court of appeals for the Eighth circuit (2 C. C. A. 252, 51 Fed. 338), that an alien who has expended time, money, and labor in exploring for and locating a mining claim on public lands, conjointly with others, may hold his interest, or recover the same if deprived thereof, as against his co-locators, and as against all the world except the United States, though section 2319 of the Revised Statutes confines the right of exploration, purchase, and occupation to citizens of the United States, or persons who have declared their intention to become such. Upon a petition for rehearing, the court distinguishes the case on trial from those cases where the proceeding is brought for the purpose of procuring title from the United States. The court says:

"There can be no question, under the provisions of section 2319 of the Revised Statutes, that, when application is made for the issuance of evidence of title to mining property, it is necessary to show that the applicant is a citizen of the United States, or has declared his intention to become such, before a conveyance of title can be properly issued; and therefore, as was held by the supreme court in the case just cited (*O'Reilly v. Campbell*, 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669), if a party is seeking to procure the title to mining property from the United States, if taken at the proper time, the objection of alienage would prevent the acquirement of title, and such objection may be made by any one adversely interested. In such cases the sovereign is a party in fact to the proceeding, which is a direct one, for the procurement of title; and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty."

The pith of the matter is in the statement that, when the case is brought in support of an application in the land department for the issuance of evidence of title to mining property, the sovereign is in fact a party to the proceeding, which is a direct one, for the procurement of title, and the question of the alienage is therefore necessarily presented, and the necessary qualification prescribed by the statute to entitle the party to hold must appear. It is, in effect, as was the case of *Lee Doon v. Tesh*, a proceeding against the government to acquire title, the suit being to obtain a judgment upon which the plaintiff is entitled to his patent from the land office, as a conclusive determination of his right thereto.

This question is decided in the case of *Manuel v. Wulff*, 152 U. S. 510, 14 Sup. Ct. 653, 38 L. Ed. 564, where the court, among other things, says:

"The objection here rests, however, on the assumption that congress has not intended to confer any estate in respect of claims of this character because the right of purchase and the right of possession are indivisible, and the validity of the location is destroyed on the transfer of the claim to a person not authorized to keep the location alive. *Tibbitts v. Ah Tong*, 4 Mont. 536, 2 Pac. 759. Of course, the same qualification required in those who may purchase is required as to those who may possess, but that, in our judgment, does not render possessory rights any the less property susceptible of distinct ownership, nor involve the consequence that their transfer to unqualified persons would operate a forfeiture *eo instanti* as for a violation of a continuing condition precedent, so that the removal of the disqualification would not cure the defect. If it could be properly held that the qualification of his grantee should be regarded as at all a condition annexed to the ownership of the

qualified locator, such condition would be a condition subsequent, and governed by the rule laid down in *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. Ed. 551."

In the light of these cases, the question of the right of an alien to inherit a mining claim located upon government land is, as against every person but the United States, determined by the laws of the state in which the mine is located, and under the laws of this state an alien may inherit such property.

It is argued, however, that, this property being personal property at the time Yorgensen was appointed administrator, it must remain subject to administration in the state probate court. In 1899 the legislature of this state passed an act providing that "all mining claims, whether quartz or placer, shall be real estate, and the owner of the possessory right thereto shall have a legal estate therein within the meaning of section 316 of Hill's Code." Laws 1899, p. 62. Upon the passage of this act, if not before, the property in question passed by inheritance, as real property, to the complainants, unless it had been previously disposed of by the administrator. Upon the facts alleged, there had been a pretended sale of the property as personalty, but the sale was void under the statute, and the administrator had long ceased to hold the property in his representative capacity, if he had ever so held it. Since the passage of the act of 1899 making mining claims real property, this property has had that character, and the title has necessarily vested in the heirs. The assertion of that title, as in all cases where real property is involved, is not inconsistent with the right of the administrator to sell the property, upon the order of the county court, to pay funeral charges, expenses of administration, or claims against the estate, if there should be any necessity therefor. So long as it is not held or claimed by the administrator for any purpose of administration, it is not within the jurisdiction of the court of probate.

It is not necessary, upon the demurrer, to determine whether it is competent for this court to order an accounting as to the gold taken from the mine since the pretended sale. It is within the jurisdiction of the court to grant the other relief prayed for, and, if the complainants ask too much, their complaint is not demurrable on that account.

HUTCHINSON et al. v. AMERICAN PALACE-CAR CO.

(Circuit Court, D. Maine. October 1, 1900.)

No. 530.

1. RECEIVERS—JURISDICTION TO APPOINT—GENERAL RECEIVERSHIP FOR CORPORATION.

The courts in any jurisdiction may, in a proper case, take possession through receivers of property within its limits, independently of the question of the domicile of the owner; but, where the purpose of a suit is to wind up a corporation, or a joint-stock association, or a partnership, on account of alleged insolvency or fraudulent transactions, or where a general receivership of the property of such concern is sought, the initial proceedings should be at the place of domicile, and other receiverships should be ancillary thereto.

2. CORPORATIONS—APPOINTMENT OF RECEIVER—HEARING ON APPLICATION.

An interlocutory receivership of a corporation should not be granted, except in extreme emergencies, unless after public notice, so that creditors and stockholders generally may intervene and be heard on the application if they desire. A receiver is not essential to give the court jurisdiction over the assets of the corporation, which attaches from the time of the filing of the bill; and, moreover, the court may, in case of emergency, take actual possession of such assets by appointing its marshal custodian, without interfering with the usual operations of the corporation.

3. SAME—REQUISITES OF BILL.

To justify a court in appointing a receiver for a corporation, it is essential that the bill should entitle the complainant to some final equitable relief to which the receivership is appropriately incidental.

4. SAME—GROUNDS FOR APPOINTMENT OF RECEIVER—APPLICATION BY MINORITY STOCKHOLDERS.

A court of equity in the domicile of a corporation will not appoint a receiver therefor on a bill filed by minority stockholders, to the end merely that such receiver may appear and represent the corporation in litigation instituted by complainants in a court of another district, to which the corporation is a necessary party, but in which it has refused to appear in accordance with a vote of a majority of its stockholders. Whatever remedy the complainants may have in such case, an interlocutory order appointing a receiver for the corporation is not appropriate.

5. SAME.

A court of equity will not, on the application of minority stockholders, interfere with what has been approved by the majority, unless the complainants have a clear and substantial grievance.

6. SAME.

The general rules with reference to the appointment of temporary receivers stated.

In Equity. On application for appointment of a receiver.

A. S. Kneil, for complainants.

Clarence Hale, Geo. F. Gould, and Arthur F. Belcher, for defendant.

PUTNAM, Circuit Judge. This bill was filed by complainants, representing a minority interest in the stock of the respondent, and the matter now under consideration is an interlocutory application for the appointment of a receiver of the assets of the corporation pending litigation in this suit. So far as this opinion relates to matters of general practice in this district in regard to receiverships until formal adjudication with reference thereto, it has been deemed advisable that the profession should be advised concerning them, and the court is authorized to say that the learned district judge for this district expresses himself in harmony therewith.

There are some special objections of a jurisdictional character brought to the attention of the court which involve much doubt. If the points had been fully settled, and the propositions of law in reference thereto were clear, the court would feel compelled to dispose of them; and if, also, they were of such a character as would involve a dismissal of the bill, the court would deny the petition for a receiver without investigating its merits. In this respect the principle is exactly the same as that stated in *Ladd v. Oxnard* (C. C.) 75 Fed. 703, 729. The court, however, seems to be required to notice one objection raised by the respondent. This is the contention that, as the corporation has no assets in the district of Maine, the

proper jurisdiction in which to apply for a receiver is New Jersey, where is to be found its property, if it has any. It is true that every state is entitled to take control, according to its own local rules, of property lying within it, and this independently of the question of domicile; so that, under exceptional circumstances, there is no doubt that a local tribunal may properly constitute a receivership of assets actually within its jurisdiction, independently of any question of domicile. Nevertheless, where the purpose is to wind up a corporation, or a joint-stock association, or a co-partnership, on account of alleged insolvency or fraudulent transactions, or where it is desired to obtain a general receivership, as this expression is commonly understood, initial proceedings should be at the place of domicile, and the other receivership should be ancillary thereto. This question was incidentally before the presiding judge in an unreported case in the district of Massachusetts, and the court refused to constitute a receivership of assets within the state of Massachusetts belonging to a corporation created by the laws of New Jersey, until application had been made to the United States circuit court for the district of New Jersey for the appointment of a general receiver.

On the filing of this petition for the appointment of a receiver the court ordered notice to the corporation, the only respondent named in the prayer for a subpoena, and also, on inquiry as to the probable residences of the principal stockholders and creditors of the corporation, directed that notice of the pendency of the application be given by publication in newspapers of suitable circulation in their localities. An interlocutory receivership of a corporation ought not to be granted, except in very extreme emergencies, unless after public notice, so that creditors and shareholders generally may intervene, and be heard on the application, if they desire. Receiverships are too often sought in order to accomplish under color of judicial process what is prohibited by the common law and by the statutes against fraudulent conveyances; that is to say, for the purpose of delaying creditors. Moreover, the proceeding is so much of the nature of one in rem that notice of its pendency should, so far as practicable, be given to all concerned. This practice creates no difficulty, because it is now clearly settled that the jurisdiction of the court in which a bill is filed of such a character as to justify the appointment of an interlocutory receiver attaches to all the assets to which the bill relates from the time of its filing. *Farmers' Loan & Trust Co. v. Lake Street El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. Moreover, in cases of emergency, it is feasible to appoint the marshal a temporary custodian, with directions not to interfere with the usual operations of the corporation; thus securing the actual possession by the hand of the court in addition to the theoretical possession which the filing of the bill gives it, and at the same time leaving the court in a position to rid itself of the property without the complications which arise from the appointing and discharging of a receiver, no matter how short the time the receivership continues. The spirit of the common law requires that judicial action should be taken in open court on issue between the parties, or after an opportunity for such issue; and a regard for its

traditions will not only insure the rights of litigants, but will also protect from the unjust criticisms so often made, and, what is of more importance, will secure the courts themselves against hasty and ill-considered action.

This case brings to the court three essential conditions, compliance with which is necessary to justify the appointment of a receiver as now asked for: First, that the case be fairly within the jurisdiction of the court, having in view both the limited jurisdiction of federal tribunals and the true nature of proceedings in equity; second, that some proper final relief in equity be asked for in the bill which will justify the court in proceeding with the case; and, third, that the circumstances calling for a receiver be of a clear and urgent character.

The first and second conditions, of course, run into each other. It is occasionally said, on an application for a receivership, that all the parties in interest have agreed. This does not relieve the court from looking at the question of jurisdiction, and especially from inquiring whether the application for the receivership is really with the view of obtaining final relief, or merely for the purpose of securing a receivership for the mere sake of the receivership. It is true that, when the subject-matter is of itself of an equitable nature, certain conditions which might be availed of to defeat jurisdiction may be waived. *Hollins v. Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127, 37 L. Ed. 1113. This, however, cannot go to the extent of justifying the court in appointing a receiver merely because all the parties in interest agree thereto. Not only does this not justify the court in taking jurisdiction where it ought not to, but it requires it to say to the parties that, if they are agreed, they are capable of making amicable adjustments or arrangements without its assistance, so that, therefore, there is no occasion for relief in equity. But, so far as the case at bar is concerned, this topic is of special importance, because the bill does not properly point out any suitable final relief, and on the presentation of the case at bar the counsel for the complainants were not able to state what final relief the complainants desire. The bill contains no prayer for special relief. It does contain a prayer for general relief, but the frame of the bill is such that it is impossible for the court to perceive, on the present hearing, what relief the complainants could properly ask for, or what they intended to ask for. On this matter being opened by the court during the hearing, it was plain to be seen, from the statement of the counsel for the complainants, that in filing the bill they had no clear purpose for final relief, and that they desired the appointment of a receiver only in order that the receiver might become a party respondent in certain litigation in New Jersey. This is the litigation in which Judge Kirkpatrick rendered the opinion found in *Eldred v. Car Co.* (C. C.) 96 Fed. 59, to which reference may well be had for the purpose of explaining the nature of the controversy pending in New Jersey, and the results which the complainants, the minority stockholders, desire to accomplish. It appears that, after Judge Kirkpatrick rendered the opinion referred to, the present respondent, acting through its officers, under direction of a vote of the large majority of its stockholders, directed its coun-

sel to object that the United States circuit court for the district of New Jersey had no jurisdiction over it; and thereupon the court was required so to hold, and the respondent corporation was dismissed from the New Jersey litigation. In view of the facts that the litigation in New Jersey is in equity, and therefore cannot proceed unless all parties in interest, among which is the respondent corporation, are parties to the record, and that, also, the opinion of Judge Kirkpatrick shows *prima facie* that that litigation involves serious questions and substantial interests, a court having proper jurisdiction might take action in that direction; either directly by acting upon the respondent corporation itself, or indirectly by appointing some person to represent it, provided the parties complainant showed that they had a substantial grievance. But as this bill asks no final relief, and was not filed for that purpose, it is beyond the power of this court to grant the pending motion, even if the court could perceive that a receiver appointed by an interlocutory decree could obtain a standing in the New Jersey litigation. It does not follow that, because this court denies the relief now asked for, relief could not be obtained on proceedings by mandamus, either in the federal courts, or the state courts having jurisdiction over the corporation, or by a bill filed showing that the complainants have a substantial interest to be promoted, and in which the relief asked for should be the appointment of a trustee, who should appear in the New Jersey litigation in the name of the corporation, with authority to represent it, on the principle adopted by the supreme court of New Hampshire in the well-considered case of *Pearson v. Railroad Corp.*, 62 N. H. 537, 550. Such a bill, however, if one can be maintained, would be a bill framed for the particular purpose of the appointment of a trustee, and asking for such appointment as a matter of final relief, thus enabling the court to pass on the question intelligently on formal proofs and proper issues.

Some litigation in which the corporation is alleged to be concerned is said to be pending in Massachusetts, but the observations which we have made in reference to the New Jersey litigation dispose of that.

Pending this hearing, the complainants, by leave, amended their prayer in the bill by adding the following: "And, in case it shall appear that said respondent corporation is hopelessly insolvent, the court may order said corporation to be wound up and dissolved." With this was a prayer for the appointment of a receiver to have the control of the corporation's assets "until further order of court," with the further prayer that the respondent corporation might be decreed to make a transfer to such receiver. This relates only to an interlocutory receiver, and is subject to the observations we have already made.

Independently of any question whether this court should interpose against the bankruptcy statutes and the statutes of the state with reference to winding up corporations, or the collection of debts, and under its general equity powers close the affairs of an insolvent corporation, the prayer which thus came in by amendment with reference to the issue of insolvency is not effectual, in view of the fact that the

bill is not framed in that direction. This prayer for relief, thus brought in by amendment, was clearly an after-thought, and it does not change the position of the case as it is presented to the court, namely, that the bill was brought merely to obtain a receiver, without any purpose of prosecuting it to final relief.

In view of the considerations we have stated, we have no occasion to discuss the merits of the case with regard to the appointment of a receiver if the bill were properly framed to give us jurisdiction for such an appointment. The same principles apply with reference to the exercise of discretionary powers for the appointment of receivers as to the exercise of discretionary powers for preliminary injunctions, which powers, in either event, unless used carefully, run into uncontrolled and arbitrary action on the part of a single judge. The safeguards against this are the rules laid down by the circuit court of appeals for this circuit in *Hatch Storage Battery Co. v. Electric Storage Battery Co.*, 41 C. C. A. 133, 100 Fed. 975, with reference to interlocutory injunctions, and by the same court in *Post v. Electrical Co.*, 28 C. C. A. 431, 84 Fed. 371, to the effect that courts in equity ought not, on the application of minority interests in the stock of a corporation, interfere in what has been approved by the majority, unless the complainants have a clear and substantial grievance. Merely a technical injury, or one which involves only nominal consequences to the complainants, or circumstances which are doubtful, are not sufficient to call into action the conscience of the chancellor.

In view of the facts that the affidavits now before us show that the respondent corporation has been practically inert for many years, and that they raise no belief that, in any event, under the most advantageous circumstances, we could work out any surplus for the shareholders, and that they do not indicate that the complainants have any pecuniary interest in the payment of the corporate debts, it may well be doubted whether the case shows clearly that the complainants could derive any substantial advantage if we granted all the bill now asks. However this may be, we do not find it necessary to fully consider it, because the other aspects to which we have referred determine this present question against the complainants.

The petition for the appointment of a receiver, filed the 25th day of August, 1900, is denied.

FIRST NAT. BANK OF DENVER v. WILDER.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1900.)

No. 1,341.

1. LOST INSTRUMENTS—ACTION TO RECOVER—INDEMNITY.

A court of law—especially one which is vested with jurisdiction both at law and in equity—has power to require a plaintiff to give a bond of indemnity as a condition precedent to a recovery in an action brought therein on a lost negotiable instrument.

2. SAME.

The payee of a negotiable instrument, who claims to have lost the same before maturity, but that it had not been indorsed, should not be allowed

to recover thereon against the maker without giving reasonable indemnity, unless the evidence that the paper has been actually destroyed is so cogent that there is practically no risk of its reappearance. A finding of the jury in such an action that the instrument was not negotiated, but was lost while unindorsed, is not in itself a ground for dispensing with the requirement of indemnity, since it would not be available to the maker as a defense against an action by a third person who produced the instrument properly indorsed.

In Error to the Circuit Court of the United States for the District of Colorado.

Charles J. Hughes, Jr. (A. Moore Berry, on the brief), for plaintiff in error.

Lucius M. Cuthbert (Henry T. Rogers and Daniel B. Ellis, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The case presented for decision is as follows: George W. Wilder, the defendant in error, on November 19, 1898, brought an action against the First National Bank of Denver, the plaintiff in error, to recover the amount due to him on two certificates of deposit (one for \$500, and the other for \$3,000) which were issued to him as payee, by the bank, on or about December 1, 1897. Each of the certificates, by its terms, was "payable in current funds to the order of self [that is, the payee, George W. Wilder] on the return of this certificate properly indorsed." The plaintiff alleged that he had never indorsed or transferred the certificates to any one; that on or about March 4, 1898, he had lost them by their being taken from his possession without his consent; that he had immediately informed the bank of the loss, and subsequently, in September, 1898, had demanded payment of the certificates, which was refused. The bank admitted the issuance of the certificates and their nonpayment, giving as an excuse for its refusal to pay them when payment was demanded that the certificates were not at the time produced by the payee, that he made no tender of indemnity on the occasion of the demand for payment or subsequently, and that it had no sufficient information on which to base a belief whether the certificates were lost or stolen, as the plaintiff alleged, or whether, if lost or stolen, they were at the time unindorsed by the payee.

Concerning the testimony adduced at the trial, which was before a jury, it will be sufficient for present purposes to say that the plaintiff testified, in substance, that on January 5, 1898, he went from Tacoma, Wash., to Skagway, in Alaska, landing there on the 10th of January, 1898; that he carried the certificates in a belt which he wore about his body; that he took up his abode at Skagway in a small hotel; that on the night of March 3, 1898, he took off his belt, which contained the certificates, some gold, and a diamond, and laid the same on one side of his bed, and went to sleep; that, when he dressed the next morning, through oversight he failed to put on his belt, and left it in his room, where he had placed it when he retired; that he did not return to his room until 10 o'clock p. m. of that day, and never missed his belt until his return; that on his return, when he undressed

for the night, he missed it; that he searched for it, and could not find it; that he suspected his landlady of having made way with or stolen it, and subsequently made efforts to find and recover it, but that such efforts were unsuccessful. The plaintiff below produced several other witnesses to corroborate his statements concerning the loss of the certificates; but the knowledge of the loss possessed by these witnesses was derived, as it seems, wholly from statements made by the plaintiff, and inferences drawn from his conduct subsequent to the alleged theft. They appear to have had no other means of knowledge. The cashier and the assistant cashier of the defendant bank testified that in the summer of 1898 a letter was received by the bank from the plaintiff, detailing the circumstances under which he had parted with the certificates, in which he said that he had been forced to sign his name on the back of the same, and that, if he had not done so, he would have been taken out and hung. They were unable to produce the letter, because, as they said, it had been mislaid, and could not be found after diligent search. The bank proved by another witness, resident in Denver, Colo., who appears to have been an old acquaintance of the plaintiff, that he had also received a letter from the plaintiff in the summer of 1898, in which he stated that he had been forced to sign or indorse the certificates on the threat of being hung, and requesting him to make that fact known to the defendant bank. The record contains other evidence from which it appears that the plaintiff was a professional gambler; that he went to Skagway for the purpose of following that occupation; that he played for high stakes, and sometimes lost and sometimes won; that during his residence in Skagway he was forced on one occasion by its citizens to leave the place on account of some transaction in which he was engaged; and that during the summer of 1898 he was for a time confined in the jail at Skagway, Alaska. The trial court was of opinion that if the certificates in question were lost or stolen in the manner related by the plaintiff, and at the time of such loss or theft were unindorsed by the payee, he might recover without tendering the bank any indemnity against the future production of the lost instruments. It accordingly instructed the jury to that effect, and the plaintiff below recovered a verdict for the full amount of the certificates and interest. The principal contention in this court is that such instruction was erroneous.

The negotiability of the certificates when they were executed and delivered by the defendant bank is not challenged by either party, and we shall accordingly assume that they were negotiable, though "payable in current funds," and that they were subject to all the rules applicable to notes and bills drawn in such form as to be negotiable by the law merchant. Neither was the question raised in the lower court, nor argued in this court, whether the remedy to recover the contents of a lost negotiable instrument, such as a note, bill, or bond, is exclusively in equity, or may be pursued at law. On behalf of the bank it is conceded, apparently, that by the modern practice a suit at law may be maintained on a lost negotiable instrument, and that courts of law in such cases have power to require a proper indemnity against the reappearance of the lost instrument; while on the part

of the defendant in error it is said, in effect, that courts of law may entertain such actions, and properly require indemnity to be given in those cases where the defendant will be exposed to a risk of loss by permitting a recovery. It is claimed, however, that in the present case the defendant bank can safely pay the certificates, because the jury have found that they were unindorsed by the payee when lost; that, in consequence of this finding, no one can ever acquire a valid title to the paper; and that a recovery was properly allowed without an indemnifying bond.

We are aware of no sufficient reason why a court, especially if it is one which is vested with jurisdiction both at law and in equity, may not require a bond of indemnity as a condition precedent to a recovery in a suit at law brought therein upon a lost negotiable instrument. Whether such an action be brought on the law or equity side, the court has the same opportunity to determine accurately whether, in view of all the circumstances attending the loss, the case is one in which the defendant would be subjected to a risk of loss or expense if compelled to pay the lost instrument, and the same opportunity to determine the amount of indemnity, if any, which should be exacted. In these days courts of law manifest a strong disposition to administer the law in accordance with those principles of justice which are recognized by courts of equity, and instances are not wanting where they have entertained defenses and enforced obligations, without express statutory authority, which at one time would have been entertained and enforced only by courts of equity. No substantial objection to such action is perceived, when a court possessed of legal and equitable powers can conveniently give effect in a legal proceeding to a well-established equitable right without harm to either party. Some courts of high reputation have heretofore entertained actions at law upon lost negotiable instruments, and have exercised the power of requiring the plaintiff to give a bond of indemnity as a condition precedent to a recovery, and some of them have maintained their right to exercise this power by reasoning that is very persuasive. *Fales v. Russell*, 16 Pick. 315; *McGregory v. McGregor*, 107 Mass. 543, 546; *Bridgeford v. Manufacturing Co.*, 34 Conn. 546; *Fisher v. Webb*, 84 N. C. 44; *Bank v. Benedict*, 18 B. Mon. 307, 311; *Robinson v. Bank*, 18 Ga. 65, 110, 111. Conceding, then, that the practice of requiring indemnity in suits upon lost negotiable instruments originated with courts of chancery, which were the first to recognize a right of recovery on lost instruments, no substantial reason can be assigned at present why a court of law should not adopt the practice, and exact indemnity under the same circumstances where a court of equity would exact it.

Passing to a consideration of the principal question discussed in the briefs and at the bar, namely, whether, in view of all the facts disclosed by the record, the case is one in which the plaintiff should have been required to furnish indemnity, we observe in the first instance that, according to the plaintiff's own showing, the certificates in suit were not overdue at the time of the alleged loss, but were capable of negotiation to a bona fide holder. In the second place, the finding by the jury that the certificates were lost and never negoti-

ated, as well as the finding that when lost they had not been indorsed by the payee, rest upon fallible human testimony, which might be discredited by another jury called to determine these issues in a suit brought by a third party against the defendant bank on the certificates. It is hardly necessary to observe that the finding of the jury on the above issues in the present case would not operate as an estoppel, and would not even be admissible in evidence against a third party suing on the certificates, who was able to produce them, bearing the plaintiff's indorsement. No prudent banker, on the facts disclosed by this record, would pay the certificates voluntarily, without proper indemnity; and what a prudent man would not do voluntarily, surely a court should not compel the defendant bank to do. As between the maker of commercial paper and the payee and all subsequent holders thereof, there is an implied understanding that when payment is demanded and received the paper will be produced and surrendered as a voucher; and, although it is now well settled that this obligation is not so imperative that the payment of commercial paper cannot be enforced under any circumstances without its production and surrender, yet when this cannot be done, in consequence of its loss or destruction, reasonable security against its future appearance should be required, unless the proof that the paper has been actually destroyed is so cogent that there is practically no risk of its reappearance. One who has lost a negotiable instrument, and is unable to produce it on the day of its maturity, in accordance with the implied understanding that it shall be produced, should not be allowed to cast the burden of his misfortune upon the maker, but should be compelled to tender a reasonable indemnity. *Welton v. Adams*, 4 Cal. 38, 41; *Gordon v. Manning*, 44 Miss. 756, 762; *Wade v. Banking Co.*, 8 Rob. 140, 142; *Fales v. Russell*, 16 Pick. 315, 316; *Bullet v. Bank*, 2 Wash. C. C. 172, 4 Fed. Cas. 647. We are accordingly of opinion that the plaintiff should have been required to indemnify the defendant bank against all further liability on the lost certificates before a judgment was entered on the verdict of the jury. As such action was not taken, the requisite security should be given before the judgment is enforced. We might allow the judgment to stand, and direct that execution thereon be withheld until such security is given by the plaintiff; but as the lien of such a judgment, especially if it existed for some time, might prove a source of considerable embarrassment to the bank, we have concluded to vacate the judgment, and allow the verdict of the jury to stand unaffected by such action. It is accordingly ordered that the judgment of the lower court in this case be, and the same is hereby, vacated and annulled, but that the verdict on which the same is based be permitted to stand unaffected by such action, and that the case be remanded to the circuit court, with directions to enter a judgment on such verdict, on the motion of any party in interest, at any time after the right of action upon such certificates of deposit shall have been barred by the statute of limitations of the state of Colorado applicable thereto, provided no action shall have been brought thereon in any court prior thereto; also, to enter a judgment on such verdict at any time hereafter when the plaintiff, or any one in his behalf, shall have executed a bond, with security satisfactory to the court, in

the penal sum of \$4,500, payable to the defendant bank, and conditioned that the obligors therein, on the payment of said judgment, will hold the defendant bank harmless of and from all liability, claim, or demand which may thereafter be preferred by any owner or pretended owner of said certificates, and that they will also refund such reasonable attorney fees as may be incurred by the defendant bank in defending any action or actions which may be brought in any court upon said certificates.

HOYT v. FULLER.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

No. 1,343.

1. DAMAGES—DETENTION OF PERSONAL PROPERTY—MEASURE OF DAMAGES

The general rule for the measure of damages for the wrongful detention of personal property is the value of the use of that property during the detention.

2. SAME—HIGHEST MARKET VALUE.

Compensation is the basic rule for the measure of damages. In an action for special damages for the loss of a sale of personal property at the highest market value during its detention, it is competent for the defendant to prove that within 30 days after the property was returned to the plaintiff, while he still held it, and before the action was commenced, its market value was as high, and its sale as feasible, as during the detention.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This was an action for damages for an excessive levy. In the amended complaint upon which the action was tried the defendant in error, J. L. Fuller, alleged that on October 4, 1894, the plaintiff in error, Sue A. Hoyt, caused a writ of attachment against him for the sum of \$517.50 to be levied upon 23,000 bushels of his corn in the crib, which was then situated in Guthrie county, in the state of Iowa; that this property was worth \$11,500, and the levy was excessive in the sum of \$10,745; that the plaintiff in error retained this property under the levy until December 6, 1894, when she dismissed the suit and released the levy; that the market value of the corn was 45 cents per bushel when the writ was levied, and that it advanced to 65 cents per bushel while the property was detained under the levy; that on account of the levy the defendant in error was unable to sell his corn at the highest market price thereof, and was damaged in the sum of \$4,600. The plaintiff in error denied all the allegations of the complaint, except the issue and levy of the writ, and pleaded a counterclaim. There was a trial to a jury. The evidence disclosed the fact that the defendant in error held his corn from the time it was returned to him in December, 1894, until August or September, 1895; that the market value of corn in Guthrie county was from 50 to 55 cents per bushel in the month of November, 1894. Thereupon the plaintiff in error offered to prove that in the months of January, February, March, April, and May, 1895, the market value of corn in that county was as high as it was during the period of detention under the writ. This evidence was excluded, and an exception was taken. There were many other objections and exceptions to the rulings of the court in the course of the trial, and at its close there was a verdict and judgment for \$2,800 damages, and interest from November 19, 1894, amounting in the aggregate to \$3,447.73. The writ of error has been sued out to reverse this judgment.

I. M. Earle, for plaintiff in error.

A. B. Cummins, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The measure of damages for the conversion of personal property is the value of that property at the time and place of its conversion, in the absence of a plea and proof of facts and circumstances which entitle the injured party to special damages. *Suth. Dam.* § 1109; *Brown v. Allen*, 35 Iowa, 306; *Gravel v. Clough*, 81 Iowa, 274, 46 N. W. 1092; *Thew v. Miller*, 73 Iowa, 742, 36 N. W. 771. One of the exceptions to the general rule is that the measure of damages for the conversion of stocks and like speculative property is the highest market value which the property attains between the time of its conversion and the expiration of a reasonable time to enable the owner to put himself in statu quo after notice to him of the conversion. *McKinley v. Williams*, 74 Fed. 94, 103, 20 C. C. A. 312, 321, 36 U. S. App. 749, 763; *Galigher v. Jones*, 129 U. S. 193, 201, 32 L. Ed. 658. This, however, is not an action for conversion. It is an action for the simple wrongful detention of personal property for the period of about two months. The measure of damages for the detention of personal property is the value of its use during the period of detention, in the absence of a plea and proof of facts and circumstances which warrant special damages. *Lumber Co. v. Spencer*, 81 Iowa, 549, 550, 46 N. W. 1058. So far as this record discloses, the value of the use of the corn in the crib during the two months it was retained under the levy was nothing. But the plaintiff, the defendant in error here, recovered \$2,800 damages for the difference between the highest market value this corn reached during the period of detention and its market value on the day it was released from the levy. The defendant offered to show that within 30 days after it was released, and while it was still held by the plaintiff, its market value was as great as it was at any time during the detention, and this evidence was rejected. Conceding for the purpose of the consideration of this question, but not deciding, that under some circumstances the highest market value of personal property during its detention is the basis for the measure of damages, the question is whether or not, in an action for special damages, consisting of the difference between the highest market value of personal property during its wrongful detention and its market value when returned to the owner, it is competent for the wrongdoer to show that after the property was returned to the plaintiff, and before he commenced his action, its market value was as great and its sale as feasible as at any time during the detention.

Compensation is the standard for the measure of damages. *Rockefeller v. Merritt*, 76 Fed. 909, 917, 22 C. C. A. 608, 616, 40 U. S. App. 666, 679. With the exception of those rare cases in which punitive damages may be recovered, of which the case at bar is not one, a defendant is never liable to pay more than the actual loss which he has inflicted upon the plaintiff by his wrong. Nor is the plaintiff permitted to exaggerate, increase, or speculate on his loss so as to in-

inflict a penalty upon the defendant. He is as much bound to protect the latter against inconsequential and unnecessary damages as the defendant is to pay to the plaintiff his actual loss. In the case before us the plaintiff has recovered damages to the amount of \$2,800 and interest, amounting in the aggregate to \$3,447.73, because the defendant kept the levy of a writ of attachment against the plaintiff for \$517.50 on 23,000 bushels of corn in the crib, worth about \$11,000, from October 4, 1894, until December 6, 1894; and the highest selling price of the corn during this period was \$2,800 more than it was on December 6th, when the attachment was released. The defendant is not charged with maliciously inflicting the injury. The writ of attachment is not claimed to have been unadvisedly issued, and the only complaint is that the levy under it was excessive. Why should the defendant pay such large damages, if, as she offered to prove, the plaintiff's corn was worth as much within 30 days after the levy was released as at any time during its detention under it? If the plaintiff had sold the corn on December 6, 1894, and had thereby sustained an actual loss of the difference between the value of the corn in November and its value on that day, there would have been more plausibility in his claim that the detention entailed the loss of this large amount of money upon him. But he did not do so. He held the corn until August or September, 1895. He did not commence this action until April, 1895, after the corn had advanced in price and value to the highest market price it attained at any time while the levy was upon it. The levy upon and detention of the corn was not the cause of the fluctuation in its price or value. It had no greater effect, in any event, than to prevent the plaintiff from accepting a favorable opportunity to sell it at the high price which ruled in November, 1894. The corn was returned to him uninjured, and after its return, and while he still held it, he had another opportunity to sell it at a price as high and on terms as favorable as were presented during the detention. How could it be said that he suffered any actual loss, except possibly the interest on the money from the date of the first to the date of the second opportunity to sell at the price desired? He certainly could not legally charge the defendant with anything more than the loss which the detention entailed upon him. He could not legally charge her with the loss which he would have sustained if he had sold the corn on December 6, 1894, because, in view of the fact that he held until the price advanced, that was not an actual loss. Nor could he retain his property, and speculate upon the defendant's liability. When the corn again reached the highest market value it attained during the detention, and remained there for more than four months, he could not refuse to accept the opportunity to sell it thus offered, keep the corn in his possession, and then charge the defendant with the loss he suffered because the price subsequently dropped again to the value on December 6, 1894. During the early months of 1895 he had the corn, and he had the opportunity to save himself from loss, and the defendant from liability. If he failed to embrace this opportunity, he ought not to be permitted to charge the defendant with the consequences of his unfortunate speculation. The reason of the rule which charges the defendant in con-

version with the highest market value which speculative personal property attains between the date of its conversion and a reasonable time to enable the party injured to put himself in statu quo after he receives notice that his property is converted is that during this time the defendant has or may have the property under his control, and the opportunity to realize the highest price for it at his command, while the plaintiff is deprived of this chance. The rule was adopted to prevent the party in possession and control of personal property from speculating with it to the injury of its owner. The reason of this rule pleads as cogently against allowing a plaintiff, who has recovered the possession of his property, and who may sell and deliver it at such price and on such terms as he chooses, to speculate on the liability of the defendant, and to charge him with heavy damages because at the time of its release to him, or at some times thereafter, its market value was low, when for months after its return, and while he still held it, that value was so high that he might have sold it for such a sum as would have relieved him from all loss, and the defendant from all liability. When in the spring of 1895 the market value of this corn rose as high as it was during the detention, the plaintiff had the possession and control of this property, and it was not at the command of the defendant. He had the power to sell and deliver the corn, and the defendant had no opportunity to do so. If he had exercised his power and embraced this opportunity, he would have sustained no substantial loss from the detention, and the defendant would have been relieved from all serious liability. All he lost by the detention, in any event, seems to have been an unembraced opportunity to sell the property at a given price. If within 30 days after its release, and while he still held the property, he had a later opportunity to sell it, equally favorable, he cannot be said to have suffered substantial loss because he was prevented from embracing the earlier one. The evidence that the market value of the corn was as high within 30 days after it was returned to the plaintiff, and while it was still in his control, as it was at any time while it was detained under the levy, was competent and material testimony to reduce the damages which the plaintiff claimed, and it was error to reject it. For this reason the judgment below must be reversed. *Bank v. Rush*, 85 Fed. 539, 543, 29 C. C. A. 333, 337, 56 U. S. App. 556, 564.

The evidence which was produced upon the trial of this case is not embodied in the bill of exceptions, and it is not intended by the views which follow to forestall the consideration by the court below of the evidence which may be presented upon the second trial, or to decide the questions of law which may arise upon that evidence. But, in view of the fact that the case must be tried again, attention is called to the following suggestions: It is difficult to conceive of any state of facts suggested by the amended complaint in this action which would sustain the extraordinary judgment that was rendered on the former trial. This is not an action for conversion. It is a simple action for unlawful detention of corn, and the general rule of damages is the value of the use of the property while it is thus detained. The plaintiff seeks to recover the difference between the highest price which corn reached during the detention and its market

price on the day the levy was released. If on the day the levy was made he had a contract, executed by some responsible party, to buy this corn at the highest price it should attain during the period of detention, and if he was prevented by the levy from performing his part of this contract, and the market value of corn rose during the detention above the price on the day of the release, there would be some show of reason in his claim. But if his claim for this \$2,800 damages rests on the simple facts that the market price of corn was higher during the detention than it was when the levy was released, that he might have sold it if there had been no levy upon it, and that the sheriff held it under this levy of the writ of attachment for \$517.50, we are at a loss to see how that claim can be sustained. The measure of damages based on the highest market value which property attains applies in cases of conversion of stocks of corporations, and like property of a speculative character, which has no fixed market value. Corn does not belong to this class of property. It is an agricultural product, vast in quantity, always for sale, and always having a well-known market value. If this 23,000 bushels upon which the levy was made on October 4, 1894, had been converted to her own use by the defendant on that day, there could have been no question but that the measure of damages would have been its market value at the time and place of conversion. A claim that the owner was entitled to the highest market value it subsequently attained would not have been even plausible. The ordinary rule would have measured the damages. It is not perceived why the customary measure of damages for detention—the value of the use—should not, for the same reason, limit the damages for the detention of this property. There is, indeed, a more cogent reason why the general measure should be applied in the latter case than in the former. The reason of the rule which measures the damages in conversion of speculative personal property by the highest market value is that the defendant has or may have the power to sell and deliver the property at his command when the highest price is attained, that he is thus enabled to take advantage of the opportunity to sell it at the advanced price, while the plaintiff by the conversion is deprived of that opportunity. In the case in hand, however, the defendant, who merely detained the corn under a lawful writ of attachment, had no power to sell or dispose of it,—no chance to realize the highest market value which it reached during the detention,—and, since the reason of the rule fails, the rule itself ought not to apply. There is another reason why the recovery of the extraordinary damages which the plaintiff claims in this action seems impracticable, even if the measure based on the highest market value was applicable. It is that it rests on the claim that the plaintiff was prevented from selling 23,000 bushels of corn in the crib, worth \$11,000, by the mere levy of an attachment for \$517.50. Such a levy could not prevent the sale of a quantity of corn of this great value. The plaintiff could have sold his corn, could have applied the \$517.50 to the payment of the amount claimed under the writ, could have delivered the property, and have received the balance of its proceeds. He could have given a bond for three times the amount of the claim, \$1,552.50, to deliver the property to the sheriff

to satisfy any judgment that might be obtained against it; and in this way he could have released the property from the levy, and have sold and delivered it at will. McClain's Ann. Code Iowa, § 4221; Sargent v. Fuller, 132 Pa. St. 127, 133, 19 Atl. 34; Girard v. Moore (Tex. Civ. App.) 24 S. W. 652; Drew v. Ellis (Tex. Civ. App.) 26 S. W. 95. It may be that a state of facts was proved in the former trial, and will be again, which will sustain the claim for some of the special damages which plaintiff sought, but such a state of facts is certainly not more than suggested by the amended complaint. The judgment below is reversed, and the case is remanded to the circuit court, with directions to grant a new trial.

UNITED STATES v. DEMPSEY.

(Circuit Court, D. Montana. September 28, 1900.)

1. ARMY—PAY OF OFFICERS—RIGHT TO COMMUTATION FOR QUARTERS.

Under section 1480 of the army regulations, which provides that "officers on duty, without troops, at stations where there are no public quarters, are entitled to commutation therefor," any suitable quarters provided by the government for the use of an officer answer the requirement for "public quarters," though not expressly built for army officers; and an officer assigned to duty as an Indian agent, and furnished a suitable building on the reservation for his quarters, without charge, is not entitled to receive commutation for quarters.

2. SAME—OVERPAYMENT OF OFFICER THROUGH MISTAKE OF LAW—RECOVERY.

Where an army paymaster has paid an officer a sum as a commutation allowance through an error of law, the United States is not bound by such payment, and may recover the money so paid in a proper action, with interest from the date when the officer's accounts were settled by the treasury department, at the rate established by the laws of the state in which the action is brought.

Action by the United States to recover an alleged overpayment made to defendant as an army officer through mistake of law.

Wm. B. Rodgers, U. S. Dist. Atty.
Henry N. Blake, for defendant.

KNOWLES, District Judge. This cause has been submitted to the court upon an agreed statement of facts. The defendant, Charles A. Dempsey, at the times mentioned in the complaint herein, was a captain in the regular army of the United States, and was assigned by the president of the United States, in accordance with the power vested in him by a federal statute, to act as Indian agent for the Osage Indians. In pursuance of such assignment, he entered upon and performed the duties of the position as such Indian agent. He claimed from the government of the United States a certain sum as commutation for quarters while performing his official duties, and received from the government, through paymasters in the army, as such, the sum of \$240, at different times between the 13th day of June, 1893, and the 31st day of January, 1894. It is claimed by the government in this action that this money was erroneously paid to the defendant under a mistake of law. The defendant claims that he

was justly entitled to this money under and by virtue of section 1480 of the army regulations, which reads as follows:

"Officers on duty, without troops, at stations where there are no public quarters, are entitled to commutation therefor, which will be paid by the pay department at established rates."

The facts show that the defendant was on duty, without troops, upon the Osage Indian reservation, acting as agent for said Indians. The question arises whether or not, at that station, there were public quarters. If there were none, he was entitled to commutation as pay for the procurement of quarters at the established rates. As used in this regulation, "public quarters" signify quarters provided by the national government for the use of army officers while performing their duties. Has the government provided the defendant such quarters? It is agreed and set forth in the fifth paragraph of the agreed statement of facts:

"That there was provided by the government of the United States, free of charge, for the defendant's occupancy and use and comfort, a building and quarters suitable for the occupancy of an officer of the rank of captain in the regular army of the United States, upon said Osage Indian reservation, which had been erected in the year 1873; which said building and quarters were in the possession of the defendant, as such acting Indian agent, through the whole of the time he was such Indian agent, and was under the control of the government of the United States, and had theretofore and at all times been designated by the government of the United States and used as a residence and quarters for the United States Indian agents and acting Indian agents of said Osage Indian reservation, and was subject to such use during the whole of the time the said defendant acted as Indian agent upon said Indian reservation."

This would seem to answer the question as to whether or not there were public quarters provided by the government at said Indian reservation or agency for army officers acting as Indian agents, or assigned to perform the duties of Indian agents. It is undoubtedly claimed, however, that these quarters so provided for the use of the defendant at said agency were built for the benefit of the Indians exclusively, and with moneys provided by the act of July, 1870, for their benefit, and that the same are not "public quarters." It is to be noted that it is not stated or agreed to that the Indians actually owned these quarters, but only that they were built with moneys which belonged to them, and for their benefit exclusively. It is not stated that they were built under a contract with the Indians, or that they were ever delivered to the Indians, or used and occupied by them. These quarters, it appears, were built upon the Osage Indian reservation. By article 2 of the treaty with the Great and Little Osage Indians, dated June 2, 1825, there was reserved to said tribes, so long as they might choose to occupy the same, a tract of land which embraced the section of country upon which these buildings were erected, and in that clause of said treaty it is provided that upon said reservation the agent for said tribe, and all persons attached to said agency, as also such teachers and instructors as the president might think proper to authorize and permit, should reside and occupy and cultivate, without interruption, such lands as might be necessary for them. This reservation did not abrogate the paramount title of the United States to said reserved lands. The legal title remained in

the government. A right of occupancy was granted to the Indians, subject to the above conditions as to the right of the agent for said tribes and other parties named to reside thereon. It must be acknowledged that this was a peculiar way on the part of the government of the United States to provide for the Indians a compensation for its violation of a solemn treaty compact made with them by making an appropriation for the building of a house upon its lands for the use and occupancy of an Indian agent,—an officer of the United States. This, however, appears to be the fact. It is agreed by the parties herein that the building provided for the occupancy and use of the defendant was a building and quarters suitable for occupancy of an officer of the rank of captain in the regular army of the United States, and the inference would be that it became and was a part of the realty embraced in the Indian reservation, and under these circumstances it was and is the property of the national government. The army regulation above referred to did not contemplate that the quarters furnished should be quarters expressly built by the government for army officers, and devoted exclusively to that purpose. Any suitable quarters provided by the national government, in any way, ought to meet the demands and requirements of the regulation above referred too. I have come to the conclusion, therefore, that the government did provide for the defendant "public quarters" on the Osage Indian reservation.

The next question is, the money having been paid over to and received by the defendant by reason of an erroneous construction of the law, can the same be recovered from the defendant by the government in this suit? The paymaster who paid the defendant the above sum of money could go no further in this matter than he was authorized by law. The law limited his powers. He could bind the government only to the extent authorized by law. The government was not bound when he exceeded the authority given him by the federal statutes. The money paid to the defendant was the money of the government, and, as stated above, the government having provided the defendant with suitable quarters, free of charge, the paymaster was not authorized to pay him this money. That belonged to the government. Under such circumstances the following decisions maintain the rule that the government may sue for and can recover back this sum of money so paid: *McElrath v. U. S.*, 102 U. S. 441, 26 L. Ed. 189; *Wisconsin Cent. R. Co. v. U. S.*, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399.

Interest is demanded in this case on the amount found due from February 1, 1894, till paid. I hold, however, that the rule is that where money has been paid to another by mistake, unaccompanied by fraud, interest should not be allowed on the same until a settlement has been made between the parties. The second auditor of the treasury is authorized by the statutes of the United States to settle the accounts of army officers. In this case it is admitted that a settlement was made by the proper officer on the 17th day of November, 1897. The statutes of Montana provide that after the settlement of any account interest shall be allowed thereon at the rate of 8 per cent. per annum. In the case of *Goddard v. Foster*, 17 Wall. 124, 21 L. Ed.

589, it is held that in a case like this the law of the state should control. The government, therefore, is entitled to interest on the above sum of \$240 at the rate of 8 per cent. per annum from the 17th day of November, 1897, the date of the settlement of the said account. It is therefore ordered that the plaintiff recover judgment against the defendant for the sum of \$294.94, together with costs to be taxed.

STAVER CARRIAGE CO. v. PARK STEEL CO.

(Circuit Court of Appeals, Seventh Circuit. October 12, 1900.)

No. 681.

1. SALES—CONSTRUCTION OF CONTRACT—BREACH.

A contract to furnish "all the tire steel * * * which will be used in buyer's works prior to September 1, 1899, not to exceed 14,000 sets, nor to be less than 10,000 sets," to be specified by the buyer for shipment, "all not later than 15 days before the expiration of this contract," is one in which the quantity of tire steel which the seller is bound to furnish and the buyer to take is measured by the quantity reasonably required for use in the buyer's works up to the date named, within the amounts specified; and a breach of the contract cannot be predicated on the failure of the seller to furnish steel ordered for shipment beyond the 10,000 sets, and up to 14,000 sets, unless it is further shown that such material was actually needed for use in the buyer's works prior to September 1, 1899.

2. PLEADING—SUFFICIENCY OF DECLARATION—ALLEGATION OF BREACH OF CONTRACT.

An allegation, in a declaration for breach of a contract by which defendant obligated itself to furnish all the tire steel used in plaintiff's works prior to a time stated, that defendant failed and refused to furnish steel "ordered from and specified to the defendant in accordance with the terms of said contract, * * * to be furnished by the defendant to the plaintiff to be used in its works * * * in accordance with the terms of said contract," is insufficient as an allegation that the steel ordered was required for use in plaintiff's works prior to the time fixed by the contract, which allegation is essential to the statement of a cause of action.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The plaintiff in error, Staver Carriage Company, sued in assumpsit to recover damages for alleged breach of a contract for the sale of tire steel. The court below sustained a demurrer to the declaration as amended, and the plaintiff elected to stand by its pleading, whereupon judgment was entered against it, and writ of error issued.

The declaration sets up the making by Park, Bro. & Co., Limited, a joint-stock company, at Pittsburg, Pa., of the following contract in writing:

"Pittsburg, Pa., August 4th, 1898.

"Memorandum of Sale Made by Park, Brother & Co., Limited.

"To Staver Carriage Co., of Chicago, Ill., all the tire steel of good and suitable quality which will be used in buyer's works prior to September 1, 1899, not to exceed 14,000 sets, nor to be less than 10,000 sets, at the following price and terms:

Grade.	Price per 100 Pounds.
Round edge tire steel, 3-4x3-16,	\$1.15.
and heavier	Terms: Cash, fifteen days from date
	of each invoice, less 2 discount.

"Deliveries f. o. b. Pittsburg, less car-load rate of freight to Auburn Park, Ill. No freight allowed on shipments of less than 300 pounds. To be specified: For car-load shipments, and in reasonable time for seller to make required deliveries, but all not later than 15 days before the expiration of this contract. Any steel proving defective when used for the purpose specified will be replaced, but no claim for labor or damage will be allowed. In case any shipment of steel proves unsuitable, it is understood that the buyer will immediately discontinue its use and advise the sellers of the fact, that the sellers may have an opportunity of deciding what shall be done under the circumstances, so that possible loss or damage to either party shall be prevented. Serious fires, strikes, differences with workmen, accidents to machinery, or other causes unavoidable or beyond seller's control, shall excuse any delay in filling orders caused thereby. There are no understandings or agreements relative to this contract that are not fully expressed herein, and no changes will be made in this contract unless reduced to writing and signed by both parties. The title to goods delivered under this contract to remain in the sellers until they shall have received the money for the same, and upon failure to make such payment the sellers may repossess themselves and take away said goods. To render this contract binding upon sellers, it must be signed by one or more of their officers, and its acceptance by any salesman or agent is subject to their approval.

"Accepted.

"Staver Carriage Co.,

"Per W. N. Abbott, Supt.

Accepted.

Park, Brother & Co., Limited.

W. G. Park, Chairman.

"Jas. H. Park, Manager.

"Signed in duplicate."

—And further avers as follows: "That during the term of said contract, and on or about the 1st day of March, A. D. 1899, the said Park, Bro. & Co., Limited, assigned and conveyed its property, assets, and business to the defendant, in consideration whereof the defendant then and there assumed the performance of the contract aforesaid to be performed on the part of Park, Bro. & Co., Limited, along with other liabilities, and then and there promised and agreed to perform the same in so far as the same remained at that time unperformed by the said Park, Bro. & Co., Limited. That, since said defendant so assumed the performance of said contract, it has only partially performed the same, and has failed and refused to perform the same, in this: That on, to wit, the 6th day of July, A. D. 1899, within a reasonable time to enable defendant to ship the same, and more than fifteen days prior to the expiration of said contract, the plaintiff ordered from and specified to the defendant, in accordance with the terms of said contract, one hundred and thirty-four thousand six hundred pounds of tire steel, of good and suitable quality, part and parcel of the steel mentioned and described in said contract, to be furnished by the defendant to the plaintiff to be used in its works at Auburn Park, Illinois, in accordance with the term of said contract, as follows: [Specifying 3,400 sets, of various descriptions.] All and every of which said tire steel so ordered and specified as aforesaid the defendant failed and refused to ship and deliver to the plaintiff for use as aforesaid, although the amount thereof, together with the amount previously furnished by Park, Bro. & Co., Limited, and the defendant, under said contract, did not exceed fourteen thousand sets, and although the plaintiff had fully performed said contract on its part to be performed, and had promptly paid, in accordance with the terms of said contract, the purchase price of all tire steel delivered, at the contract price, by reason whereof an action has accrued to the plaintiff to demand of and from the defendant the damages suffered by it for failure to furnish and deliver said tire steel as provided by said contract, which said damages the plaintiff avers amount to the sum of two thousand and nineteen hundred dollars (\$2,019). Nevertheless the said defendant has not paid the same or any part thereof to the plaintiff, though often requested, but so to do has hitherto refused, and still does refuse, to the damage of the plaintiff of three thousand dollars (\$3,000.00), and therefore it brings its suit," etc.

The demurrer states the general ground of insufficiency, and, for special cause, "that it does not appear from said amended declaration that the 134,600 pounds of tire steel alleged to have been ordered July 6, 1899, were to be used or could have been used in plaintiff's works prior to September 1, 1899."

Almon W. Bulkley, for plaintiff in error.
Harrison Musgrave, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after making the foregoing statement, delivered the opinion of the court.

The briefs and arguments have been addressed to the single question of pleading,—whether breach of the contract in suit is well averred in the declaration. The covenant is for sale and delivery of “all the tire steel of good and suitable quality which will be used in buyer’s works prior to September 1, 1899, not to exceed 14,000 sets, nor to be less than 10,000 sets,” to be specified by the buyer “for car-load shipments, and in reasonable time for seller to make required deliveries, but all not later than fifteen days before the expiration of this contract.” The contract thus stated is of the class upheld and well defined in *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427, 434, as one by which the seller was to furnish, and the buyer was to take, the entire supply of tire steel to be used in the buyer’s works up to the date and within the amounts specified; “that is, such a quantity, in view of the situation and business [of the buyer], as was reasonably required and necessary in its manufacturing business.” See, also, *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 94, 43 N. E. 774, 31 L. R. A. 529. However the minimum amount specified, of 10,000 sets, may govern, breach of the contract cannot be predicated alone on the failure to furnish the material beyond that amount, and up to 14,000 sets, because of the further limitation in its terms of the actual need of a supply for the use of the works prior to September 1, 1899. Whether the covenant is set out either in *hæc verba* or according to its legal effect, the rule is elementary that the breach must be assigned with certainty in the declaration. It is generally sufficient, when the terms are clear, in assigning the breach to follow and negative the words of the covenant, but the terms must then be embraced to their full extent; and, when the general assignment of a breach in the words of the covenant does not necessarily imply that the covenant has been broken, the breach must be specially assigned. 4 Enc. Pl. & Prac. 939, 940; *Marston v. Hobbs*, 2 Mass. 433, 436; *Karthaus v. Owings*, 2 Gill & J. 430, 441. And, when the obligation to perform the contract depends upon an event which does not otherwise appear from the declaration to have occurred, an averment of such event is essential to a statement of the cause of action. 1 Chit. Pl. (16th Am. Ed.) 329; *Harrison v. Vreeland*, 38 N. J. Law, 366, 369; *Gwillim v. Daniell*, 2 Crompt. M. & R. 61. Tested by these rules, it is manifest that a breach is not well assigned in this declaration. There is no averment of the fact that the tire steel as ordered was needed for the use of the works within the term specified by the contract. The statement that it was “ordered from and specified to the defendant in accordance with the terms of said contract, * * * to be furnished by the defendant to the plaintiff to be used in its works at Auburn Park, Illinois, in accordance with the terms of said contract,” does not meet the requirement, as it avers only the

making and terms of the order, and not that the fact or condition existed on which the tire steel was to be furnished under the contract; and in any view the statement is not limited, in the words of the contract, to "be used in buyer's works prior to September 1, 1899." The declaration is manifestly framed upon the theory advanced by counsel in its support,—that the purchaser was entitled to the maximum amount mentioned in the contract, without regard to this qualifying clause,—a theory which we deem untenable, as above indicated. The doctrine applicable in such case is well stated by Lord Abinger, in accord with our view, in *Gwillim v. Daniell*, 2 Crompt. M. & R. 61, approved in *Brawley v. U. S.*, 96 U. S. 168, 172, 24 L. Ed. 622. The demurrer was special, pointing out this defect in the declaration, which was easily curable by amendment if the state of facts warranted such course. The ruling of the circuit court thereupon was correct, and the judgment is affirmed.

WOOD v. BROWN.

BROWN v. WOOD.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

Nos. 1,330, 1,331.

1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY.

If the obligee in a bond obtains control of money or property of the principal therein, which he may lawfully apply to the discharge of that principal's obligation to him, and to which he is not otherwise entitled, and then voluntarily surrenders or releases the money or property, so that the surety loses the benefit of the security it furnishes, the latter is discharged from liability on the bond to the extent of the value of the money or property thus surrendered.

2. SAME.

But the release by an obligee in a bond for the payment of a decree of a levy upon real estate in Colorado of an execution issued upon a decree whose record constituted a lien upon the property before the writ was issued, and after the release of the levy, will not discharge a surety on the bond, because it does not affect the lien of the obligee nor diminish the security of the surety.

3. APPEAL AND ERROR—BREACH OF APPEAL BOND—DAMAGES.

The measure of damages for the breach of the condition of a bond to "answer all damages and costs," which works a supersedeas under Rev. St. §§ 1000, 1010, 1012, in a writ of error to reverse a personal judgment for money, or in an appeal from a decree which directs the payment of money from the appellant to the appellee, is the amount due to the obligee by the terms of the judgment or decree, just damages for delay, and costs.

4. SAME.

The measure of damages for the breach of the condition of a bond to "answer all damages and costs," which is made to work a supersedeas under Rev. St. §§ 1000, 1007, 1012, in an appeal from an order directing the issue of an execution under a decree in chancery for the payment of money, is the same as for the breach of the condition of such a bond in an appeal from the decree. It is the amount due to the obligee under the decree, just damages for delay, and costs.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

Henry T. Rogers, Lucius M. Cuthbert, and Daniel B. Ellis, for James O. Wood.

J. M. Downing, C. S. Thomas, W. H. Bryant, and H. H. Lee, for David R. C. Brown.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Each party to this action has sued out a writ and made many specifications of error, but they present but two questions. The obligee in a bond filed to work a supersedeas of an order to issue an execution upon a decree in chancery attacks the judgment in his favor thereon because it is limited to interest on the amount due him under the decree from the time the order was made until it was affirmed, while he claims it should have covered the entire amount due him under the decree. The surety on the bond assails the judgment against him on the ground that the court erroneously held that he was not discharged by the subsequent levy of a writ of execution upon real estate of one or more of the defendants in the decree, and the release of that levy without a sale. These are the facts which present these issues: On July 16, 1894, a decree was rendered in the United States circuit court for the district of Colorado to the effect that Margaret Billings, James O. Wood, Thomas E. Wood, Hiram H. Wood, and William Wood, as heirs of William J. Wood, should recover of Jerome B. Wheeler and the Aspen Mining & Smelting Company a certain amount of money and interest from that date; that Wheeler and the mining company should pay this amount in 30 days; that in default of such payment execution therefor should issue in the ordinary form, and that the sum so recovered should be divided among the heirs of William J. Wood, named, according to the provisions of the statutes of descent of the state of Colorado. On August 27, 1894, a transcript of this decree was filed for record with the clerk and recorder of the county of Pitkin, in the state of Colorado, and thereby became a lien upon the real estate of the defendants situated in that county. On February 27, 1897, the circuit court, on the application of the plaintiff James O. Wood, ordered its clerk to issue an execution to the marshal of the district of Colorado commanding him to satisfy and discharge the decree, so far as the rights of James O. Wood were concerned, out of the property, goods, chattels, and effects of Jerome B. Wheeler and the Aspen Mining & Smelting Company. Thereupon the Aspen Mining & Smelting Company filed a bond, executed by itself as principal and by David R. C. Brown and Benjamin Ferris as sureties, whereby they bound themselves to the plaintiff James O. Wood in the sum of \$15,000 upon the condition "that, if the said the Aspen Mining & Smelting Company shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue"; and prayed that an appeal to this court from the order of February 27, 1897, might be allowed to it, and that its appeal might be made

to operate as a supersedeas upon the approval of this bond. The court approved the bond, allowed the appeal, and ordered it to work a supersedeas. The mining company failed to prosecute its appeal to effect, and on December 13, 1897, the order from which the appeal was taken was affirmed by this court. When this appeal was taken, there was due to James O. Wood under the decree \$8,847.03, and interest thereon from July 16, 1894, at 8 per cent. per annum. James O. Wood, the plaintiff, brought this action against David R. C. Brown, the defendant, and one of the sureties on the appeal bond, and claimed to recover the amount which was due him under the decree at the time the appeal was taken, interest, and costs. The only defense interposed to this action was that Wood had caused an execution to be issued under the decree of July 30, 1896, and the subsequent order of the court, had caused the marshal to levy this writ on property of one or both of the defendants named in the decree which was situated in Pitkin county, Colo., and had thereafter caused this levy to be released without a sale; and that William Wood, another of the complainants named in the decree, had caused a like writ to be issued for the amount due him thereunder, had levied it upon the same real estate, had caused a sale of this property to be made to himself under the execution, and the circuit court had refused to direct any portion of the proceeds of this sale to be paid to James O. Wood. The facts stated in this defense are substantially established, and upon the conclusion of the evidence the court instructed the jury that the plaintiff was entitled to recover of the surety, Brown, the interest on the amount due him under the decree from February 27, 1897, when the appeal was made a supersedeas, to February 14, 1898, when the mandate of the court of appeals affirming the order to issue the execution was filed in the circuit court, and, in addition, the costs in the appellate court, and interest thereon. There was a verdict and judgment accordingly, and this is the judgment which the writs of error seek to review.

The first question to be considered is whether or not the surety on this bond was discharged by the release of the levy of the writ of execution upon the real estate of the defendants named in the decree situated in Pitkin county. It may be conceded that if the obligee in a bond obtains control of money or property of the principal to which he is not otherwise entitled, and which he may lawfully apply to the discharge of the principal's obligation to him, and then voluntarily surrenders or releases it, so that the surety loses the benefit of the security which it furnishes, the latter is discharged from liability on the bond to the extent of the value of the property thus surrendered. *Brandt*, Sur. § 434; *Thomas v. Wason*, 8 Colo. App. 452, 46 Pac. 1079. But this principle has no application to the facts of this case. The only property upon which the execution of James O. Wood was ever levied was real estate of one or both of the defendants named in the decree, situated in Pitkin county, Colo. That levy was made and discharged in the year 1899. Under the laws of Colorado the lien of a judgment or decree may be fastened upon the real estate of the defendants therein by its record. In the case at bar the lien of this decree was fastened upon the lands of Wheeler and the mining

company by the filing of a transcript in the county of Pitkin in August, 1896, and the subsequent levy and release of the levy of the execution thereon neither strengthened nor impaired that lien. *Mills' Ann. St. Colo.* §§ 2529-2531, 4185 (5); *Schofield v. Coke Co.*, 92 Fed. 269, 271, 34 C. C. A. 334, 337; *Stephens v. Clay*, 17 Colo. 489, 491, 30 Pac. 43; *Bank v. Newton*, 13 Colo. 249, 250, 22 Pac. 444. The security of Wood and of the surety, Brown, for the payment of the money due the former under the decree was not, therefore, released or impaired by the levy or by the release of this execution, and hence the surety was not discharged thereby. The levy and release of an execution upon real property which does not discharge or impair the lien of the judgment or decree under which the writ was issued does not release a surety for its payment, because it does not impair his security. *Brandt, Sur.* § 436; *Sasscer v. Young*, 6 Gill & J. 243, 249. Nor does the fact that William Wood, under an execution in his favor, based on the same decree and lien, has caused this real estate to be sold, and has purchased it at the sale under the decree himself, release the surety, Brown, from his obligation upon this bond, or impair or affect the lien of this decree in favor of the plaintiff, James O. Wood. The rights of William Wood and James O. Wood rest upon the same decree and upon the same lien. When the transcript was filed in Pitkin county, it fastened the liens of each for the amounts respectively due them under the decree upon the real estate of the mining company and Wheeler at the same time, and no sale or purchase of either under any process issued under this decree can divest or affect the lien or security of the other. There was no error in the ruling of the court below that neither the plaintiff's release of his levy upon the real estate nor William Wood's sale of it under his execution constituted any defense for the surety, Brown, against this action upon the bond.

Turning to the question of the measure of the damages for the breach of the condition of the bond, we enter upon its consideration from the established proposition that a bond which works a supersedeas, and is conditioned, as required by the Revised Statutes, to "answer all damages and costs" resulting from the allowance of a writ of error to reverse a personal judgment for money, or from an appeal from a decree which directs the payment of money from the appellant to the appellee, entitles the obligee to recover upon its breach not only compensatory damages for the delay arising from the stay of the execution or other process, but also the amount due him by the terms of the judgment or decree. *Rev. St.* §§ 1000, 1007, 1012; rule 29, *Sup. Ct.*; rule 13, *C. C. A.*, 31 *C. C. A. cli.*, 90 Fed. liii.; *Catlett v. Brodie*, 9 *Wheat.* 553, 6 *L. Ed.* 158; *Stafford v. Bank*, 16 *How.* 135, 139, 14 *L. Ed.* 876; *Jerome v. McCarter*, 21 *Wall.* 17, 22 *L. Ed.* 515; *Hotel Co. v. Kountze*, 107 *U. S.* 378, 2 *Sup. Ct.* 911, 27 *L. Ed.* 609; *Rosenstein v. Tarr* (*C. C.*) 51 Fed. 370; *Tarr v. Rosenstein*, 3 *C. C. A.* 466, 53 Fed. 112. Every reason which can be urged in support of the position that the measure of damages for the breach of a bond on an appeal from a decree for the payment of money which works a supersedeas includes the amount due under the decree pleads with equal cogency for the same measure for the breach of a like

bond on a like appeal from an order directing the issue of an execution under such a decree. The two bonds are required by the same statute and by the same rules of court to contain the same condition and to cover the same amount. Rev. St. §§ 1000, 1007, 1012; rule 29, Sup. Ct.; rule 13, U. S. C. C. A. The effect of each bond is the same. The bond on an appeal from a decree which works a supersedeas simply stays the execution or process under the decree until its affirmance. It has no other effect. The bond on an appeal from an order to issue an execution to enforce the decree, which is made to work a supersedeas, has the same effect. It stays the execution as completely until the order is affirmed. Since the two bonds contain the same condition, are issued under the same statutes and rules, and have the same effect, the damages resulting from their breach must be determined by the same standard. The decree of July 30, 1896, upon which the order to issue the execution from which the appeal was taken was based, adjudged that the complainants in that suit should recover the amount of money there specified from the defendants in that decree, the mining company and Jerome B. Wheeler; that the latter should pay that amount within 30 days, and that in default of payment thereof execution should issue therefor in the ordinary form. If the mining company had taken an appeal from that decree, and had given a bond with the same condition as that contained in the bond in suit, and had obtained an order making it a supersedeas, the damages for its breach would have been the amount due under the decree, just damages for the delay, and the costs. The only effect of that supersedeas would have been to stay the execution under the decree pending the appeal. The supersedeas obtained by filing the bond in suit in the appeal from the order directing the execution to issue upon this decree was procured for this very purpose, and had exactly this effect. It stayed the execution until the order was affirmed. The damages which the obligee is entitled to recover for its breach must, therefore, be the same. The measure of damages for the breach of the condition of a bond to prosecute an appeal to effect and to answer all damages and costs, which is made to work a supersedeas of an order directing the issue of an execution on a decree for the payment of money, is the same as for the breach of such a bond in an appeal from the decree itself. It is the amount due to the appellee under the decree, compensatory damages for the delay, and costs.

The judgment must be reversed, and the case must be remanded to the court below, with directions to enter judgment for the plaintiff James O. Wood and against the defendant David R. C. Brown for the amount which they have agreed by their written stipulation in this record is due to him under the decree, \$8,847.03, and interest thereon at 8 per cent. per annum from July 16, 1894; and also for \$20 costs of this court on the appeal from the order to issue the execution, and interest thereon at 8 per cent. per annum from December 13, 1897, and for the costs in this suit. It is so ordered.

PLUMMER et al. v. HILLSIDE COAL & IRON CO. et al.

(Circuit Court of Appeals, Third Circuit. June 13, 1900.)

No. 24.

1. MINES AND MINERALS—CONVEYANCE OF MINERAL—SEVERANCE FROM SURFACE.

By an instrument under seal, duly acknowledged and recorded, an owner of land leased the same for a term of 100 years for a fixed price, to be presently paid, and an annual rental of one dollar, the lease being conditioned as follows: "It being, however, clearly understood that the possession which the said Thomas [lessee] acquires under this lease shall extend only to the use of the leased premises as a coal field; that is to say, the said Thomas shall have full right, power, and possession to search for coal anywhere on the leased premises, in any manner he may think proper, to raise the coal when found from the beds, at all times to enter and carry away the coal, * * * and to sell the same for his own benefit and profit. * * * These rights and privileges shall extend to the heirs * * * and assigns of the said Thomas during the term aforesaid." The instrument further reserved the right to the lessor and his heirs, so long as they resided on the leased premises, to dig whatever coal they might want for their own use, "but not to sell, so as to interfere with the works of said lessee." *Held*, that such instrument was a present demise, and, though in terms a lease, operated not only to work a severance of the surface of the land from the underlying coal, but as a sale of the coal with the right of removal within 100 years, and that after such severance the continued occupation of the surface of the land by the lessor and those claiming under him did not create title in them to the coal by adverse possession or by limitation.

2. SAME—CONSTRUCTION—OPERATION OF CONVEYANCE.

The title to the underlying coal having passed by such instrument to the lessee, the possession was thereafter referable to such title, which could only be extinguished by actual adverse possession distinct from possession of the surface. The failure of the lessee to enter and mine the coal for any length of time short of the 100 years would not affect his title, nor would it be forfeited to the lessor by a failure to pay the annual rental for a number of years, in the absence of any provision for such forfeiture in the lease.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

S. B. Price, for plaintiffs in error.

E. N. Willard, for defendants in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. This case is here on a writ of error to the circuit court for the Western district of Pennsylvania. The plaintiffs in error, plaintiffs below, brought an action of ejectment against the defendants in error, to recover six-sevenths of the coal underlying about 145 acres of land in the borough of Blakely in Lackawanna county, Pennsylvania. The defendants having pleaded the general issue, the case went to trial and a verdict was by instruction of the court returned for the defendants on which judgment was duly rendered. The assignments in error are numerous and it is unnecessary to consider them seriatim. Both parties claim title through one Samuel Callender, and the plaintiffs also assert title by virtue of alleged adverse possession, abandonment and forfeiture.

Callender died intestate in 1851 leaving as his heirs seven children, six of whom in 1881 conveyed whatever interest they may have had in the coal in controversy to Edward E. Cannon, whose alleged title is claimed to be vested in Emma A. Plummer, one of the plaintiffs. This case does not relate to the title to the surface of the land described in the writ of ejectment, but to the title to the coal underlying that land. Callender and Thomas Meredith executed an instrument in writing under seal dated October 1, 1828, relating to the mining of coal underlying the whole or a portion of the land described in the writ. It was as follows:

"This agreement made the 1st day of October, A. D. 1828, between Samuel Callender, Jr., of the Township of Blakely, in the County of Luzerne and State of Pennsylvania, of the one part, and Thomas Meredith, of Belmont, in the County of Wayne and State aforesaid, of the other part, witnesseth: That the said Samuel doth lease and to farm let unto the said Thomas all the land that he now holds or is possessed of either by deed, article of agreement or by any other title in said Township of Blakely, County and State aforesaid, except one hundred acres of land which the said Samuel purchased of William Woodbridge by article of agreement, about one hundred acres. The said land leased to the said Thomas contains one hundred and thirty acres or thereabouts, and the lease is to continue for one hundred years from this day. It being, however, clearly understood that the possession which the said Thomas acquires under this lease shall extend only to the use of the leased premises as a coal field, that is to say, the said Thomas shall have full right, power and possession to search for coal anywhere on the leased premises in any manner he may think proper, to raise the coal when found from the beds, at all times to enter and carry away the coal in wagons, sleds or other vehicles, and to sell the same for his own benefit and profit. And also that he shall have the right to occupy whatever land may be useful or necessary as coal yards; these rights and privileges shall extend to the heirs, executors, administrators and assigns of the said Thomas during the term aforesaid, and also to his and their agents, engineers, laborers and workmen. It is also understood that in case it shall be either useful or necessary to make roads of any description through the leased premises for the purpose of transporting the coal to market it may be done, taking care to do the least possible damage to the land or the improvements, and in case it may become necessary for securing the full enjoyment of the premises aforesaid, as a coal field as aforesaid, then the said Samuel covenants and agrees to execute such further writings as counsel learned in the law may deem proper at the expense of the said Thomas, his executors, administrators or assigns. And the said Thomas, for himself, his heirs, executors, administrators and assigns covenants, promises and agrees to pay to the said Samuel on the 1st day of August next the sum of two hundred dollars in manner following: So much money as may remain due for principal and interest on a contract for land entered into by the said Samuel with the heirs of Samuel Meredith, deceased, on which he now resides in said Township of Blakely, the residue in cash and also an annual rent of one dollar payable on the 1st day of October in each and every year. And in case the coal on the leased premises shall prove extensive and abundant and of an average thickness of ten feet, then the said Thomas on these facts being satisfactorily proved, agrees to pay to the said Samuel the further sum of one hundred dollars. It is also agreed that the said Samuel or his heirs, so long as they reside on the leased premises, shall have a right to dig whatever coal they may want for their own use, but not to sell so as to interfere with the works of said lessees. Provided always, nevertheless, that the said Thomas, his heirs, executors or administrators, by endorsing forty dollars on the contract aforesaid, made by the said Samuel with the heirs of Samuel Meredith, deceased, at any time previous to the 1st day of August next, shall have full right and authority to declare this agreement and lease absolutely null and void anything in this instrument of writing to the contrary notwithstanding. For the true and faith-

ful performance of the covenants in this agreement and lease the parties within named bind themselves, their heirs and administrators, each to the other firmly by these presents. Witness our hands and seals," etc.

The above instrument was duly acknowledged and recorded. It was not disputed at the trial that the land acquired by Callender from William Woodbridge was not in whole or in part included in the land described in the writ. It was admitted on both sides that the land on which the coal in controversy is located was part of a larger tract for which Edward London took out a warrant dated January 27, 1804, under which an official survey was made September 8, 1804, and returned to the land office March 1, 1808. The plaintiffs claim that at the time of the execution of the above quoted lease Callender was not the owner of all the land described in the writ; that from twenty to twenty-five acres thereof were not acquired by him until afterwards and therefore were not subject to the provisions of the lease. The defendants on the other hand contended that Callender was at the time of the execution of the lease the owner of all the land described in the writ. There was evidence on both sides of this question. It appeared that Callender took title to the whole or a portion of the land so described from Isaac London, a son of Edward London, then deceased, prior to the execution of the lease. Isaac London and his wife executed February 14, 1840, to Callender a deed duly acknowledged purporting to convey to him land including the same tract mentioned in the writ. This deed contained the following recital:

"It being part of a tract of land claimed by Edward London, deceased, and becoming the property of the said Isaac London of the first part by heirship, and surveyed to the party of the second part in the year of our Lord 1819 and possession given and deed made out and burned before recording by accident."

There was uncontradicted evidence that the original deed from Isaac London to Callender was burned in Callender's house which was destroyed by fire in or about 1830. There was also uncontradicted evidence that the deed of February 14, 1840, was written under the dictation of Callender. Isaac London executed a lease under seal bearing date October 1, 1828, to Meredith for the term of one hundred years from that date, the general provisions of which were similar to those contained in the above mentioned lease from Callender to Meredith bearing the same date. This lease from London to Meredith included all the coal in any land that London then held or was possessed of by deed, article of agreement or by any other title in Blakely township, being about two hundred and thirty acres. This lease was duly acknowledged and recorded. The tenth assignment of error is based on the refusal of the court to instruct the jury as follows:

"If the jury believe the testimony of Stephen Callender that his father obtained possession of the northwesterly part of the Dolph lot in 1833, and the Dolphs occupied or used the lot prior to that time from about 1820, and that the coal under said lot was not leased or sold to Thomas Meredith by either Isaac London or Samuel Callender; they may render a verdict in favor of the plaintiffs for said twenty or twenty-five acres northeast of the Cadwalader line."

In view of the above quoted recital in the deed of February 14, 1840, from Isaac London and wife to Callender under whom the plaintiffs claim and of the circumstances attending its preparation and execution, and of the character of the evidence, we think the court was justified in refusing to charge as requested. The twelfth assignment is based on the admission in evidence of the lease from London to Meredith of October 1, 1828. This assignment clearly cannot be sustained. The lease either did or did not include the coal underlying a portion of the land described in the writ. If it did, it was properly admitted. If it did not, its admission was at most harmless error. The case before us largely turns on the effect of the lease of Callender to Meredith of October 1, 1828. It appeared from the evidence that all the rights which Meredith acquired from Callender under that lease, save in so far as they may have been affected by the considerations presently to be noticed, passed to and became vested in the defendants prior to the commencement of this suit. The lease was for the term of one hundred years in consideration, inter alia, of the payment of the sum of two hundred dollars, an annual rent of one dollar payable October 1st in each and every year, and the further sum of one hundred dollars "in case the coal on the leased premises shall prove extensive and abundant and of an average thickness of ten feet." The more material of the remaining stipulations in the lease are as follows:

"It being, however, clearly understood that the possession which the said Thomas acquires under this lease shall extend only to the use of the leased premises as a coal field, that is to say, the said Thomas shall have full right, power and possession to search for coal anywhere on the leased premises in any manner he may think proper, to raise the coal when found from the beds, at all times to enter and carry away the coal in wagons, sleds or other vehicles, and to sell the same for his own benefit and profit, and also that he shall have the right to occupy whatever land may be useful or necessary as coal yards; these rights and privileges shall extend to the heirs, executors, administrators and assigns of the said Thomas during the term aforesaid and also to his and their agents, engineers, laborers and workmen. * * * It is also agreed that the said Samuel or his heirs, so long as they reside on the leased premises, shall have a right to dig whatever coal they may want for their own use, but not to sell so to interfere with the works of said lessees."

The lease contains words of present demise. It is not executory, as claimed by the plaintiffs. It operated not only to work a severance of the surface of the land from the underlying coal, but as a sale of coal with the right of removal within one hundred years. After such severance the continued occupation of the surface of the land by Callender and those claiming under him did not create title in them to the coal by adverse possession or the statute of limitations. In *Plummer v. Iron Co.*, 160 Pa. St. 483, 28 Atl. 853, the lease from Callender to Meredith of October 1, 1828, was under consideration. The court said:

"This instrument contemplates a sale of the coal under the leased premises at a fixed price, to be increased one hundred dollars if the quantity of coal reach the proportions described in it. The right of removal was to be exercised within one hundred years. The fact that the instrument is in the form of a lease is not material when the character of the transaction is apparent. * * * A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance

of the title to the coal or ore in fee. * * * Such a conveyance operates to sever the surface from the underlying stratum of coal; and after such severance the continued occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate, and will not give title under the statute of limitations."

In *Kingsley v. Iron Co.*, 144 Pa. St. 613, 23 Atl. 250, the lease from London to Meredith of October 1, 1828, was considered and the same doctrine was laid down, the court, among other things, saying:

"Where a fair interpretation of the written agreement shows that a sale was intended by the parties, and a right to mine and remove all the coal is conferred by it, in express terms or by plain and necessary implication, it will constitute a sale, notwithstanding a term is created within which the coal is to be taken out. We hold that the writings in this case constitute a sale of the coal to be mined within the term stated therein."

In *Plummer v. Iron Co.*, *supra*, the court, referring to the severance of the surface of land from the underlying coal, said:

"After such a severance, the possession of the holder of each estate is referable to his title. The owner of the surface can no more extend the effect of his possession of his own estate downward, than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface under the statute of limitations. The owner of the surface can be affected only by the invasion of the surface. The owner of the underlying stratum is not bound to take notice of the invasion of the estates that do not belong to him; but when his own estate is invaded he is bound to take notice. The conclusion thus reached disposes of the title by possession set up by the plaintiffs, and of their right to recover in this case."

And in *Armstrong v. Caldwell*, 53 Pa. St. 284, the court said:

"The owner of the surface can acquire title against the owner of the minerals underneath by no acts, or continuous series of acts, that would not give title to a stranger. If the owner of a coal mine is not in actual possession, and the owner of the surface, or any other person digs pits or drives adits into the minerals and carries on mining operations there continuously for the statutory period, adversely to the right of any other, he may acquire a right. In such a case he takes actual possession of the entire body of minerals in the tract of land."

There is nothing in the case to show that Callender opened and continuously worked the coal underlying the land described in the writ adversely to Meredith and those claiming under him for the statutory period in such manner as to create title by adverse possession. Callender excepted and reserved to himself and his heirs so long as they should reside on the premises "a right to dig whatever coal they may want for their own use, but not to sell so as to interfere with the works of said lessees." Callender and his heirs from time to time exercised this right for their domestic purposes. On one or two occasions this right may have been exceeded, but the evidence wholly fails to show that Callender or his heirs so removed coal from the premises as to acquire title to the coal in place by adverse possession as against Meredith and those claiming under him. The plaintiffs contend that whatever rights Meredith or those claiming under him had were forfeited through non-payment of rent reserved by the lease after October 1, 1849, and of the additional sum of one hundred dollars agreed to be paid "in case the coal on the leased premises shall prove extensive and abundant and of an average thickness of ten feet." In or about 1890 the defendants ascertained that

the amount of such coal satisfied the above requirement. The lease contained no clause authorizing its forfeiture for such non-payment and in the absence of such a provision we cannot hold that a forfeiture occurred. The plaintiffs and those under whom they claim might by a proper remedy have enforced payment of rent in arrear and of the one hundred dollars. But this point is not before us for decision. The plaintiffs further contend that there was evidence tending to show abandonment of the rights of Meredith and those claiming under him which should have been left to the jury, arising not only from the non-payment of rent and the one hundred dollars above mentioned, but from their omission until a short time before the commencement of this action to open and work the coal underlying the lands described in the writ. This contention cannot be sustained. We think the learned judge below was right in holding as matter of law that these facts were insufficient to justify the finding by the jury of abandonment. The rights of Meredith and those claiming under him were not merely inchoate, conditional or contingent. They had a vested right in the underlying coal and an estate therein. That right or estate, save by release or other proper conveyance or by adverse possession, could not be terminated during the term of one hundred years specified in the lease. As was said in *Plummer v. Iron Co.*, supra, "all idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee." The same doctrine was recognized in *Armstrong v. Caldwell*, supra, where the court said:

"Nor does the owner of the minerals lose his right or his possession by any length of non-user. * * * Neglect of the grantee to enter, as we have seen, did not interfere with his right, or raise any presumption against it. Having the title, the possession was presumptively in him, or those holding under him; and the burden was on the plaintiff to show that he, or his father under whom he claimed, had taken and maintained that adverse, continued, notorious and hostile possession which is essential to bar an owner's right. * * * But such possession must be distinct from that of the surface. It is unaided by surface rights or surface occupancy."

This action was not brought to enforce the payment of the rent in arrear and the one hundred dollars; nor is it necessary to determine whether it would lie for that purpose. The plaintiffs declined the tender in July, 1890, of the unpaid rent reserved under the lease from Callender to Meredith as follows:

"July 18, 1890. We decline to accept above tender; the instruments and rights under it having been abandoned, and claim said contract is outlawed. The party of the second part, or Meredith, has not complied with the covenants, express or implied, never took possession or exercised any right thereunder."

It is evident that this action was not brought to enforce any rights under the lease, but was instituted and prosecuted in hostility to rights claimed by the defendants thereunder. Its object is to recover possession of the coal, and not of rent or purchase money. For the reasons above given and without taking up the assignments of error in detail we are satisfied that none of the latter can be sustained.

The judgment of the circuit court is affirmed with costs.

GALE v. CHASE NAT. BANK.

(Circuit Court of Appeals, Second Circuit. July 5, 1900.)

No. 156.

1. BANKS—POWERS OF CASHIER—CERTIFICATION OF CHECK DRAWN BY HIMSELF.

The cashier of a bank has no authority, by virtue of his office, to bind the bank by a certification of his own individual check drawn thereon; and, as in this case he had neither real nor apparent authority, the certification was invalid.

2. PAYMENT—MONEY OBTAINED ILLEGALLY—RECOVERY BY OWNER.

A creditor who receives payment of his debt in money in due course of business, and in good faith, cannot be required to repay the money to one from whom the debtor illegally obtained it.

3. BANKS — POWERS OF CASHIER — DRAFT ISSUED IN PAYMENT OF INDIVIDUAL DEBT.

The cashier of a bank, as such, has no authority to issue cashier's drafts to his own order in payment of his individual debts, and a creditor accepting a draft so drawn takes the risk of such lack of authority.

4. SAME—EVIDENCE TO ESTABLISH IMPLIED AUTHORITY.

To warrant a finding that the cashier of a bank had implied authority to issue cashier's drafts to his own order in payment of his individual debts, such as will bind the bank and protect a creditor in accepting a draft so drawn for a sum so large as to be out of the usual line of conduct in the banking business, a settled course of business must be shown, by which he was permitted, with the acquiescence of the directors, to exercise such authority during a series of years or in numerous transactions; and evidence that he had drawn not exceeding nine drafts in all in payment of his own debts, only four of which were to his own order, and all of which were issued within the preceding six months, is insufficient.

In Error to the Circuit Court of the United States for the Southern District of New York.

E. B. Whitney, for plaintiff in error.

George A. Strong, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Gale, as receiver of the Elmira National Bank, which became insolvent in May, 1893, brought in the circuit court for the Southern district of New York an action at law against the Chase National Bank, a national banking association established in the city of New York, upon the cause hereinafter stated, which action resulted in a verdict of the jury for the defendant. This writ of error was brought by the plaintiff below to review the judgment which was entered upon the verdict. The transaction between the Elmira Bank and the defendant was, as stated in the charge of the presiding judge, as follows:

"Mr. J. J. Bush was the cashier of the Elmira National Bank. He had borrowed money of the Chase National Bank, and given his note for \$25,000, payable at the Chase National Bank, and secured by the stock of the Elmira National Bank. This note had been reduced by payments to \$15,000. On the 4th day of May, 1893, the officers of the Chase National Bank telephoned to Bush that his collateral was unsatisfactory, and asked him to come down and settle the matter up. Mr. Bush came in response to this telephone message on the morning of May 5, 1893, bringing with him \$8,000 in money and a draft of the Elmira Bank on the Quaker City Bank of Philadelphia for \$7,000, which was originally made either to the order of Bush individually or

as cashier. * * * Bush said that with this money and draft he wished to take up his \$15,000 note. Mr. Porter, the vice president of the bank, objected to the \$7,000 draft on Philadelphia, as there was some considerable delay with collections from Philadelphia, something of a panic in the money market, and some uncertainty about collections from Philadelphia banks. He said that, as they wanted to use funds, and Philadelphia funds were not available to pay this loan, which was payable at the Chase National Bank, and therefore payable in New York funds, a different arrangement should be made. Mr. Porter asked Mr. Bush if he had a personal account with the Elmira National Bank, and he said he had. Porter then suggested to him that he (Bush) should put the money to the credit of the Elmira National Bank, and the \$7,000 draft in its collection account, and make a personal draft for \$15,012.50, the amount of the note and interest, on the Elmira Bank, payable at the Chase National Bank, so that it would be in New York funds. Mr. Voorhees, one of the clerks in the Chase National Bank, then brought the form which is ordinarily used in making such a draft; and Mr. Porter made it out, and Bush signed it individually as maker, and certified and accepted it as cashier, and left the \$7,000 draft and the money."

Whether the \$7,000 draft was originally made to the order of Bush as cashier was a matter in dispute. Bush testified that it was so drawn. Porter testified that, when Bush indorsed the draft as cashier, he called Bush's attention to the fact that it was made payable to him individually, whereupon he added "Cashier" to his name as payee. The plaintiff is of opinion that the question, whether or not actually decided by the jury, must be regarded as settled by the verdict in favor of the defendant's version of the transaction. The check for \$15,012.50 was immediately charged to the Elmira Bank, and the currency was credited to it. The \$7,000 Quaker City draft was nominally taken for collection, and was collected and credited to the Elmira Bank on May 8th. The note and collateral were left with the defendant. No notice of the transaction was given by Porter to the Elmira Bank, but the charge of \$15,012.50 appeared on the defendant's account rendered June 6, 1893, to the receiver, who brought the suit to recover that amount. The \$8,000 in currency were embezzled by Bush from the Elmira Bank, and the use of the \$7,000 draft was also an embezzlement. His account with the bank on May 4th was overdrawn. If the transaction rested entirely upon the fact that Porter received this certified check for \$15,012.50 in payment and discharge of Bush's individual debt, there would be no doubt as to the illegal character of the transaction, and of its invalidity as against the Elmira Bank. Porter took in payment of Bush's debt his individual check upon the Elmira Bank, payable at the Chase Bank, which was certified by Bush as cashier; the certification being in violation of section 5208 of the Revised Statutes. The trial judge charged that there was no evidence tending to show that Bush had any real or apparent authority for the certification, or to make the check payable at the office of the defendant. The certification was invalid because it was the certification of the cashier's individual check, given and received for his individual benefit, with no authority either to certify it, or to make it payable elsewhere than at the office of the Elmira Bank. The validity of the certification by the president or cashier of a bank of his individual check was examined by Chief Justice Selden in *Clafin v. Bank*, 25 N. Y. 293,—a well-known case, in which it was held that the acceptance or the certification of the president's indi-

vidual check by the president was void, irrespective of the question whether he had funds in the bank to meet it; for he could not act in regard to the same check in two capacities,—both as drawer and as agent to bind the bank to its payment. While this is true, yet, if Bush had, at the time when this unauthorized and therefore void certification was made, deposited with the defendant an equal amount of his own funds to meet the check, the Elmira Bank, having lost nothing by the transaction, could not recover the amount of the deposit from the defendant. In that case Bush would have deposited \$15,012.50 of his own funds to the credit of the Elmira Bank, and have drawn the same amount to pay his note to the Chase Bank,—a transaction which, while it would have been irregular, would not have injured the Elmira Bank. The real defense is not that the certified check created a liability against the Elmira Bank, or that either the money or the \$7,000 draft was the property of Bush, but that the transaction was, though in form a payment by certified check, actually a payment of the face of the note with the currency and the Quaker City draft, and that the money could not be recovered, although stolen by Bush from the Elmira Bank, because received by the defendant in good faith, and that the amount of the draft could not be recovered, because Bush had implied authority to use cashier's drafts to his own order in payment of his individual debts. The money was, without question, taken by Bush from the vault of the Elmira Bank without authority, and was its property; but if received by the defendant in due course of business, in good faith, and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained. *Stephens v. Board*, 79 N. Y. 187; *Holly v. Society*, 34 C. C. A. 649, 92 Fed. 745.

The remaining question in the case was in regard to the authority of Bush to draw a cashier's draft for \$7,000 upon the Quaker City Bank to his own order in payment of his own individual debt, and thus embezzle the funds of the Elmira Bank. The question turned, not upon an express authority on the part of Bush, but upon an implied authority, which was to be inferred from the alleged acquiescence of the Elmira Bank in his prior assumption of authority. That, in the absence of any authority in a cashier to draw cashier's drafts to his own order in payment of his individual debts, the person who receives such a draft in payment of the cashier's individual debt takes the risk of being obliged to repay the draft to the bank, was not denied. *Bank of New York Nat. Banking Ass'n v. American Dock & T. Co.*, 143 N. Y. 559, 38 N. E. 301; *Hanover Nat. Bank v. Same*, 148 N. Y. 612, 43 N. E. 72; *Corn Exchange Bank v. Same*, 149 N. Y. 174, 43 N. E. 915; *Anderson v. Kissam (C. C.)* 35 Fed. 699; *Lamson v. Beard*, 36 C. C. A. 56, 94 Fed. 30. The cases proceed upon the line of reasoning in the *Claffin Case*, *supra*, and, therefore, if a cashier has no authority to issue a cashier's draft to his own order in payment of his own debt, the creditor who receives such a draft in payment "takes the risk" of the cashier's lack of authority, although he may have had individual funds upon deposit. If the cashier had express authority to issue cashier's drafts to his own order upon the same

terms upon which he could issue them to an individual (that is, upon payment therefor), two New York cases hold that the creditor is justified in receiving such a draft, although it was issued fraudulently. *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Hanover Nat. Bank Case*, supra. The trial judge charged in accordance with these general propositions, and said:

"But this general authority as such general agent of the bank to draw drafts or checks on the bank in the conduct of its business does not, by itself, permit him to draw such drafts or checks in payment of his personal debts, or to raise money for the transaction of his personal business. Where, therefore, as in this case, he draws a draft or check on the bank, payable to his own order, and for his individual debt, the party acting thereon takes the risk that the agent or the cashier may act without authority to do so. But if it appears that the agent had repeatedly done such acts on previous occasions, and that such acts had been ratified, and not repudiated, by the officers of the corporation, then, providing such acts have been done for a period sufficiently long to establish a settled course of business, it may be inferred, from the general manner in which they have been done, that such acts were known, or ought to have been known, by the directors, and that the cashier had authority to do such acts. If that be shown, the bank is liable. The authority to make such personal use of the funds of the bank may be shown, therefore, by the long-continued doing of such acts under such circumstances as warrant the inference that the acts were known and authorized by said bank; that is, the authority of the cashier may be inferred from the power he was accustomed to exercise without the dissent of the bank, and with its acquiescence."

He further charged:

"If you find that Bush had no implied authority to use the funds of the bank in this way, then your verdict as to the \$7,000 and interest should be for the plaintiff."

The charge upon this point was in accordance with the views of the supreme court, as expressed in *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, in which it is said that the authority of a cashier "may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted, without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations." The authority is to be implied from the acquiescence of the directors in permitting the officer, during a series of years or in numerous business transactions, to pursue a particular course of conduct; and their acquiescence is derived from their actual knowledge, or from what should have been their knowledge, of the conduct or course of business of the officer. In a case of this sort, in which a cashier's use of the bank's funds, and assumption of authority to use the bank's name for his individual benefit, was so much out of the line of the ordinary conduct of a cashier that it would seem that its unusual boldness would have prevented him from making the attempt, we are of opinion that clear proof should be required to satisfy a jury that

the directors had, by their long or frequent acquiescence or laches, permitted him to exercise authority which directly leads to embezzlement. A defendant cannot be permitted to shield itself under the implied authority of a cashier to embezzle the funds of the bank, without clear and satisfactory proof that such implied authority existed. The question upon this part of the case is whether there was adequate evidence upon which the fact of implied authority could be affirmatively found; for, unless it could be affirmatively found, the draft was upon its face no protection to the defendant. The form of procedure by which it was received, nominally for collection for the Elmira Bank, and really, when collected, in part payment of Bush's note, was no protection. It was proved that in 1892 Bush, as cashier, drew three checks, amounting to \$1,000 in all, upon the National Bank of North America, in favor of himself, individually. It does not appear whether on these occasions his account with the Elmira Bank was overdrawn. In 1893 he, as cashier, drew drafts upon the defendant as follows: One for \$77.50, to his own order, in payment of interest upon his note for \$25,000; one for \$500 to the order of a life insurance company; one to order of the defendant for \$77.50, for interest; one for \$300 in favor of the Central Trust Company; and one for \$75 to the order of the defendant, for interest. The life insurance company and the Central Trust Company were creditors of Bush. In 1893 he drew a cashier's draft for \$600 upon the Hide & Leather Bank to the order of M. L. Grieder, an individual creditor. In 1893 he drew a check upon his personal account in the Elmira Bank for \$250 to pay for drafts upon some other bank, but by whom the drafts were signed does not appear; and in 1893 he drew a check upon his personal account in the Elmira Bank for \$90 to pay for a draft upon the Hide & Leather Bank. Who signed the draft does not appear. The assistant cashier was in the habit of signing drafts upon correspondent banks. In March, 1893, he drew two cashier's drafts upon the defendant for \$228.50 to the order of H. K. Bush Brown, his brother, as a loan to him, and a cashier's draft upon the defendant to the order of one Jenkins for \$257.50, also as a loan to his brother. He paid for these drafts by his personal check upon an overdrawn account; and in May, 1893, he drew a cashier's draft upon the Quaker City Bank for \$100 to the order of his brother, which was also a loan, but paid by his own personal check upon his overdrawn Elmira Bank account. It thus appears that in 1892 three cashier's checks were drawn to the order of Bush upon the Bank of North America for \$1,000 in all, and in 1893 one cashier's draft for \$77.50 was drawn upon the defendant to the order of Bush, and two cashier's drafts were drawn upon the defendant to its order,—one for \$75, and the other for \$77.50. In the same year three drafts were drawn by Bush, as cashier, upon correspondent banks, for \$1,400, to the order of his creditors. The cashier's drafts, not known to have been drawn by Bush, were not material to this issue; and we do not regard the drafts drawn in favor of Brown or Jenkins as of importance, because the question is in regard to Bush's course of business, which was known, or ought to have been known, by the directors of the bank. The argument of the defendant is that, if the audit-

ing committee had searched the history of the Brown and Jenkins drafts, it would have been discovered that they were loans by Bush or by the bank to Brown, which had been paid by Bush's personal checks. These drafts were on their faces apparently the ordinary cashier's drafts in favor of a third person, which are constantly issued to a depositor or to a purchaser. An auditing committee is not required to search into the history of each draft of that class, beyond the fact that payment has been made therefor. This course of conduct, from which implied authority is to be inferred, began in October, 1892, and ended in May, 1893, and consisted of nine drafts, five of them to the order of creditors, all amounting to \$2,630. This evidence is very far from being adequate to show a settled course of business "during a series of years," or "in numerous business transactions," whereby Bush was permitted to draw cashier's drafts to his own order, and use the funds of the bank for his own personal benefit. It is too weak to establish an implied authority to do the thing which Bush boldly undertook to do by a misuse of his position and opportunity as cashier. There was no evidence in the case that Porter did in fact rely and act upon this supposed course of conduct of Bush, and therefore no estoppel in pais was created upon the plaintiff, as the representative of the Elmira Bank. *Bloomfield v. Bank*, 121 U. S. 125, 7 Sup. Ct. 865, 30 L. Ed. 923.

The plaintiff requested the court to direct the jury to find a verdict for the plaintiff in at least the sum of \$7,000 and interest. The court refused to charge as requested, to which refusal the plaintiff excepted. Upon the evidence in the case, a verdict should have been directed in favor of the plaintiff to recover \$7,000 and interest, in the event of a finding by the jury that he was not entitled to the entire sum in controversy. The judgment is reversed, with costs, and the case is remanded to the circuit court, with instructions to set aside the verdict and order a new trial.

RAYMOND V. COLTON.

(Circuit Court of Appeals, Second Circuit. July 25, 1900.)

No. 151.

1. STATUTE OF FRAUDS—SALES—BARTER AND EXCHANGE.

The statute of frauds, requiring some part of goods purchased to be delivered or some part of the purchase money to be paid to render a sale valid, where no memorandum in writing is made, is applicable to a case of barter and exchange; each party in such case being both a buyer and a seller.

2. SAME—PART PAYMENT OF PRICE.

Under the statute of frauds of New York, which provides that a contract for the sale of goods, where no note or memorandum in writing is made, shall be void unless the buyer shall receive some part of the goods, or "shall at the time pay some part of the purchase money," as construed by the courts of the state, in order that the receipt by the seller of a part of the consideration for goods sold, after the time when a verbal agreement for the sale was originally made, shall render the contract valid, the payment must have been made for the expressed purpose of complying with the statute, or there must have been at the time a restatement or reaffirmance of the contract.

8. SAME.

Plaintiff and defendant were the owners of all but 5 of the 2,500 shares of a joint-stock mercantile company, of which plaintiff was vice president and general manager and a director, while his father was also a director, and his brother the manager of the company's business in Japan. Plaintiff owned one-fourth of the stock, which was pledged to defendant to secure an indebtedness; defendant being the owner of the remainder of the stock. The parties made an oral agreement that plaintiff should "get out" of the business, and he and his relatives should resign their positions, in consideration of which he should receive one-fourth of the goods owned by the company, after deducting the amount of his indebtedness to defendant. After this agreement there was talk of a different arrangement, and several days passed, when plaintiff delivered to defendant the resignation of himself and brother; stating that it was in fulfillment of the agreement. These were accepted by defendant, and plaintiff subsequently brought suit to compel delivery of the goods. *Held* that, in legal effect, the contract was one for the exchange of plaintiff's shares of stock for the goods, and that, regarding plaintiff as a buyer and the resignations as a part of the consideration to be paid, there was no such restatement or reaffirmance of the contract at the time of their delivery as to render the payment one made "at the time," which would validate the contract under the New York statute of frauds; defendant, regarded also as a buyer of plaintiff's shares, having neither received any part of the goods nor paid any part of the price. Shipman, Circuit Judge, dissenting.

4. CONTRACT—VALIDITY—PUBLIC POLICY.

A contract by which a shareholder and officer of a joint-stock association agreed to resign his office and sell his stock to another shareholder, receiving payment in goods belonging to the association, while ordinarily it would be void, as against public policy and a violation of trust towards the association, cannot be so regarded as between the parties, where they are the principal beneficial owners of the association, although there be one or more minor holders of stock, each of whom is liable for all the debts of the association, who do not consent and have no knowledge of the transaction. Thomas, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of New York.

E. C. James, for plaintiff in error.

A. Walker Otis, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges, and THOMAS, District Judge.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The jury found a verdict for \$160,000.

The action was brought to recover damages for the breach of an agreement by the defendant to purchase the interest of the plaintiff in A. A. Vantine & Co., a joint-stock mercantile association created under the statutes of New York. Laws 1894, c. 235. The principal assignments of error present the question whether the contract was void under the statute of frauds, or because it involved a breach of the trust duties of the parties towards the association.

The complaint alleged that on or about August 3, 1898, the defendant promised plaintiff that if the latter would resign his position as vice president and general manager, and would "sever his connection" with the company, and his brother would resign his position as

manager in Japan, the defendant would pay the plaintiff, in consideration thereof, a one-fourth interest in the business of the company less the amount owing from the plaintiff to the defendant; that the plaintiff thereupon accepted the offer made by the defendant, and resigned his position as vice president and general manager, and his brother resigned his position as manager in Japan; and that the defendant thereafter refused to carry out the terms of the said agreement. The complaint further alleged that the value of the net assets and good will of the business of the company was over \$300,000 in excess of the indebtedness of the plaintiff to the defendant.

The evidence upon the trial tended to prove the following facts: Prior to the creation of the joint-stock company the defendant had been the proprietor of the mercantile business carried on in the name of A. A. Vantine & Co., and had promised the plaintiff, who had been in his employ and had contributed by his services largely to the success of the business, a one-fourth interest therein. In April, 1894, the plaintiff and defendant adjusted the value of this interest as of the sum of \$100,000. The defendant then suggested the formation of a joint-stock company to which the business should be turned over, and in which the plaintiff should have his interest in shares, allowing the defendant therefor one-fourth of the net value of the assets less the \$100,000. The plaintiff assented to this agreement, and thereupon the articles of association were executed and the company was created. Five persons besides the plaintiff and the defendant joined in executing the articles of association; the defendant agreeing to acquire 2,494 shares, and the others 1 share each.

By the articles of association the property was divided into 2,500 shares; the business was to be directed and governed by a board of directors, consisting of not less than three shareholders; a majority in number of the board were to constitute a quorum, and their decisions be deemed the act of the associates; four persons named were to be the first directors, among whom were the defendant and plaintiff and the plaintiff's father; and it was provided that the association might dissolve at any time, provided that eleven-twentieths of the interests of the shareholders should consent in writing, and thereupon a majority of the interests might direct the manner of closing up its business.

The defendant turned over the assets of the former concern, receiving the shares of the association in exchange, and caused a certificate for 625 shares to be delivered to the plaintiff, and certificates for 1 share each to be issued to the other associates. None of these associates paid anything for their shares. One of them was the wife of the defendant, and another was the father of the plaintiff. The plaintiff executed a note to the defendant for the difference between \$100,000 and the one-quarter value of the assets, and assigned his certificate to the defendant as collateral for the payment thereof. There was a meeting of the board of directors of the association, and the defendant was elected president, and the plaintiff vice president, and the plaintiff was appointed general manager; and at this meeting salaries of \$10,000 annually were voted to the president and the vice president. Thereafter no change took place in the board of directors or officers,

or in the shareholders of the association. The business was conducted as it had been previously, except nominally; and the parties conducted themselves towards one another and towards the association as though the concern were a partnership, of which they were the only members. No dividends were declared, and both the plaintiff and the defendant drew out moneys in excess of their salaries. This situation continued until August, 1898. At that time the plaintiff's brother was a manager for the concern in Japan, receiving a salary of \$5,000. August 3, 1898, differences having arisen between the plaintiff and defendant, the plaintiff proposed that the defendant buy out his interest, saying to him:

"I want my interest in the concern of Vantine & Co. in goods, and I'll go out. I will resign, and leave you to run your business by yourself. I will give you my brother's resignation, my resignation, and my father's resignation."

Some conversation ensued as to the way the plaintiff's interest should be ascertained and the goods divided, and, as it would require a long time to take an inventory of the stock, it was suggested that the parties take the books on the preceding 1st of January as the basis for fixing the value of the plaintiff's interest and the valuation of the goods. The defendant finally assented. Thereafter it was suggested that the parties might make some new arrangement for continuing together; the plaintiff stating that he was willing to discuss such an arrangement, but it must be understood that the arrangement already made should stand, and any further arrangement be optional with him. Negotiations respecting a new arrangement ensued until August 15th, when the plaintiff said to the defendant:

"Mr. Raymond, we have talked ever since we made our trade. You have not come to anything definite. Now, I am going to give you my resignation, my brother's resignation, and my father's resignation, in compliance and fulfillment of the trade that we have made, and I want you to give me my one-fourth interest in the business, as you agreed to on that day."

Thereupon the plaintiff handed the defendant his own resignation as vice president and general manager, and his brother's resignation, and the defendant took them and retained them. Later in the day the defendant sent a cable message to the plaintiff's brother in Japan, stating that the plaintiff had resigned, and directing him to turn over the business. Several days later plaintiff sent the defendant his father's resignation as director and his own resignation as director. At the time of these negotiations the plaintiff was indebted to the defendant, upon the promissory note for which his certificate of stock had been pledged as collateral, in the sum of \$165,000, with interest from January 1, 1897, and in the further sum of \$12,248 for moneys advanced. Evidence was also given tending to show that the value of one-fourth of the assets on the preceding 1st of January was \$389,000. Upon the trial the plaintiff offered to the defendant the certificate for 625 shares of stock, which had been produced by the defendant and put in evidence by the plaintiff.

At the close of the evidence the trial judge was requested on behalf of the defendant to instruct the jury that the agreement on which the action was founded was void—First, because, being for a sale of

goods or things in action and not in writing, it was invalid by the statute of frauds; and, second, because, being between trustees of a joint-stock association, it was one in breach of their duties towards their associates. The judge refused to so instruct the jury. In submitting the case to the jury he instructed them, in substance, that if they found that, in consideration of the resignations promised by the plaintiff, the defendant promised to buy out the plaintiff's quarter interest in Vantine & Co., and pay him in goods of the concern, the amount of such interest and the value of the goods to be taken as they stood on the January 1st preceding, and if they found that the resignations were given on the one side and accepted on the other at the time, the plaintiff would be entitled to recover. In instructing them that the agreement was void under the statute of frauds, unless some part of the consideration of the purchase was paid by the plaintiff and accepted by the defendant at the time, he used the following language:

"Of course, the phrase 'at the time' has a reasonable measure of elasticity, depending upon the circumstances of the case while the transaction is still in progress of negotiation. When the minds have come into accord, and before the parties separate, that is the time within which payment can be made. But it may very well be, where the parties have negotiated and come into an agreement without any payment of part of the consideration, they subsequently, with the matter theretofore discussed by them plainly before them, may renew the agreement that their minds have met upon, and then proceed to carry out the agreement,—by the payment of the consideration being made by the one as part of the transaction originally entered into, and then renewed, and accepted by the other with that distinct understanding."

He further instructed them that, before they could find a verdict for the plaintiff, they must reach the conclusion that:

"When he handed in the resignations to the defendant the agreement was practically renewed between the parties, and was present in their minds, so that the resignation was accepted by the defendant as a fulfillment of the contract."

These instructions were excepted to by the defendant.

In considering the assignments of error it is desirable to understand what the agreement between the parties was, in legal contemplation. The evidence may indicate that they regarded themselves as partners, and the association merely as a formal entity having the legal title to assets of which they were the real owners. In the negotiations the proposition on the one side was that the plaintiff should "get out," and on the other that for doing so he should receive his interest in the assets themselves. The plaintiff was to renounce his interest by resigning as an officer and managing agent of the association. Nothing was said about his shares of stock, which were then pledged to and in the possession of the defendant, or about his \$165,000 note, or about his \$12,000 indebtedness; but the sum and substance of the arrangement which the testimony authorized the jury to find as having been made was that he was to retire from the concern, be paid the value of his interest, and evidence his withdrawal by giving his resignation to the defendant. It may be inferred that the parties, regarding this as a settlement of their partnership interests, intended to disregard everything which had been done after the creation of the association, and intended to treat the issue of the shares to the plaintiff, and his pledge

of them to the defendant, as mere matters of form, and the note and other indebtedness as items to be deducted in ascertaining his interest. But the evidence would not have authorized the jury to find that the minds of the parties met upon any definite understanding to that effect. In fact and in law there was no partnership between the parties, and there were no firm assets, and the view which they took of their relations could not change their legal aspect. All that the plaintiff had to sell, and all that the defendant could buy, were the plaintiff's shares in the association. The plaintiff could not sell, nor could the defendant buy, the directorships of the association. In legal effect the agreement was one for the barter or exchange of the shares in the association for the goods; the defendant being the buyer of the shares, and the plaintiff the buyer of the goods.

As embodied in the laws of this state, the statute declares any contract "for the sale of goods, chattels, or things in action" void, in the absence of a note or memorandum in writing, unless the buyer shall accept and receive "some part of the goods, or the evidences or some part of them of such things in action," or "shall at the time pay some part of the purchase money." The statute applies to contracts of barter and exchange, as well as to contracts strictly for the sale of goods. *Bennett v. Hull*, 10 Johns. 364; *Walrath v. Ingles*, 64 Barb. 265. The provision excepting contracts from the statute when the buyer shall accept and receive some part of the goods, or the evidences of the things in action, does not require the acceptance to be at the time of the making of the contract. *McKnight v. Dunlop*, 5 N. Y. 537; *Sprague v. Blake*, 20 Wend. 63. The provision excepting contracts when the buyer makes a payment of the purchase money, as construed by the courts of this state, does not require that the payment be made at the very time of the original negotiations. In *Bissell v. Balcom*, 39 N. Y. 275, the court used this language:

"Where parties have made such an agreement, complete and operative in all respects but for the statute, and afterwards one offers payment on that contract, his act is an offer to enter into the relation and obligation which the terms thereof are apt to create, and of part performance of its duties; and, if the other accept the payment of the contract, his act is a then present declaration or affirmance of his assent to the conditions of the agreement, and an acceptance of its performance. At that very time, the minds of the parties do actually meet in the fact of sale, and then there is a bargain made and adopted, and at that time part of the purchase price is paid. Before that time, there had been treaty and words of agreement, but having no legal force. Now, by plain reference, though not by recital, the agreement is re-enacted. The terms are present in the minds of the parties, and are affirmed by payment and acceptance of the amount thereof."

That was a case where the plaintiff and defendant had made a verbal agreement for the sale of cattle, at a price exceeding \$50, without any actual delivery or payment of any part of the price, but the next day the plaintiff called on the defendant for a payment to "bind the bargain, so that there will be no chance to back out," and for that purpose the defendant made a payment of part of the price. The contract was held valid and binding within the statute of frauds. The doctrine of this case has been restrictedly reaffirmed in *Hawley v. Keeler*, 53 N. Y. 114, *Hunter v. Wetsell*, 57 N. Y. 375, *Hunter v. Wetsell*, 84 N. Y. 549, and in other decisions to which it is not necessary to refer.

In *Hunter v. Wetsell*, 57 N. Y. 375, it was held that, to have the effect of validating the contract, the subsequent payment must be made and received for the express purpose of complying with the statute and validating the contract, or, when the payment is made, the parties must reaffirm or restate the terms of the contract. This ruling was repeated in *Hunter v. Wetsell*, 84 N. Y. 549. In *Jackson v. Tupper*, 101 N. Y. 515, 6 N. E. 65, it was held that, to validate the contract by a subsequent payment, it must appear that at the time of the payment "the terms of the prior oral contract were in the minds of the parties, and were reaffirmed by them"; the court saying:

"This being shown, a cause of action arises, not on the prior oral contract, but on the new contract made at the time of the payment."

In *Hallenbeck v. Cochran*, 20 Hun, 416, where the agreement was for the sale of hay, and on a subsequent day the purchaser made a payment to the seller "on the hay contract, or towards the hay," which was accepted, the court held that as at the time of the payment the contract was not restated, or even referred to, except by implication, it did not validate the prior oral agreement. The statute, in requiring the payment to be "at the time," is a departure from the terms as originally adopted, and as they are generally expressed in the statutes of other states. Effect must be given to the requirement.

The action was not tried or submitted to the jury upon the theory that the shares were the things purchased, or the consideration of the defendant's promise. It was assumed upon the trial that there had been no acceptance of the shares by the buyer, and upon this theory the certificate was tendered to the plaintiff upon the trial. There was no evidence that anything had been said or done by the parties, either at the time of the contract or subsequently, which had the effect of changing the relations of pledgor and pledgee. Unless the acceptance of the resignations was evidence of an acceptance of the shares, there was no evidence in the case to show that the defendant had accepted and received some part of the goods, or the evidences, or some part of them, of the things in action, which were the subject of purchase. The trial judge adopted the theory of the complaint, and treated the delivery of the resignations as the consideration for the defendant's promise to purchase. They were in part the consideration of that promise, and no other effect can be given to the delivery of the resignations than as a part payment of the consideration or purchase money. As there was no restatement or reaffirmation of the terms of the prior oral agreement between the parties at the time of the delivery of the resignations, except by implication, and as they were not delivered for the express purpose of complying with the statute and validating the contract, it must be held that there was no part payment at the time of the contract, within the meaning of the statute as construed by the highest courts of the state. Irrespective of this consideration, if the defendant should be deemed to be the buyer, there was no part payment by him, such as there was having been made by the seller. We conclude, therefore, that the contract was void under the statute of frauds.

The objection that the contract was obnoxious to public policy proceeds upon the ground that it was one for the sale of official positions,
104 F.—15

and for the disposition by a trustee of the assets of a corporation for his own benefit. The association was substantially a corporation, although the shareholders in such associations are individually liable for its debts, and the plaintiff and defendant occupied towards it the relations of directors towards a corporation. *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046; *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96. The general doctrine that trafficking in the offices and directorships of corporations for private gain is not tolerated by the law, and that contracts having that object in view are void, is undoubtedly applicable. A party occupying a public or quasi fiduciary position is not permitted to trade away the performance of his duties for money, or other private or secret advantage to himself (*West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838, 34 L. Ed. 254); and a contract by which an officer or director contracts to procure another officer or director to abandon his trust duties, and especially one in which he agrees to pay the latter for doing so out of the funds of the *cestui que trust*, is clearly within the condemnation of this principle. But it would be an extreme, and, as we think, an unwarranted, extension of this doctrine to hold that an officer and director of a corporation may not procure another officer and director to resign his office, if he does so for the advantage of the corporation itself, and with the consent of everybody who has a voice, or is entitled to be heard, in its affairs; and we know of no rule of law which, in the absence of a statutory interdiction, forbids an officer or director from entering into a contract to dispose of the assets of the corporation, when the contract has the approval of all who would be entitled to object. It matters not whether the consent of all the interested parties is given in advance by express stipulations or by implication. If it can be fairly raised by inference, it is as well proved as by formal stipulation. When all the interested parties concur, except such as are merely the mouthpieces of others, it is a reasonable deduction that what is proposed is sanctioned by all.

In the present case there was no element of secrecy or corrupt purpose. The parties did not contemplate any transaction prejudicial to the association. The resignations had become expedient. The assets, to the extent they were to be depleted by the goods, would have been made good by the personal liability of the defendant for their value. The plaintiff and defendant had, from the origin of the association, owned substantially all its shares, and had been permitted to manage its affairs as though it were a partnership, and themselves the only partners. The other shareholders were gratuitous beneficiaries of insignificant interests. Three of the four directors took part in the transaction. If they had formally organized themselves into a meeting of the board, all that was contemplated and all that was done would have been strictly regular and binding upon the association. To declare, under such circumstances, and because there was no formal meeting, that what was contemplated and what was done was a wrong to the shareholders, or contrary to good conscience, would seem to be an affront to common sense, and we think it would be a radical misapplication of legal principles.

We conclude that the trial judge erred in his rulings in respect to

the statute of frauds, and was correct in his rulings in respect to the other question which has been considered.

The judgment is therefore reversed, with instructions to the court below to grant a new trial.

THOMAS, District Judge. There should be a reversal of the judgment, upon the ground stated in the opinion, and also because of the illegality of the alleged contract, whereby two shareholders and trustees undertook to divert a portion of the assets from the association and its purposes, and use the same in the settlement of private dealings existing between them, without the knowledge, consent, or acquiescence of minor shareholders, each of whom was liable for all the debts of the association.

SHIPMAN, Circuit Judge. I dissent from the conclusions of the majority of the court with respect to the invalidity of the contract under the statute of frauds of the state of New York. Vantine & Co. became in name a corporation, but continued to be managed as a partnership; Colton being called the general manager upon an annual salary of \$10,000. Differences of opinion in regard to the proper business system for the successful financial management of the corporation took place between the two managers, which resulted in the agreement of August 3, 1898, which the verdict of the jury declares was entered into. In this oral agreement the parties, using the language of business men, spoke of the interest of Colton in the concern of Vantine & Co., and of the method of ascertaining the value of the interest, as though it was still a partnership, while in legal effect the agreement was for the purchase by Raymond of Colton's equitable interest in his shares of stock, which Raymond already held as collateral, and for the purchase by Colton of the goods. Colton was to receive payment for his one-fourth "interest" in the corporation in goods, and, in addition to his sale of stock, was to resign as general manager and from his other official positions, and was to procure and furnish the resignation of his brother, who was the business manager in Japan. These resignations were a part of the consideration of the purchase by Raymond. In the brief language which was used, Colton was to "get out" of all participation in Vantine & Co., and could establish himself anew with the capital in goods which he brought from the corporation. The agreement was, as stated in the opinion of the majority, one of barter or exchange, in which each party was the buyer. While this parol agreement was formed, it was yet understood, if Colton's version of the negotiations is correct, that it might be entirely changed or modified by subsequent agreements, and that the two contracting parties might still remain together; for Raymond was opposed to separation, and was strongly in hope of unity. Thereupon, the two parties consulted with each other almost daily until August 15th as to the modification of the system of business, if they remained together. Colton, in his testimony, calls the proposed continuance an "option" which he would have in case they should agree upon the terms of continuance. He testified that Raymond and he talked nearly every day, quite a portion of the time while Raymond was

in the office, in regard to this future co-operation and the proposed changes in business methods which were suggested. "We talked it over continually back and forth on these days." On August 15th, Colton's version of the abandonment of the negotiations and the fulfillment of the agreement of August 3d is as follows:

"I asked Mr. Raymond to come to the office. He was on third floor when I first saw him that morning. I said: 'I wish you would come upstairs. I want to talk to you.' We went up into his private office. It was in the rear of mine. We went in, and I said: 'Mr. Raymond, we have been talking ever since we made our trade. You have not come to anything definite. Now, I am going to give you my resignation, my brother's resignation, and my father's resignation, in compliance and fulfillment of the trade that we have made; and I want you to give me my quarter interest in the business, as you agreed on that day.' I handed him three resignations. He took them in his hands, and turned to me with almost tears in his eyes, and said: 'Charlie, aren't you a little hasty? Don't you think you will be sorry for it? Don't you want more time?'"

Inasmuch as the resignations were in part the consideration of the defendant's promise to purchase, and were a part payment of the consideration, the majority of the court is of the opinion that as there was no restatement or reaffirmation on August 15th of the terms of the prior oral agreement, except by implication, and as they were not delivered for the express purpose of complying with the statute, it must be held that there was no part payment at the time of the contract, within the meaning of the statute as construed by the highest courts of the state of New York, and, furthermore, whatever payment was made was made by the seller. The last most authoritative statement of the construction which the highest court of New York has given to its statute of frauds, to which we have been referred (*Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. 65), places in compact form the result of the prior cases, commencing with *Bissell v. Balcom*, 39 N. Y. 275, and is as follows:

"It is, in substance, held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough, in addition to the act of payment, to show that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them; and, this being shown, a cause of action arises, not on the prior oral contract, but on the new contract made at the time of the payment."

In the case at bar the court charged as follows:

"If your verdict should be for the plaintiff (that is, if you should reach the conclusion that a contract was made whereby he was to receive one-quarter of this interest in Vantine & Co., that quarter to be measured out to him in goods, both the quarter and the goods to be on the basis of the statement of January 1, 1898, and that in consideration thereof he was to resign and get out), and further believe that on the 15th day of August, when he handed his resignation in, that same agreement was practically renewed between the parties, and was present in their minds, so that the resignation which he then handed in was accepted by the defendant as a fulfillment of the contract, and not as a mere voluntary act,—if you reach that conclusion, your verdict will be for the plaintiff, and it will then remain for you to determine the amount of damages."

The view which I take of this case, as the result of the verdict of the jury, is: That a parol contract was made on August 3d, which in the minds of the parties was to be a permanent contract, unless abro-

gated or changed by mutual agreement. That time was to be given and to be used for further negotiations. That time for the next 12 days was occupied in that attempt, which failed, when the parties again met, and Colton said, in substance: "We have come to nothing new. The old contract is unaltered, and I am going to complete my obligations under it, and I wish you to complete your part of it." Whereupon he gave the resignations of himself and his brother as managers, which were reluctantly accepted by Raymond, who instructed the agent in Japan by cable to "turn over the business." The history of the negotiations from August 3d has an important bearing upon the meaning of the transaction of August 15th, because that transaction was not merely the payment of part of the consideration. The whole course of the negotiations from August 3d shows that the terms of the contract of that date were continually, until August 15th, in the minds of the parties, were understood by both of them on the latter day, and the jury could properly find a reaffirmance of the contract, and that a part of the consideration was, on August 15th, accepted by the defendant as a fulfillment of the agreement, and that the acceptance was evidenced by his cablegram to the agent in Japan. At the interview of August 15th, negotiations for a change in the contract were abandoned, and each party was compelled to stand in affirmance or in rejection of the prior oral agreement of barter. The acts of both parties show that it was reaffirmed, and that a part of the consideration to be given by the plaintiff, who was the buyer of the goods, was received and accepted by the defendant.

in re TESLOW et al.

(District Court, D. Minnesota, Second Division. February 15, 1900.)

BANKRUPTCY — PREFERENCES — SURRENDER BEFORE ALLOWANCE OF OTHER CLAIMS.

Bankr. Act 1898, § 57g, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," extends to all claims of a creditor who has received a preference, and is not limited to the particular claim on account of which the preference was given or received.

In Bankruptcy. On proceedings to review an order of Jean A. Flittie, referee, requiring a creditor to surrender a preference, or, in the alternative, that its claim previously allowed be expunged. The opinion of the referee was as follows:

"At the first meeting of the creditors of said bankrupts, Wyman, Partridge & Co. duly filed and had allowed its claim against the estate of said bankrupts in the sum of \$1,292.92; and this is an application on the part of P. L. Vranizan, trustee in bankruptcy of the estate of Teslow & Haugen, for an order requiring said Wyman, Partridge & Co. to restore to said trustee the sum of \$448.30 claimed to have been paid said creditor, as a preference, within four months of the filing of bankrupts' petition and their adjudication in bankruptcy, or, in the alternative, disallowing and expunging in full from the records herein the said claim of Wyman, Partridge & Co., so filed and allowed as aforesaid. The matter came before the referee, August 10, A. D. 1900, upon stipulation filed herein by and between the respective attorneys of the trustee and said Wyman, Partridge & Co., and was submitted to the referee for his decision upon said stipulated facts and briefs of counsel.

"The admitted facts in the case are briefly these: On or about November 1, 1899, the bankrupts began a general merchandise business at the village of Bricelyn, Faribault county, and state of Minnesota, and continued in said business at that place up to the time of their adjudication in bankruptcy, on the 15th day of February, A. D. 1900. Between November 2, 1899, and the 6th day of February, 1900, the claimant Wyman, Partridge & Co., who are general wholesale dealers in merchandise at the city of Minneapolis, Hennepin county, Minn., at different times sold and delivered to the bankrupts various invoices and items of merchandise, aggregating in amount the sum of \$1,741.22. These sales were made on 90, 60, and 30 days' time, and a few small sales were made on a net cash basis. On January 2, 1900, \$448.30 of this indebtedness matured or was past due, and on that date Wyman, Partridge & Co. rendered the bankrupts a statement of items of account then due, which amounted to the sum of \$448.30, and this amount was on the 25th day of January, 1900, duly paid. Said payment was made in the usual course of business, and Wyman, Partridge & Co. had then no notice or knowledge of the insolvency of the bankrupts, though, in fact, the bankrupts were then, and had been for some time, wholly insolvent. The payment in question was received in good faith by said Wyman, Partridge & Co., and was credited upon items of account, payment of which fell due January 2, 1900. At the first meeting of the creditors of said bankrupts, Wyman, Partridge & Co. duly proved and had allowed against the estate of said bankrupts its claim for the balance falling due subsequent to January 2, 1900, upon its account.

"It is claimed by the trustee that the payment in question is a preference. Wyman, Partridge & Co. contend, however, that each sale of merchandise was a distinct and separate transaction, and that the prohibition in the bankruptcy act against the giving and receiving of preferences can only apply to each separate and distinct transaction, debt, or claim, and that no other claim or debt is tainted by the preferential payment, except such claim or debt as is paid, or partially paid, by the preferential payment. This contention cannot be sustained. To do so would have the sweeping and fatal effect of utterly defeating the provisions in the act as to preferences. In case of payment on an account containing sales at different times, all the creditor would need to do in order to defeat the preference would simply be to do as Wyman, Partridge & Co. has done,—apply the payment received on separate items or debts, and reserving other items and debts to be proven against the estate to the damage of other creditors not so favored. This would lead only to injustice. Were such a construction of the law to hold as is here contended for, preferences could be extended and received with impunity, and there would be no redress. The power to defeat a preference would thus rest exclusively with the creditor preferred, for he could apply payments of money received within the prohibited time as he saw fit, and so as to wholly liquidate and pay claims, debts, or items of account entirely of his own choosing. And a trustee in bankruptcy seeking to recover or defend against a preference would be as helpless as Prometheus bound. The contention of the claimant is born of utter necessity. None but a creditor in the most dire straits would think of splitting its accounts into severalties, particulars, and items, except for the purpose of attempting to create for itself an exception to the statute, contrary to its letter and plain intentment.

"The provisions in the present bankruptcy act in regard to preferences are very specific and broad. Section 57g provides that 'the claims of creditors who have received preferences shall not be allowed, unless such creditors shall surrender their preferences.' And section 60a defines a 'preference' as follows: 'A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or make a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class.' If Wyman, Partridge & Co. are to be permitted to retain the large payment of \$448.30 made it by the bankrupts on January 25, 1900, when the debtors were insolvent, and when other items of the account in question were also due, and file their claim and share in the dividends as to the balance of said account, the inevitable result will be that Wyman, Part-

ridge & Co. is receiving a greater percentage of its debt than any other creditors of the same class who have received no such payment. This the act expressly forbids.

"This is not a case falling within section 60b of the act, where the trustee seeks by action to recover a preference illegally and fraudulently made. In the present case the trustee simply seeks to protect the estate from the allowance of a claim until the creditor is willing to and shall surrender what advantage he has acquired over the other creditors. It is the duty of the trustee to marshal all the assets of the estate, and to distribute the fund equally among all the creditors in proportion to their respective amounts. And, while the law will not permit the trustee to recover that which has been innocently received, it does say to the innocently preferred creditor, 'If you want to share in the remaining estate of the bankrupt, as a condition precedent to your doing so you must surrender the preference received, for he who seeks equity must do equity.' It is the opinion of the referee that, under the prohibition contained in section 57g, no claim can be proven and allowed to stand unless the creditor shall surrender his preference. This seems to be the plain spirit and intent of the act. It is the entire indebtedness of the creditor that must be looked to in order to determine whether or not a preference has been received, and not the form or number of its component parts. Any other construction of the law will lead to injustice and mischief, perjury, and schemes of evasion. In support of the views herein expressed, see *In re Conhaim* (D. C.) 97 Fed. 923, 2 Nat. Bankr. News, 148; United States circuit court of appeals in *Re Ft. Wayne Electric Corp.*, 39 C. C. A. 582, 99 Fed. 400, 2 Nat. Bankr. News, 434; *Loveland, Bankr.* p. 237; *In re Beswick*, 2 Nat. Bankr. News, 808.

"It is the order of the court that the said claim of Wyman, Partridge & Co. be disallowed and expunged, unless said Wyman, Partridge & Co. shall, within 30 days, elect to pay and restore to the trustee herein the sum of \$448.30 paid it on January 25, 1900, in which event said Wyman, Partridge & Co. may present and file an additional claim against said estate for the amount of \$448.30. Wyman, Partridge & Co. duly excepts."

A. E. Clark, for the trustee.

Fred B. Dodge, for Wyman, Partridge & Co.

LOCHREN, District Judge. The exceptions are overruled, and the foregoing decision of the referee is affirmed. Section 57g of the act provides that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." The prohibition extends to all claims of such creditors against the estate of the bankrupt, and is not, as in the act of 1867, confined to the claims "on account of which the preference is made or given."

IN RE DURHAM.

(District Court, E. D. Arkansas, W. D. October 19, 1900.)

BANKRUPTCY—EXEMPTIONS—STATE STATUTE.

Under Sand. & H. Dig. §§ 4727-4729, providing that a debtor cannot claim an exemption in personal property in his possession as against a claim for its purchase price, and giving the seller the right to an attachment for the property in an action to recover the price, a debtor cannot avail himself of the bankruptcy law to defeat the execution of such an attachment after its issuance, by filing a voluntary petition on which he is adjudged a bankrupt, and in which he claims the property as exempt, as Bankr. Act 1898, having adopted the state laws as to exemptions, cannot be so administered as to enlarge the rights of debtors thereunder. In such case, while the property may be temporarily in the possession

of the trustee, he has no title or beneficial interest therein, and the possession, in effect, remains in the bankrupt, within the meaning of the state statute, and the trustee will be directed to surrender it to the bankrupt, to be taken on the state process.

In Bankruptcy. On creditor's petition for an order allowing him to subject property claimed by the bankrupt as exempt to the payment of a debt against which such property is not exempt under the state statute.

This is a petition filed by H. Fellheimer, a creditor of the bankrupt, setting up that on March 20, 1900, the petitioner filed a suit in the circuit court of Garland county, Ark., against the bankrupt, to recover \$125, due him from the bankrupt for furniture sold, and at the same time also filed, under the statutes of Arkansas, which will be hereinafter set out, his affidavit to secure a seizure of the property; whereupon an order of possession was issued by the state court, and placed in the hands of the sheriff for execution. When the sheriff proceeded to make the seizure, he was informed by the defendant that he desired to execute a retaining bond for the property, as permitted by the laws of the state. Immediately thereafter, and before the sheriff seized it, the bankrupt filed a voluntary petition in bankruptcy, and was adjudged a bankrupt, and when the sheriff desired to execute the order of possession, no retaining bond having been given by the defendant, the property was in the possession of the trustee of the bankrupt, who now still holds it subject to the order of the court. That all the property owned by the bankrupt is claimed by him as exempt, and as soon as appraised by the trustee, and found to be of a value not exceeding \$500, the amount exempt from execution under the laws of the state of Arkansas, it would be turned over to the bankrupt. That among the property thus claimed as exempt is the property described in the order of possession, and sought to be seized by the petitioner in his proceedings in the state court. It is further alleged that said property is not exempt under the constitution and laws of the state of Arkansas, as against petitioner's claim, but is exempt as to all other debts. On the 12th day of May, 1900, the petitioner's suit came on for trial in the Garland circuit court, and, the bankrupt having filed the certificate of adjudication as a bankrupt, no personal judgment was rendered against him, but the following judgment was entered: "It is therefore considered, ordered, and adjudged that the plaintiff have and recover of and from the defendant William Durham \$125, with interest from January 1, 1900, and all costs herein accrued, to be satisfied, however, of the following described personal property [describing the property now in controversy]; that the sheriff execute the order for possession now in his hands, which was issued and placed in his hands at the institution of the suit; that, if the defendant give bond to retain possession as provided by law, he make such return, together with the bond, but, if he shall take said property under said order of possession, he shall advertise the same for sale, and sell the same, according to law, as in the case of sale of personal property under execution, and report his proceedings to this court." The petitioner now asks this court to make an order directing the trustee to turn the property described in the petition over to the sheriff of Garland county, in order that he may execute the process of the state court, as under the laws of the state it is not exempt from seizure for petitioner's debt.

The statutes of Arkansas, under which the proceedings were had in the state court, and which the petitioner now seeks to have enforced in this proceeding, are sections 4727-4729, Sand. & H. Dig., and are as follows:

"Sec. 4727. In any action brought in the courts of this state for the recovery of money contracted for property in possession of the vendee, it shall not be lawful to include said property in any schedule intended to protect said property, or exempt it from seizure on attachment or sale on execution or other process issued from any court for the collection of any debt upon the claim of the plaintiff.

"Sec. 4728. In any such action the court or clerk shall issue, on petition of the plaintiff, duly verified, describing the property and stating its value, at or after the commencement of such action, an order, which may be embodied

In the original summons, stating the name of the court and the style of the action, and directing the sheriff or other officer to take the property described in the petition, and hold the same subject to the orders of the court.

"Sec. 4729. The defendant may give bond for the retention of the property, as in cases of orders of delivery of personal property."

Greaves & Martin, for petitioner.

Murphy & Mehaffy, for bankrupt.

TRIEBER, District Judge (after stating the facts). While the exemption laws of the state of Arkansas are very liberal to debtors, they specially provide that there shall be no exemption of any property from seizure on attachment or sale under execution or other process issued from any court for the recovery of money due for the purchase of the property as long as it is in the possession of the vendee. If this property had been seized under execution, attachment, or other process of any court, the debtor could not have included it in his schedule as against a judgment for the purchase money, but the same would be subject to seizure and sale. By section 4728, Sand. & H. Dig., it is provided that the order for the seizure of this property may be issued on the petition of the plaintiff at or after the commencement of the action; but, under section 4729, the defendant is permitted to retain the property by executing a bond therefor, as in actions of replevin, which means within 48 hours after the sheriff serves the writ on him. Bankr. Act, § 6a, merely adopts the exemption laws of the state in which the bankrupt resides at the time of the filing of the petition, from which it follows, as of course, that the bankrupt is entitled to no exemptions except such as he could claim under the laws of the state. It is not contended by counsel for the bankrupt that, if no bankruptcy proceedings had been instituted, the property would not have been subject to seizure and sale in pursuance of the judgment of the state court, nor that it could be claimed as exempt by the bankrupt; but it is urged that, as the bankruptcy proceedings will result in discharging the bankrupt from all of his provable debts, including that of petitioner, the property cannot be subjected to the judgment of the state court. I cannot agree to this proposition, as the right of a bankrupt to exemptions under the bankrupt law depends entirely upon the laws of the state; and while it is true that this right of the vendor to subject the property to the payment of his debt due for the purchase money, regardless of the exemption laws, is not, strictly speaking, a lien on the property, still it is a right given to him by the laws of the state, which the bankrupt law does not attempt to deprive him of. The rule might be different if the title to this property would vest in the trustee for the benefit of the creditors, for it would then cease to be in the possession of the bankrupt (*Bridgeford v. Adams*, 45 Ark. 136); but, where the property is claimed as exempt, no title passes to the trustee, and he is only entitled to the possession thereof for the purpose of ascertaining, by proper appraisalment, whether the value of the property does not exceed that allowed as exempt under the laws of the state. As soon as that is ascertained, it is the duty of the trustee to deliver it to the bankrupt. Thus, in those states where the rule prevails that individual members of a partnership can each claim exemp-

tions out of the partnership estate, the bankruptcy courts are bound to follow this rule. *In re Friedrich*, 40 C. C. A. 378, 100 Fed. 284; *In re Beauchamp* (D. C.) 101 Fed. 106; *In re Wilson* (D. C.) 101 Fed. 571. And, where the state law declares that a debtor shall forfeit his right to the exemption allowed if he is guilty of willful fraud in concealing from his creditors any part of the property of which he is possessed at the time he seeks the benefit of the exemption, a bankrupt who does not make a full and fair disclosure of all the property owned by him at the time of the filing of his petition in bankruptcy will be denied exemptions by the bankrupt court. *In re Waxelbaum* (D. C.) 101 Fed. 228. Nor will bankruptcy protect a debtor from arrest in a civil proceeding for the collection of debts fraudulently contracted, where the state laws provide for such a proceeding. *In re Lewensohn* (D. C.) 99 Fed. 73.

It might just as well be contended that a bankrupt could claim his personalty exempt against a judgment for a tort, although the constitution of the state provides that there shall be no exemption of personal property as against a judgment for a tort. Congress, in enacting the bankrupt law, did not see proper to provide for exemptions by special provisions, but accepted the laws of each state as suitable provisions for the protection of unfortunate debtors; and as the laws of this state expressly provide that a debtor shall not have the enjoyment of property not paid for as against his vendor, and the bankrupt act merely adopts the exemption laws of the state, it necessarily follows that the petitioner is entitled to subject the property which, by the judgment of the state court, has been declared subject to execution under his judgment, to the payment thereof, and the trustee will be directed to turn the property over to the bankrupt, and leave is granted to the petitioner to have the same seized by the sheriff of Garland county under the process of the state court.

In re ARNDT.

(District Court, E. D. Wisconsin. October 15, 1900.)

BANKRUPTCY—PREFERENCES—PAYMENTS ON ACCOUNT.

The fact that partial payments made by a bankrupt to a creditor on account, within four months prior to the filing of petition, in the usual course of business, and received by the creditor without knowledge of the debtor's insolvency, were made for the purpose of obtaining more goods on credit, and that the creditor extended such credit, does not take the case out of the established rule that such payments constituted preferences, which, under Bankr. Act 1898, § 57g, must be surrendered before the creditor's claim can be allowed against the bankrupt's estate.

In Bankruptcy. Certified question whether payments made by the bankrupt on open account, within four months prior to the filing of petition, constitute a preference, and bar claim of the John Pritzlaff Hardware Company, pursuant to section 57g, Bankr. Act 1898.

W. J. Luedke, for bankrupt.

Frank T. Boesel, for trustee.

SEAMAN, District Judge. The ground upon which the claimants urge an exception of this case from the general rule pronounced by the circuit court of appeals in *Columbus Electric Co. v. Worden*, 39 C. C. A. 582, 99 Fed. 400, is this stipulated state of facts: That the bankrupt was aware of his insolvency when the payments were made, but the creditor was not; that the payments were made in the ordinary course of business, but for the purpose of obtaining more goods; that the creditor had refused further credit, but, in consideration of the fact of payment, "they afterwards, in good faith, gave further credit, without security of any kind, for property which became part of the bankrupt's estate." The right of the creditor is unquestionable to limit the extent of his credit, and exact cash payment for all sales beyond such amount, unaffected by the provisions of the act relating to preferences; and if the payments in question and later sales were so far concurrent, in amount and time, as to admit of construction as cash sales, there would be force in the contention to so treat the payments, notwithstanding their presentation in the form of a running account. But the statement, as stipulated, shows no such concurrence; the payments being made and credited as upon general account without regard to the particular amount of the sale or sales made about the same date, and in no instance are the amounts exactly equivalent. The case as presented is distinguishable from that of the *Columbus Electric Co.*, supra, in the fact only that the payments were made upon current account instead of past-due note; and is not distinguishable, even in that feature, from *In re Fixen* (C. C. A. 9th Cir.) 102 Fed. 295, recently decided, where the same rule is applied in holding that payments within four months constitute preferences, within the act. The first-mentioned decision is controlling here, and that in the *Fixen* Case seems to be its logical sequent. I am constrained to follow such rulings, and the order of the referee disallowing the claim of the *John Pritzlaff Hardware Company*, unless the payments so made of \$280.46 are surrendered to the trustee, is affirmed.

DAVIS et al. v. STEVENS et al.

(District Court, D. South Dakota, S. D. October 11, 1900.)

1. CORPORATIONS—REQUISITES OF DE FACTO CORPORATION.

There cannot be a corporation de facto where such corporation could not exist de jure.

2. SAME—UNAUTHORIZED ASSUMPTION OF CORPORATE FRANCHISE—BANKS UNDER DAKOTA STATUTE.

Comp. Laws Dak. § 2892, which provides that "the due incorporation of any company claiming in good faith to be a corporation under this chapter and doing business as such, or its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party," is merely declaratory of the law as it previously existed, and applies only to de facto corporations. There having been no law of the territory of Dakota under which a corporation could be formed for banking purposes, an attempted incorporation for that purpose under the laws of the territory is not within the protection of such provision, and the incorporators may be charged as partners on legal contracts made in the name of such pretended corporation.

3. BANKRUPTCY—PARTNERSHIP—ILLEGAL INCORPORATION.

An association of persons claiming to incorporate as a bank under the laws of the territory of Dakota, by which such corporations were not authorized, and which has conducted business as a bank since then, under the corporate name assumed, may be held subject to the provisions of Bankr. Act 1898, as a partnership.

4. SAME—ACTS OF BANKRUPTCY—CONSENT TO APPOINTMENT OF RECEIVER.

The consent of a partnership, although insolvent, to the appointment of a receiver for its property by a state court, and the surrender of its property to such receiver, do not constitute an act of bankruptcy, under Bankr. Act 1898, where it is not shown that any creditor thereby obtained preference over another.

5. SAME—INSOLVENCY—PARTNERSHIP.

To constitute insolvency of a partnership, within the meaning of Bankr. Act 1898, the property of the firm, together with that of all the partners applicable to the partnership debts, must be insufficient to pay such debts.

In Bankruptcy. Hearing on petition in involuntary bankruptcy.

J. L. Hannett, for petitioners.

Bailey & Voorhees, for defendant Charles A. Johnson.

T. B. McMartin, for defendants Julius D. Bartow, Harns G. Baker, Francis Gould Fox, M. S. Cook, and Halo B. Stevens.

CARLAND, District Judge. On March 21, 1900, John Davis, Wayne Mason, and William C. Harris, who are creditors of the Bank of Plankinton in a sum exceeding \$500, and who are citizens of the state of South Dakota, filed a petition in this court praying that the Bank of Plankinton be adjudged bankrupt, as a private banking institution, and a co-partnership consisting of the above-named defendants. In due time all of the above defendants answered said petition, except the defendant Fred L. Stevens, who, after due service, has not appeared in this action. In their answer defendants deny generally the allegations of the petition, and, further answering, allege that the Bank of Plankinton was during the times alleged in the petition, and now is, a corporation duly organized under the laws of the territory of Dakota and the state of South Dakota. The defendant Charles A. Johnson admits that he was a stockholder in said corporation prior to May, 1898, but on the 9th day of May in said year he sold and transferred all his stock and interest in said corporation, and since said time has had no connection with the business of said corporation. The defendant Bartow admits that he owned one share of stock in said corporation, but sold it on or about the month of June, 1899. The defendant Francis G. Fox is shown by the testimony to have been a stockholder in the corporation for about 10 years last past. It appears from the testimony and admission of the parties to this proceeding that the petitioners are creditors of the Bank of Plankinton in a sum exceeding \$500, and that on the 27th day of November, 1885, articles of incorporation, duly signed and acknowledged by Edwin S. Rowley, Fred L. Stevens, Charles A. Johnson, Joseph D. McCormick, and William M. Smith, were duly filed in the office of the secretary of the territory of Dakota, wherein it was stated that the business of the proposed corporation, which was to be called the Bank of Plankinton, should be a general banking, real-estate, and loan business. Upon the filing of said articles there was issued by

the secretary of the territory of Dakota a certificate of corporate existence to the parties above named, wherein it was certified that said parties, their associates and successors, had become a body politic and corporate under the corporate name of Bank of Plankinton, and by that name had a right to sue and be sued, purchase, hold, and convey real and personal property, and to have and enjoy all the rights and privileges granted to a private corporation under the laws of this territory, subject to their articles of incorporation, and all legal restrictions and liabilities in relation thereto. It further appears from the testimony and the pleadings in the case that the Bank of Plankinton did business as a banking corporation from the time of its alleged incorporation until on or about the 10th day of January, 1900, when it closed its doors and ceased to do business; the business of the bank being transacted at Plankinton, Aurora county, in this state. It is claimed by the petitioners that, as there was no law of the territory of Dakota which authorized the incorporation of individuals to do a banking business, the defendants in this proceeding, who are alleged to have owned stock in this corporation, were simply partners, and as such were doing business as a private bank, and thus subject to be adjudicated a bankrupt as a private bank. It is contended by the defendants that whether or not the Bank of Plankinton was a corporation cannot be inquired into collaterally, and that the state of South Dakota is the only power which could, by proceedings in the nature of a quo warranto, inquire into the legal organization of this corporation. If the Bank of Plankinton was a de facto corporation, this position would be unassailable. But, in order that there may be a de facto corporation, it must have been possible for the territory of Dakota to have chartered a de jure corporation, and as there was no law of the territory of Dakota permitting the incorporation of banking corporations at the time the Bank of Plankinton received its certificate of corporate existence, it results that there cannot be a de facto corporation. The limitation of the doctrine that the validity of corporate existence cannot be litigated collaterally is that, where there is no law under which a corporation might exist, then the validity of corporate existence may be attacked collaterally. *Heaston v. Railroad Co.*, 16 Ind. 275; *Krutz v. Town Co.*, 20 Kan. 397; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; 1 *Thomp. Corp.* § 505. As is said in section 502, 1 *Thomp. Corp.*:

"We must not get too far away from the primal proposition that the legislature alone can create a corporation, and that a collection of individuals cannot make themselves a corporation by merely resolving to be such, or calling themselves such. The three tailors of Tooley street did not make themselves the people of England by passing a resolution in which they styled themselves such. There must be some basis for the operation of the rule, and accordingly we find a better statement of it in the proposition that where a corporation exists de facto, and in fact exercises corporate powers, the question whether it exercises such powers lawfully cannot be litigated in a collateral proceeding between private parties, or between a private party and the corporation. The question can only be litigated between the corporation and the state."

Defendants invoke section 2892 of the Compiled Laws of Dakota, which is in the following language:

"The due incorporation of any company claiming in good faith to be a corporation under this chapter and doing business as such, or its right to

exercise corporate powers, shall not be inquired into collaterally in any private suit to which such de facto corporation may be a party, but such inquiry may be had and action brought at the suit of the territory in the manner prescribed in the Code of Civil Procedure."

This section, as I understand it, simply declares the law in the same manner that the courts declare it. It presupposes that there is a de facto corporation, which cannot exist if there could have existed no de jure corporation. In the case of Oroville & V. R. Co. v. Supervisors of Plumas Co., 37 Cal. 354, it was held by the supreme court of California that a similar provision in the laws of that state did not go to the extent of precluding private persons from denying the existence de jure or de facto of the alleged corporation. In section 506, 1 Thomp. Corp., it is stated:

"The simple and true view is that if men undertake to form themselves into a business company which the state cannot recognize as a corporation, or which is even forbidden by the state, and in that character contract debts which would be valid and enforceable if contracted by individuals, the courts of justice should hold them liable as partners. It is intolerable that A., B. & C., by merely assuming a corporate name and pretending to be a corporation, can incur with innocent members of the public obligations which would be valid if incurred by them individually, and then escape liability because the law forbids them to act as a corporation in the incurring of such obligations. A simple rule, and one which should apply to all cases, is that, where the obligations of a pretended corporation are neither inequitable nor immoral, the judicial courts should enforce them against the corporations as partners. So to do would be strictly consonant with public policy, because, if business adventurers learn that, unless their corporate organization is lawful and valid, they are liable as partners, this will deter them from attempting to form illegal or prohibited corporations."

As the claims of the creditors who are petitioners in this action arise from simply depositing money with the Bank of Plankinton, there is no such relation between the bank and the creditors as would allow the principle of estoppel to be urged. I, therefore, am of the opinion that the parties interested in the Bank of Plankinton were co-partners. If this be so, the next duty devolving upon the court is to ascertain who those parties were, and, after a careful consideration of all the testimony in the case, the court is satisfied that the truth about who was interested in said co-partnership cannot be ascertained from said testimony. The only parties that the court has any legal evidence upon which to find that they were interested in the co-partnership are Fred L. Stevens, one of the original incorporators, and Francis Gould Fox. But, as the petition in this case must be dismissed for other reasons, I leave the consideration of the unsatisfactory testimony in regard to who were really partners. It is alleged in the petition that the alleged co-partnership did commit acts of bankruptcy, as follows:

First. "That on the 9th day of January, 1900, said co-partnership, the Bank of Plankinton, closed the doors of said bank, and suspended business, and refused to pay its depositors any part of the money deposited by them with said co-partnership, the Bank of Plankinton, and that said co-partnership on said day ceased to do a banking business in said city of Plankinton, and also ceased on said day to do any business of any kind or character in said city of Plankinton, in said district."

The evidence shows this allegation to be true, but it constituted no act of bankruptcy. It might be evidence of insolvency, but the mere fact that an individual or a co-partnership refuses to pay his or its debts is not an act of bankruptcy.

Second. "And, for a further act of bankruptcy, your petitioners represent that said co-partnership, the Bank of Plankinton, fraudulently and for the purpose of hindering and delaying its creditors, has sold and disposed of a part of its property; said partnership being then insolvent."

It is not alleged that the sale and disposal of the property occurred within four months prior to the filing of the petition in this action, and, even if it did so allege, there has been no proof offered of the truth of the allegation.

Third. "And, for a further act of bankruptcy, your petitioners represent that said co-partnership, the Bank of Plankinton, at Plankinton, in said district, did, for the purpose of defrauding, hindering, and delaying its creditors, and within four months next preceding the filing of this petition, secrete and conceal a large part of its property."

This allegation is wholly unproved. It is true that the books of the bank, at the time the bank failed, showed that there ought to be in possession of the bank more cash on account of individual deposits than was actually found; but whether this money was lost within four months or a year, or two or three years, prior to the filing of the petition, is not proved. There is no proof whatever that the bank secreted and concealed it. If the court has to indulge in any presumption, it must indulge in the presumption that it was lost through bad management, poor speculation, and not that it was fraudulently disposed of.

Fourth. "And, for a further act of bankruptcy, your petitioners allege that on or about the 6th day of January, 1900, Fred L. Stevens, the active and managing partner of said co-partnership, the Bank of Plankinton, with intent to hinder, delay, and defraud the creditors of said co-partnership, the Bank of Plankinton, absconded from the state of South Dakota, taking with him several thousand dollars belonging to said co-partnership, and that the said Fred L. Stevens still keeps himself concealed outside of said state of South Dakota; that the fraudulent acts of the said Fred L. Stevens were known to the said partners, or a majority of them, as these petitioners verily believe, or the same could have been known by the said partners by the exercise of ordinary care and diligence on their part."

This states no act of bankruptcy, and is not shown by any testimony to be true. The fact that one partner of a co-partnership embezzles the funds of a co-partnership, and absconds and conceals himself, constitutes no act of bankruptcy of that partnership. In this connection it must be stated that all these acts of bankruptcy heretofore mentioned must have been while the bank was insolvent, and there is no proof of the insolvency of the bank, other than at the time it closed its doors.

Fifth. "And, for a further act of bankruptcy, your petitioners represent that at the city of Plankinton, in said county of Aurora, in said district, on or about the 11th day of January, 1900, the said co-partnership, the Bank of Plankinton, then being insolvent, suffered and permitted certain creditors of said co-partnership, the Bank of Plankinton, namely, Warren Dye, Samuel H. Bakewell, and Hans Jensen, all of said county of Aurora, in said district, to obtain a preference over the other creditors of said co-partnership through legal proceedings, namely, by virtue of several warrants of attachment issued

out of the circuit court in and for Aurora county, in the Fourth judicial circuit of the state of South Dakota, in actions pending in said court wherein the above-named parties were plaintiffs and said Bank of Plankinton was defendant, whereby all the property, both real and personal, of said co-partnership, the Bank of Plankinton, was seized and attached thereunder by the sheriff of said county of Aurora."

It does appear in evidence that the sheriff of Aurora county did on January 10, 1900, seize all the property and assets of the Bank of Plankinton by virtue of writs of attachment in his hands for service sued out in certain cases commenced by creditors of the bank; but it also, as well, appears that on the 22d of the same month the bank consented to the appointment of a receiver by the circuit court in and for the county of Aurora, state of South Dakota, and a receiver was appointed of all the property and assets of said Bank of Plankinton. Subdivision 3, § 3, c. 3, Bankr. Act 1898, declares it to be an act of bankruptcy for any person to suffer or permit, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before the sale or final disposition of any property affected by such preference, vacated or discharged such preference. After the appointment of a receiver, no sale of property could be had under the writs of attachment, nor under any execution issued on the judgment obtained in the action in which the attachment was issued. There was not sufficient time to move to vacate the attachments before the appointment of a receiver, and there is no evidence that the funds in the hands of the receiver have been distributed, or that the writs of attachment have not been vacated. The order appointing the receiver reserved the right to move to vacate the attachments on the part of the bank. So no act of bankruptcy is shown here.

Sixth. "And, for a further act of bankruptcy, your petitioners represent that on or about the 22d day of January, 1900, at Mitchell, Davidson county, in said district, the said partnership, the Bank of Plankinton, being then insolvent, suffered and permitted a certain creditor of said co-partnership, by an action commenced in the circuit court in and for Aurora county, in said Fourth judicial circuit of the state of South Dakota, wherein Mike Gales was plaintiff and said Bank of Plankinton was defendant, to obtain an order of said court appointing a receiver of all the property of said co-partnership doing a private banking business under the name and style of the Bank of Plankinton, and to thereby obstruct and defeat the operation of said act of congress in reference to bankruptcy."

This allegation is shown to be true, and is the only alleged act of bankruptcy about which there could be any question. Under the bankruptcy act of 1867, it was held to be an act of bankruptcy to permit the creation of a receivership. In *re Binger*, Fed. Cas. No. 1,420. And, in general, the law is so stated in the text-books. Lowell, Bankr. p. 25; Bump, Bankr. (11th Ed.) 254. But in the case of *In re Baker-Ricketson Co.* (D. C.) 97 Fed. 489, it is held by Judge Lowell that where a bill in equity asking for the appointment of a receiver is brought in a state court against a corporation, and the defendant makes no opposition to the suit, but tacitly permits the receiver to be appointed and to take charge of its property, this is not a conveyance or transfer of the property, in the meaning of Bankr. Act 1898, § 3a, cl. 1, providing that it shall be an act of bankruptcy if a person shall

have "conveyed or transferred any part of his property with intent to hinder, delay or defraud his creditors," and also that under *Id.*, cl. 3, providing that it shall be an act of bankruptcy if a person shall have suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference, where a corporation makes no defense to a bill in equity against it in a state court, and tacitly permits the appointment of a receiver, and the vesting of its property in him, it is not an act of bankruptcy by the corporation, although certain classes of persons may be entitled to larger dividends under the receivership proceedings than they would obtain in bankruptcy, if it does not appear that any such persons are concerned, or that any sale or final disposition of the property affected by the receivership has been made. In the case of *Vaccaro v. Bank* (C. C. A.) 103 Fed. 436, it was held by the circuit court of appeals of the Sixth circuit that the consenting to the appointment of a receiver by a co-partnership did not constitute an act of bankruptcy. The court in the last case uses the following language:

"If the debtor while insolvent 'suffer or permit' a creditor to obtain a preference through legal proceedings, or if he permit his property to be 'concealed or removed' with intent to hinder, delay, or defraud his creditor, he has committed an act of bankruptcy. But it is not declared to be an act of bankruptcy if he 'permit' or 'suffer' a receiver to be appointed for the general benefit of the creditors of a dissolved and insolvent partnership, and this is the most that can be said to be shown by the evidence in this case. Under the act of 1867 it was held to be an act of bankruptcy to permit the creation of a receivership. But, as Judge Lowell observes in the case of *In re Baker-Ricketson Co.*, this ruling was based upon section 39 of that act, which made it an act of bankruptcy to 'procure or suffer his property to be taken on legal process with intent to defeat or delay the operation of this act.' Under that provision it was held that the appointment of a receiver was legal process. But this provision is not found in the act of 1898, and the language of section 3, subd. 1, is by no means the equivalent of that section. * * * Neither has the clause touching a concealment or removal by permission any clear bearing upon the matter of the appointment of a receiver. It would be an abuse of language and a confusion of ideas to hold that the passive conduct of the Vaccaros in respect to the bill seeking a receiver was a concealment or removal with intent to hinder, defraud, or delay creditors."

Generally speaking, the receiver would take the assets of the bank subject to all valid liens, and, if the attachments were valid and were not vacated, the bank might be said to have suffered or permitted a preference through legal proceedings, in consenting to the appointment of a receiver; but, except as to the question of insolvency, the burden of proof is on the petitioners to show an act of bankruptcy, and it nowhere appears that the attachments have not been vacated, or that they will not be vacated at least five days before the final disposition of the property affected thereby. Therefore, under the testimony in this case, I shall hold that it has not been shown that the consenting to the appointment of a receiver was an act of bankruptcy, as it is not shown that any preference was thus created. But, conceding that the consenting to the appointment of a receiver under the circumstances detailed in this case was an act of bankruptcy, it is also true that, at the time the co-partnership consented to the ap-

pointment of a receiver, it must have been insolvent. Insolvency, under the present bankruptcy law, is said to exist "whenever the aggregate of his [the bankrupt's] property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts." Under the act of 1867 insolvency did not mean an absolute inability to pay one's debts by the application of one's property upon the settlement of all one's affairs, but simply an inability to pay debts in the ordinary course of business. This difference in the definition of what shall constitute insolvency places a partnership, when proceeded against for the purpose of having it adjudged a bankrupt, in a very different position than what it was under the act of 1867. Under the act of 1867 a co-partnership would be insolvent if it was unable to pay its debts in the ordinary course of business. Under the act of 1898 all the property which may be made liable for the firm debts must be considered in determining whether or not the co-partnership is solvent. Partners are liable in solido. It is true that firm creditors have a prior right to firm property, and individual creditors have a prior right to individual property; but this merely goes to the marshaling of assets, not to the question as to what property is liable to pay the debts of the firm. The excess of the individual property after paying the individual debts goes to pay the firm debts if there is not sufficient firm property, and the excess of firm property goes to pay individual debts if there is not sufficient individual property to pay the individual debts; and therefore it is clear, in my opinion, that, in order that a co-partnership may be adjudged a bankrupt under the act of 1898, it must be shown, not only that the co-partnership is insolvent, but that every member of the co-partnership is individually insolvent. This view is indicated in the case of *In re Blair* (D. C.) 99 Fed. 76, and squarely decided in the case of *Vaccaro v. Bank*, supra, where that court even refuses to adjudge a co-partnership insolvent for the reason that the administrator of a deceased partner had sufficient property in his possession, belonging to the deceased, to pay the partnership debts. In that case the court said:

"The supreme test is whether the aggregate of the debtor's property, at a fair valuation, is sufficient to pay the debtor's debts. The debtor here was the partnership, as such, and the partners individually. If collectively there was property subject to partnership debts, the partnership was not insolvent. Whether a part of that property was in the hands of an administrator is a matter of no moment. It is no answer to say that the administrator should have come forward and paid the firm debts, and looked to firm assets and the individual estates of the surviving partners for reimbursement. * * * There is a sense in which a firm may be said to be insolvent where the joint property is insufficient to pay the joint debts. But if in fact there is a partner whose individual estate is ample to pay the firm debts as well as his own, the firm is not insolvent, under a law which defines insolvency as a condition where the property of the debtor, at a fair valuation, is insufficient to pay his debts."

I find from the testimony in this case (and there is no dispute upon the question) that Charles A. Johnson, one of the alleged co-partners, and Julius D. Bartow, another of the alleged co-partners, was, at the

time of the consenting to the receivership, solvent, and able—either one of them—to pay the debts of the Bank of Plankinton, so far as appears from the record in this case. The petition, therefore, will be dismissed.

GORHAM MFG. CO. v. EMERY-BIRD-THAYER DRY-GOODS CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

No. 1,312.

1. UNFAIR COMPETITION—FRAUD AND DECEIT THE FOUNDATION OF ACTION FOR.
The basis of a suit for unfair competition in trade is fraud. To warrant relief in such a suit, there must be proof of the fraudulent intent to palm off the goods manufactured by others as those manufactured by the plaintiff, or proof of facts and circumstances from which such an intent and fraud may be fairly inferred.¹
2. APPEAL—DECREE PRESUMPTIVELY CORRECT.
When a court has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, unless an obvious error has intervened in the declaration of the law, or some serious mistake has been made in the consideration of the evidence.
3. EQUITY—RULING ON OBJECTIONS TO EVIDENCE—NECESSITY.
A ruling by the trial court upon objections to evidence in equity must be obtained or refused, an exception taken, and these proceedings must appear in the record, to warrant a consideration of the questions they suggest in an appellate court.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 92 Fed. 774.

Rufus J. Delano (W. H. Brown, Benjamin H. Chapman, and Philip S. Brown, on the brief), for appellant.

John L. Peak, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is a suit in equity brought by the appellant, Gorham Manufacturing Company, a corporation, against the appellees, Emery-Bird-Thayer Dry-Goods Company, another corporation, and others, to enjoin them from palming off the silverware of other manufacturers as that made by the appellant, and known as "Gorham silverware," or as "silverware made by Gorham Manufacturing Company." The appellant alleged in its bill that the appellees had been and were deceiving the public and their customers by selling to them silverware of another manufacture as Gorham silver or Gorham silverware, which was well known in the market to be silverware of its manufacture, and of a superior quality and character. The appellees denied the averments of the bill. The evidence was conflicting and voluminous. It occupies 274 printed pages of the record. A recital of this evidence would not be instructive, and it is sufficient to say that the case of the appellant rested upon these four charges:

¹ Unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165, and *Lare v. Harper & Bros.*, 30 C. C. A. 376.

(1) That on one occasion the clerks of the appellees represented to one Frances MacGillis that silverware manufactured by others was made by the appellant. But this charge is denied by the clerks, and it is supported by the testimony of Frances MacGillis alone. (2) That the clerk of the appellee who had charge of its silver department sold 18 spoons which were made by some other manufacturer as spoons made by the appellant. And, although denied by the clerk, this charge is, in our opinion, sustained by the evidence. (3) That this managing clerk, at the request of an agent of the appellant, who had bought spoons of her, falsely marked them "Gorham" spoons, when she and the agent both knew that they were not such. And (4) that another clerk of the appellee sold to counsel of the appellant a spoon made by another manufacturer as one made by the appellant. But this clerk was a new and incompetent salesman, who did not know the difference between goods manufactured by the appellant and those made by other manufacturers, and he was discharged for the misrepresentation he made, the day following his sale. In this state of the evidence, the only incident upon which a decree for the appellant could be lawfully based is that described in the second charge; and this is met by the testimony of the managers of the appellee that they never made, themselves, and never permitted their clerks to make, any misrepresentation respecting the manufacture of the goods they sold, and that, if any such misdescription or misrepresentation was made, it was either through the mistake or the misfeasance of some one of their employes, without knowledge or intent upon their part. Such testimony as this would undoubtedly be insufficient to overcome evidence of a course of action, or of several fraudulent sales by the clerks of the appellees. In the presence of established facts, evidence of this character must be carefully scrutinized, and credited with caution. Nevertheless, this suit is based on fraud. Its foundation is unfair, fraudulent competition, and the intent to deceive is an indispensable element in the fraud which warrants the relief sought. This intent and the fraud in which it inheres may be, and generally must be, proved by circumstances, by facts, by sales, by a course of action. But the facts and circumstances which establish it must be such that the fraud and the intent to deceive the public are fairly inferable from them. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 549, 11 Sup. Ct. 396, 34 L. Ed. 997. The court below reached the conclusion that the fraud charged in this suit was not proved. When the trial court has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence. *Warren v. Burt*, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; *Latta v. Granger*, 68 Fed. 69, 72, 15 C. C. A. 228, 230, 32 U. S. App. 342, 346; *Paxson v. Brown*, 61 Fed. 874, 883, 10 C. C. A. 135, 144, 27 U. S. App. 49, 62; *Stuart v. Hayden*, 72 Fed. 402, 408, 18 C. C. A. 618, 623, 36 U. S. App. 462, 473; *McKinley v. Williams*, 74 Fed. 94, 102, 20 C. C. A. 312, 320, 36 U. S. App. 749, 762; *Snider v. Dobson*, 74 Fed. 757, 758, 21 C. C. A. 76, 77, 40 U. S. App. 111, 113. There was no misinterpreta-

tion or misapplication of the law by the court below, and a careful reading and consideration of all the evidence have failed to persuade us that the proof of the appellees' intentional deception and fraud in this case is so clear that we can justly say that the trial court made a mistake in its conclusion upon this question of fact. As this is the only question in the case, the decree below must be affirmed.

It has not escaped our attention that several specifications of error were leveled at certain evidence to which objections were made before the notary who took the testimony. But we have searched the record in vain for any indication that these objections were ever ruled upon, or called to the attention of the court either before or at the hearing. If the consideration by an appellate court of the objections to evidence merely noted in the taking of testimony in equity is desired, such objections must in some way be called to the attention of the trial court. A ruling upon them must be obtained, or refused, and an exception taken, and these proceedings must be spread upon the record, because an appellate court cannot declare that the court below has erred in a ruling that it has never made upon a question which was never presented to it. Rule 13, Sup. Ct. (3 Sup. Ct. x.); *Goodwin v. Fox*, 129 U. S. 601, 630, 9 Sup. Ct. 367, 32 L. Ed. 805. Moreover, a careful perusal of all the evidence concerning the admission of which any question has been made has convinced us that, whether that evidence was admitted or rejected, the result in this case must have been the same, and the bill of the appellant must have been dismissed. The decree below is affirmed.

WILLIAM MANN CO. v. HOFFMANN.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 648.

PATENTS—INFRINGEMENT—LOOSE-LEAF BINDERS.

The Leslie patent, No. 581,123, for improvements in binders for holding loose leaves, commonly known as "perpetual ledgers," does not embody a pioneer invention, but merely an improvement on prior devices, and therefore entitles the patentee to protection only for the specific improvement introduced into the previous combinations, which consists only of the peculiar form of the posts which connect the back pieces and, by engaging with notches cut on the edges of the sheets, hold them in place. Claims 8 to 13, inclusive, which do not mention such feature, but are general in their terms, must be confined to the particular construction of the device shown in the specification to avoid anticipation, and, as so construed, they are not infringed by binders made in accordance with the Hoffmann patent, No. 568,251.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

For former opinion, see 96 Fed. 237.

The bill of complaint of the William Mann Company, appellant, alleges infringement of letters patent of the United States No. 581,123, granted to Leon M. Leslie, assignor to the William Mann Company, for "improvements in binders," dated April 20, 1897, on application filed August 3, 1896, and the appeal is from a decree of dismissal on final hearing. The charge of infringement, as stated in the brief for the appellant, is based on the manufacture and

sale by the appellee, Hoffmann, of "loose-leaf ledgers, made in substantial accordance with the structure shown in patent No. 568,251, granted September 22, 1896, to said Hoffmann"; and the controversy is further stated to be "concerned with what are known as 'loose-leaf ledgers,' which are books, in effect, permanently bound, but any leaf of which can be removed, reinserted, or replaced at any desired point." Aside from the showing of the appellee's patent, the application for which was pending in the patent office concurrently with the application on the part of Leslie, and the further showing that a declaration of interference in respect of the Hoffmann claims was demanded by Leslie and denied by that office, numerous anticipatory patents are set up by way of defense, with an allegation thereupon that the several claims on which infringement is predicated are invalid.

The specifications of the Leslie patent are as follows:

"My invention relates to that class of temporary binders known in the trade as 'perpetual ledgers,' and is designed to embody certain improvements whereby they be made more compact and easily manipulated. It is further designed to fasten the sheets thereof in the binder in such a way that any sheet may be extracted from the binder without loosening the remaining sheets from the binder, and thereby possibly disarranging them. As hitherto constructed, in one form, they have consisted of an upper and a lower back piece, connected by posts which pass through apertures in the loose sheets, which are placed between and clamped by the said back pieces. With this construction, whenever it was desired to remove a sheet, it was necessary to completely separate the back pieces, and remove the desired sheet and all that might be above it by lifting them bodily until the apertures in the sheets are freed from the posts. In my improved construction I make the posts co-operate with notches or projections on the edges of the sheets, instead of passing through apertures in the sheets, whereby I am enabled to remove any desired sheet without completely removing all superposed sheets; but all that is necessary is to remove the superposed sheets enough so that the desired sheet may be bent until its notches or projections are freed from the posts. It has also been proposed to build such binders with spring backs, which, when in place, tend to hold the sheets together, and in which the sheets are accurately secured in place by means of pivoted links on the ends of the spring backs, which take into notches in the edges of the sheets. With such a construction, if it were desired to remove any sheet, it would be necessary to release the pressure of the spring backs on the sheets, and then, having swung out the links, to withdraw the desired sheet and thereby displace the other sheets, as they are not held in place by any mechanism whatever. In my improved construction I employ posts to co-operate with the notches or projections on the edges of the sheets, which posts are rigid with their back pieces and are connected with each other, so that the posts are never withdrawn from the sheets that are not to be extracted, and the other sheets, consequently, cannot be displaced while any desired sheet is being withdrawn. My invention further consists in the combination, with the binder, as above described, of a spring-catch locking device between the back pieces, so that they will be held as adjusted in any position until they are released by applying a key to said lock. To further illustrate my invention, I annex hereto a sheet of drawings, in which the same reference letters are used to designate identical parts in all the figures, of which Fig. 1 is a perspective view of my ledger with a few sheets in place; Fig. 2 is an inverted detail view in elevation, some of the covering being broken away, showing the construction of the spring-catch locking device; Fig. 3 comprises an elevation and section of the telescoping posts co-operating with the notches in the edges of the sheets; and Fig. 4 is a plan view of one of the sheets. The upper and lower back pieces, F and A, are rigid metallic plates, which may be covered with leather and have covers attached thereto by flexible hinges, as is customary in this class of devices. I have not, however, illustrated these covers, as they are not deemed to be any part of my invention. Near each end of the back piece, A, is an upwardly projecting triangular metal post, G, which is rigidly fastened to the back piece, A; and co-operating with each of said posts, G, is a post, B, rigidly fastened to the back piece, F, and located just outside of the posts, G, and having a quadrilateral cross section, so that the cross section of the posts, G and B, taken together,

form a substantially equilateral triangle, as shown in Fig. 3. To insure these posts, G and B, always remaining in proper juxtaposition, I make a slot, b, in the post, B, and I pass one or more screws, g, through this slot, and screw them into the post, G. To prevent the heads of the screws, g, from projecting, I countersink the outer portion of the slot, b, to receive the heads. To co-operate with the structure hitherto described, I employ loose sheets, E, as shown in plan view in Fig. 4. These sheets have triangular notches, e, which co-operate with the posts, B and G, as clearly shown in Fig. 1. With all the available space between the back pieces, A and F, filled with the sheets, E, if it is desired to remove any sheet, all that is necessary is to draw apart the back pieces, A and F, as far as permitted, and then to open the book at the desired sheet, when it will be found that there is sufficient space between the sheets, E, to permit of the desired sheet, E, being bent enough to disengage it from the posts, B and G. As these posts have the same bevel, it will be noted that when the back pieces, A and F, are separated, or the binder expanded, the leaves will have no more play in the expanding part of the binder than the leaves contained in the main body of the binder, which will be noted as a considerable advantage. It will be understood that I might construct my posts so that the combined cross section should be of some other shape than triangular, the only essential being that the cross sections of each of the co-operating posts shall correspond to the shape of the apertures or projections, so that the sheets shall be held with the same amount of play, whether they are held by the co-operating posts separately or together. In order to secure the back pieces, A and F, firmly in any desired relative position, so as to make a practical book capable of standing ordinary usage, I add to the structure hitherto described the spring-catch locking device shown in Figs. 1 and 2. This consists of two parallel posts, D, adjacent the edge of the back piece, A, and at the central portion thereof, provided with teeth which co-operate with a pair of spring-pressed dogs, a, pivotally mounted on the inside of a casing, I, formed at the lower end of a plate, II, projecting downwardly from the back piece, F. The edges of this plate, II, are curved, so as to form tubes inclosing the posts, D. It will be seen from this construction that when the ledger is well filled with sheets, and the back pieces, A and F, are pressed together, the posts, D, passing into the tubes formed on the plate, II, will be engaged by the dogs, a, and held firmly in whatever position they may be placed, as the dogs co-operating with the notches in the posts, D, will prevent the pieces, A and F, being separated under the expansive force of the sheets, E. It will be noticed that these sheets, E, have notches, d, to accommodate the locking device. When it is desired to unlock the back pieces, a key having oppositely disposed lugs is inserted in the keyhole, J, and it will be seen from Fig. 2 that, when such a key is inserted and turned, its lugs will take against the tails of the dogs, a, and thus release them from the notches in the posts, D, and permit the back pieces, A and F, to be separated so far as the slot and pin connection of the posts, B and G, will permit. While I have shown my invention as embodied in the form now designed by me to be the simplest and most practical, yet it will be understood that it is capable of some modifications clearly within the scope of the invention. For instance, instead of breaking the continuity of the outline of the sheet, E, by the notches, e, and having the posts, B and G, enter said notches, I might break its continuity by projections, and form and adjust the posts, B and G, so as to inclose the projections, and thus hold the sheets, E, in place by co-operating with the projections. It is also manifest that I might make the posts, B and G, to telescope, instead of having them co-operate in the manner shown. Therefore I do not desire to be limited to the exact structure shown and described, but I desire to cover such constructions as are fairly within the terms of the following claims."

The first seven claims of the patent relate to the structure and specific feature of the co-operative posts and sheets, whereof infringement is not asserted, the seventh claim reading as follows, and furnishing a fair example of their import:

"(7) A temporary binder, comprising the upper and lower back pieces, with triangular posts between the two, said lower back piece being provided with parallel, upwardly projecting posts having teeth, a casing sliding on said posts

and carried by the upper back piece, and locking mechanisms, secured to said casing, adapted to engage the teeth on the parallel posts, and leaves having V-shaped notches on each edge beveled to correspond to the triangular posts, and having cut-out portions at their rear ends to allow for the sliding movement of the locking casing, substantially as described."

The claims of which infringement is alleged are as follows:

"(8) A temporary binder, comprising the rigid back pieces with connecting pieces rigid therewith, and permanently, but loosely, connected to their co-operating connecting pieces, and having a limited sliding movement, so as to permit movement of the back pieces towards and from each other, whereby the binder may be expanded, but not separated, so that any sheet may be extracted without freeing the others from the binder, and means for locking the pieces in any desired position, substantially as described.

"(9) In a temporary binder, the combination of the back pieces having the posts rigid therewith, and permanently, but loosely, connected to and co-operating with each other, with the sheets having a broken outline, the said posts co-operating with the broken outline portion of said sheets, to hold them in position, so that any sheet may be extracted from the binder without freeing the others from the posts, substantially as described.

"(10) In a temporary binder, the combination of a rigid back piece having a plurality of posts rigid therewith with a similar back piece having a plurality of posts permanently, but loosely, connected to and co-operating with the posts of the first-named back piece, and sheets having notched portions co-operating with said posts, so that any sheet may be extracted from the binder without releasing the others from the posts, substantially as described.

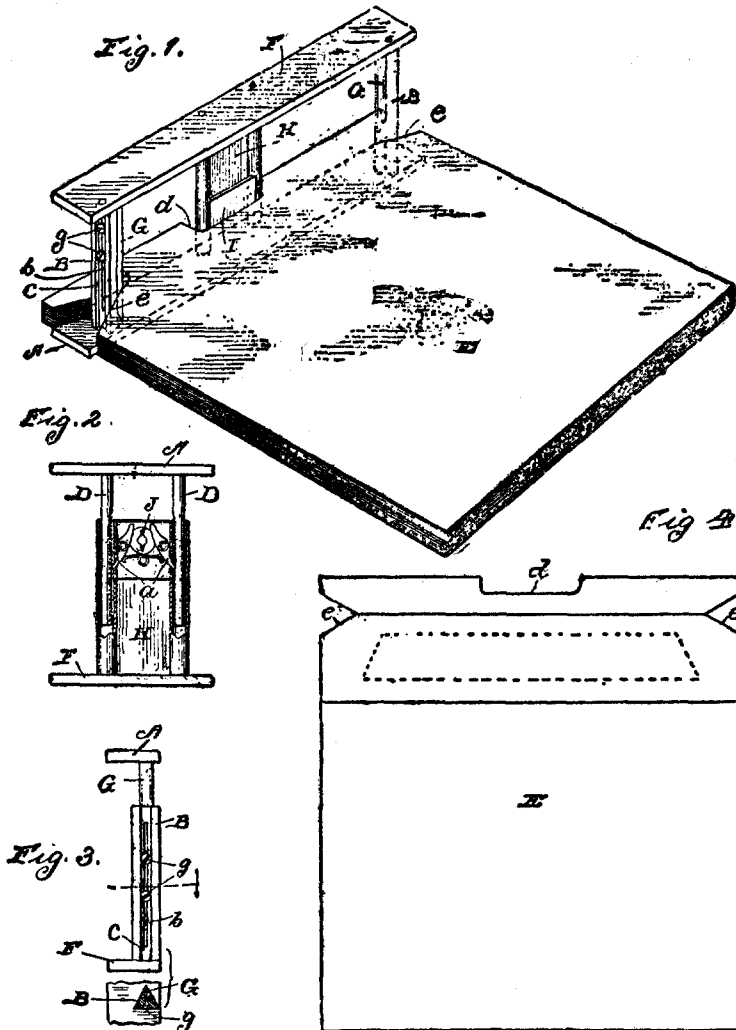
"(11) In a temporary binder, the combination of the back pieces having the posts rigid therewith, and permanently, but loosely, connected with their co-operating posts, with the sheets removably held in position by said posts, so that any sheet may be withdrawn from the binder without releasing the others from the posts, substantially as described.

"(12) In a temporary binder, the combination of the back pieces having the posts rigid therewith, and permanently, but loosely, connected with their co-operating posts, with the sheets removably held in position by said posts, so that any sheet may be extracted from the binder without freeing the others from the posts, and locking mechanism, connected to said back pieces, whereby they may be locked in any desired position, substantially as described.

"(13) In a temporary binder, the combination of the back pieces having the posts rigid therewith, and loosely connected to and co-operating with each other, with the sheets having a broken outline, the said posts co-operating with the broken outline portions of said sheets to hold them in position, so that any sheet may be extracted from the binder without freeing the others from the posts, and locking mechanism, connected to said back pieces, whereby they may be locked in any desired position, substantially as described."

The specifications of the Hoffmann patent are these:

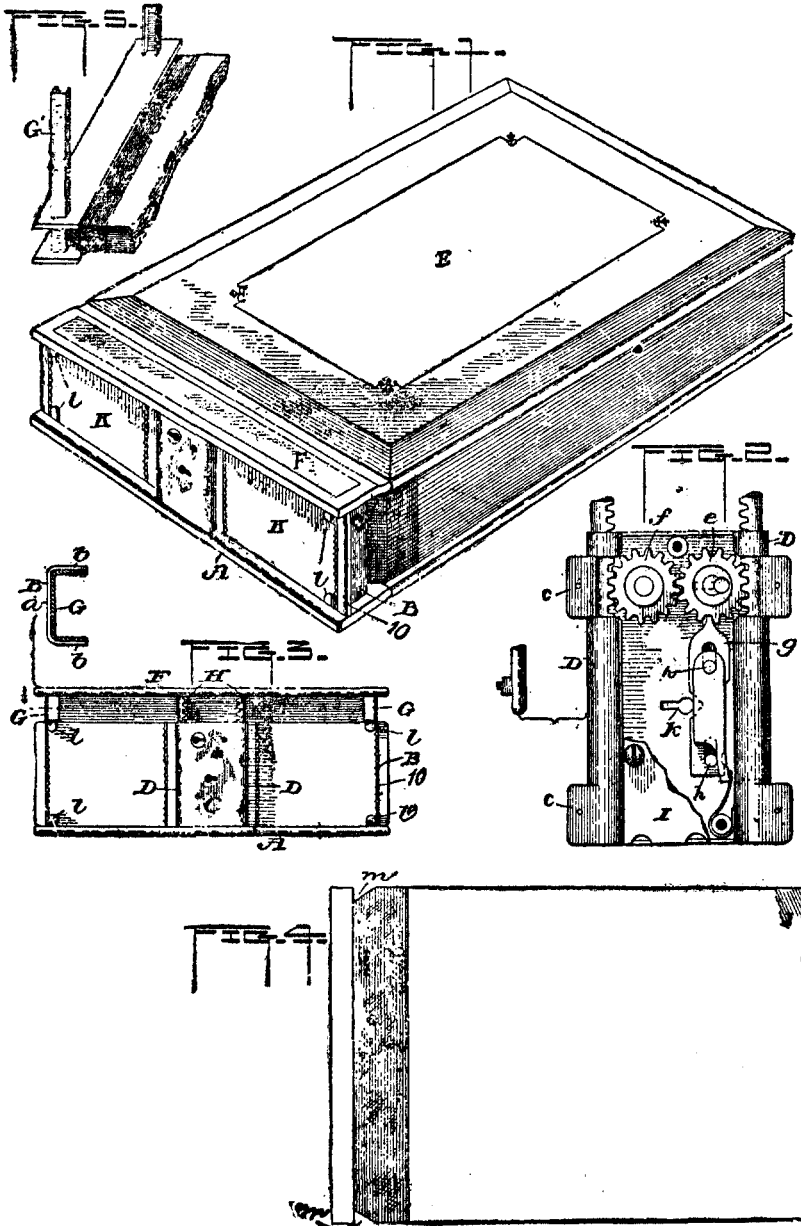
"My invention relates to an improvement in temporary binders, and I have designed the form herein shown, described, and claimed for use especially in connection with flat-opening leaves, which may be readily removed and replaced by new ones, and the binder then locked firmly upon the leaves, forming a complete flat-opening book. As usually constructed, temporary binders comprise two covers, rods secured to an edge of one of said covers and adapted to be inserted through suitable openings in the corresponding edge of the other cover, and means for detachably securing or locking said removable cover to said rods at any desired point on said rod, the temporary files being placed over the rods, between the covers, and bound together by forcing the edge of the top cover firmly thereupon, and securing or locking said cover in position. An application of such a binder just referred to has been heretofore made to what are known in the trade as 'perpetual ledgers'; that is, flat-opening account books in which the leaves are all separately placed in said binder and may be removed and replaced at will. In said temporary binders, as usually constructed, the leaves are provided with perforations fitting down over the rods, and when it is desired to remove any particular leaf a separate transfer wire is used, upon which all leaves preceding the one to



be removed are placed, and the latter then slipped off the rods, the other leaves being then turned back to proper position. These binders are open to objection by reason of the inconvenience and amount of time required in using the transfer wires for removing and putting in the leaves, and to obviate these defects it has been proposed to provide a temporary binder comprising a base piece with triangular shaped vertical posts attached thereto, a top piece having correspondingly beveled downwardly projecting posts having a sliding engagement with the first-mentioned posts, and to have the flat-opening leaves of the book provided with beveled notches on each edge adapted to engage said triangular posts. By this construction, by raising the top cover slightly, leaves can be extracted or inserted by merely giving them a slight bend and drawing the notches away from engagement with the posts. This construction just described is, however, open to the objection that the leaves must be notched at the rear central portion to make room for the locking device, and, furthermore, no arrangement is provided for protecting the outer edges of the

leaves from dust or dirt. The object of my invention is to obviate the difficulties existing in both of the devices as above described, and to this end it consists, primarily, of a base piece and a top piece, one of said parts being provided at either end with vertical boxes or chambers, closed, except on one side, and adapted to receive the stubs of the leaves; secondly, it includes, in addition to the above, removable backs for the books, whereby the entire rear edges of the leaves may be protected; and, finally, it includes a new locking device and a novel arrangement for manipulating the top cover, to raise the same, to allow of insertion and removal of said other leaves. The invention is illustrated in the accompanying drawings, in which Fig. 1 is a perspective view of a temporary binder embodying the invention; Fig. 2 is a view, partly in section, of the locking mechanism; Fig. 3 is a rear view of the binder; Fig. 4, a plan view of a flat-opening leaf, preferably used in connection with this binder; Fig. 5 is a perspective view of a binder to which leaves may be transferred after an account has been closed or a leaf filled up; and Fig. 6 is a perspective view, partly in section, showing a complete view of a temporary binder embodying my invention. In the drawings, A represents an under cover or base piece of a temporary file, which may be of any approved construction, or, if it is not desired to have an under cover, this may consist merely of a metal base piece having secured to it the upwardly extending posts, B, herein shown as composed of the rear portion, a, with the laterally extending flanges, b, forming a chamber closed on three sides, as shown clearly in Fig. 3. Adjacent the edge of the base piece, A, and preferably in a vertical plane corresponding with the vertical plane of the rear flange of the post, B, is a plate, C, bent to form the hollow posts, B; these posts being provided with the lateral flanges, c, for the purpose hereinafter referred to. E represents, as a whole, the upper cover, constructed in the usual manner, and projecting downwardly from the under side of the binding piece, F, of this cover, are posts or chambers, G, adapted to engage with and slide within the posts or chambers, B, on the base piece, and by this arrangement, when the leaves are put in position, the upper cover or binding piece may be forced towards the base piece, the edges of the stubs of the leaves being cut a proper size to fit within the chambers or casings, G, and thus be prevented from longitudinal movement and protected from dust or dirt. Also projecting downwardly from the binding piece, F, are toothed rods, H, which slide up and down within the hollow posts, D. I is a removable plate, attached to the plate, C, the two forming between them a casing in which are pivoted, near the upper end, two gear wheels, e, f, meshing with each other and with the teeth on the posts, H. One of these gear wheels has a hub, passing through it, arranged to receive a key by which it may be turned, so that by turning said gear wheel with the key the two posts may be made to ride up or down. To prevent any improper tampering with the binder, a locking dog, g, is provided, slotted to slide back and forth on pins, h; this dog having a pointed end adapted to engage with the teeth of the gear wheel, e. The same key which fits the gear wheel, e, and rotates it, also fits the keyhole, K, and engages with the locking dog to move it into or out of engagement with the teeth of the wheel, e. When it is desired to remove or insert a leaf, the dog is unlocked from engagement with the wheel, e, the key taken out and inserted in the hub of the wheel, e, and the latter turned to raise the upper cover. In order to protect the rear edges of the sheets from dust or dirt, removable pieces or backs, K, of leather or suitable material, may be provided, which are guided into proper position and held at one end by the clamping flanges, l, secured to the posts, B, and which, at their opposite ends, rest on the flanges of the lock casing heretofore referred to. The numeral 10 represents flanges extending between the members, but which form no part of the invention. In connection with this binder I have illustrated a special form of leaf which I have found preferable, and it is constructed as shown in Fig. 4, having a hinge of linen or muslin pasted to the rear edge of the leaf, and having a rectangular re-enforcing strip on the rear edge of the hinge, said hinge being notched, as shown at m, but leaving the lateral rear edge of the hinge and re-enforce squared to fit quite closely within the chamber or casing, G. In Fig. 5 I have shown a transfer ledger which I have found of value in connection with my improved device. In this construction only posts, G', are used, and they are made con-

siderably longer than those on the ordinary perpetual ledger. It will be understood that any ordinary locking mechanism may be used to secure the upper binding piece upon these posts, and I have not herein deemed it necessary to illustrate such locking means,—the principal object of illustrating this transfer ledger being to show that the same idea of having the flanged posts



forming a recess to receive and guide the projecting ends of the rear edges of the leaves may be applied to this transfer ledger as well as to the perpetual ledger; but it will be understood that any suitable arrangement for securing the upper cover in position may be provided. To remove or insert a leaf, all that it is necessary to do is to unlock the binder, move up the top piece, lay the book on its back, and open, and it will be found that there is sufficient play to separate the leaves at any desired place, so that by curving any leaf a little it may be easily lifted out."

The appellee's structure as manufactured differs from that set out in his patent in the substitution of a locking device, which is described by the appellant's expert as serving "the double purpose of fixing the limit of movement of the two back pieces away from each other and of rocking the back pieces in any desired relation within their limit of movement, to which they may have been adjusted,"—such limit of longitudinal movement not being furnished by the "telescoping channel-shaped posts" of the Hoffmann structure. The answer of the appellee discloses that his form of perpetual ledger, as patented, was devised subsequently to that of Leslie and with full knowledge of that structure; but the file wrapper and contents in the matter of the Leslie patent show simultaneous consideration in the patent office of both applications, and the denial of a declaration of interference which was urgently requested on behalf of Leslie. The same record shows that sundry amendments were imposed by the rulings of the patent office to restrict the original broader claims in the Leslie application, on reference to British patents. The prior art is shown in two devices of the patentee, Leslie, which were in public use more than two years before his application in question, and various foreign and domestic letters patent. The following letters patent of the United States are especially referred to the briefs: Peck, No. 151,427, May 26, 1874; Adams, No. 169,665, November 9, 1875; Archer, No. 185,205, December 12, 1876; Paxson, No. 283,653, August 21, 1883; Appleby, No. 324,451, August 18, 1885; Doyle, No. 333,061, December 22, 1885; Snow, No. 337,027, March 2, 1886; Lake, No. 341,252, May 4, 1886; Blackburn and Brimm, No. 410,346, September 3, 1889; Moynahan, No. 427,350, May 6, 1890; Henry, No. 431,350, July 1, 1890; Morehouse, No. 464,731, December 8, 1891; Waide, No. 484,349, October 11, 1892; Stoelting, No. 486,989, November 29, 1892; Morehouse, No. 511,860, January 2, 1894; Morehouse, No. 543,101, July 23, 1895; Huttenbach, No. 553,678, January 28, 1896,—and the following British patents: Cooper, No. 110, January 3, 1888; Coghill, No. 17,894, October 7, 1892; Strauss, No. 18,737, October 19, 1892; also duplicate German patents of Cooper and Strauss.

J. H. McElroy and Charles B. Collier, for appellant.

C. L. Sturtevant and Taylor E. Brown, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after the foregoing statement, delivered the opinion of the court.

Each of the devices in suit is of the well-known general class of temporary binders for books or files of loose leaves, whereby the leaves are, "in effect, permanently bound, but any leaf can be removed, reinserted, or replaced at any desired point." This fundamental feature is old in the art, and so are the general means employed, of back pieces with associated posts which enter through or engage with the leaves in various ways to hold them in place, while permitting their removal or replacement as occasion requires. The addition of a locking mechanism to provide against unauthorized interferences is not only an obvious expedient, but is shown as well in prior devices. Aside from the peculiar construction of the telescoping posts, which

serve both (1) to connect the back pieces and permit their movement "towards and from each other," while preventing complete separation, and (2) to preserve constant co-operation and engagement with the notched leaves, no element of the appellant's combination is new in itself, nor presents a new use of any old element. Thus back pieces, connecting and co-operating posts, both plain and telescopic, and leaves with perforations, notches, or broken outline, to make them "removably secured" in the binder, are each shown in like use in analogous devices; and the locking mechanism in this patent is not only a familiar structure, but is identical with one previously employed by Leslie for like purpose, and in public use for more than two years prior to the present application. It is manifest that Leslie was not a pioneer in the art of so-called "loose-leaved binders"; that his advance in the art, through the structure and two-fold service of the posts described in the patent, is completely embodied in the first seven claims, of which no infringement is here alleged; and that the further claims in question, assuming their validity, can receive no broad construction, and surely no construction which would exclude use of the like structure as found in the same art. Indeed, the narrowness of the contention on the part of the appellant is thus assumed and stated by counsel in their brief:

"We are not contending for a broad construction that would cover, or be anticipated by, any structure that merely shows a pair of back pieces connected by rigid posts, which are expansible, but not entirely separable, and which posts co-operate with notches in the leaves, merely to determine the position and location of the leaves, and not to prevent their removal, because such a construction is admittedly shown in the Waide patent, No. 484,349. What we are contending for has been set out previously, and is for a pair of back pieces connected by posts, so as to be capable of freely sliding back and forth (as distinguished from being screwed slowly back and forth), and which are so located and so co-operate with notches in the edges of the leaves as to hold the leaves in position, not merely determining their location, whether the back pieces are expanded or contracted. In other words, we are contending for a construction in which back pieces with telescoping and nonseparable posts are employed, co-operating with leaves, so that the leaves are securely held in position, not by any clamping action of the posts, but by reason of the engagement of the posts with the notches in the leaves."

The invention of the patentee, as recited in the specifications, "relates to that class of temporary binders known in the trade as 'perpetual ledgers,' and is designed to embody certain improvements whereby they may be made more compact and easily manipulated"; and "it is further designed to fasten the sheets thereof in the binder in such way that any sheet may be extracted from the binder without loosening the remaining sheets from the binder, and thereby possibly disarranging them." For the purpose indicated, Leslie devised a new form of two-part post to connect the back pieces, so arranged as to have a limited sliding movement one part upon the other, "whereby the binder may be expanded, but not separated"; and the posts are shaped "to co-operate with the notches or projections on the edges of the sheets," being triangular as shown in the patent, "so that any sheet may be extracted without freeing the others from the binder." In the ordinary form of telescoping the two sections of the post, the one of least diameter would not closely engage the notch in the leaf;

and, as such leaves would be liable to displacement, Leslie obviated the difficulty through the shape of his posts, whereby he made a sliding provision in the sections and preserved the post "in holding contact with the broken outline portions [of the sheet] in all positions." The provision thus made is clearly claimed and fully set forth in the first seven claims of the patent, of which infringement by the appellee is not alleged. The advantage in the improvement for which the appellant contends, if fully conceded, is wholly attributable to this form of post co-operating with the old elements. Substituting the new form for the post shown in various elder devices, and combining it with the old elements found in one and the other, the new combination furnished an improved binder. In the language of the specifications, it was "made more compact and easily manipulated"; and it certainly operated more readily and effectively than the two-part telescoping posts and screw device shown in Waide's patent, No. 484,349, which is, perhaps, the closest prototype of the Leslie form of post. This means, however, is not entitled to consideration as a pioneer invention in the sense of the patent law. It was a mere advance in a line marked out by numerous inventions,—a useful step, whereby the binder was manipulated with more convenience and speed, and with less liability to displace the leaves, and the desired removal or replacement of leaves was readily accomplished; obtaining a better result than by the old devices, but not essentially new. Thus the feature of removability and reinsertion of the leaves is expressly shown in several of the prior patents, and in the devices of Leslie in use for more than two years before his application for a patent; and the testimony of the inventor, Leslie, on behalf of the appellant, that he knew of no prior binder with such feature, and that he considered his "invention broad enough to cover any binder having this characteristic," is evidently founded on a misunderstanding. Applying the excellent definition stated by Mr. Justice Bradley in *Railway Co. v. Sayles*, 97 U. S. 554, 556, 24 L. Ed. 1054, it was not the case of an inventor who "precedes all the rest, and strikes out something which includes and underlies all that they produce," and thereby "acquires a monopoly and subjects them to tribute"; but it is an instance of the gradual advance which "proceeds step by step, so that no one can claim the complete whole, and each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs." See, also, *Duff v. Pump Co.*, 107 U. S. 636, 639, 2 Sup. Ct. 487, 27 L. Ed. 517; *Boyd v. Hay-Tool Co.*, 158 U. S. 260, 267, 15 Sup. Ct. 837, 39 L. Ed. 973.

The new combination of the Leslie invention is distinctly set out, with the various elements embodied, within the first seven claims of the patent; the new form of co-operating post being the marked feature according to the fact. The subsequent claims, 8 to 13, inclusive, on which this action is founded, are general in terms concerning the back pieces and co-operating posts, without limitation as to form. They differ in the description of the sheets, mentioned in some of the claims in mere general terms, and in others as notched or "having a broken outline," and three of the claims contain general

mention of a locking mechanism, while this feature is omitted in the others. Each claim refers to the effect produced of permitting the withdrawal of any sheet without freeing the others from the post or binder; but the means of co-operation for that purpose, consisting of a notch or "broken outline" on the side edges of the sheet, is likewise shown in prior patents,—notably in Paxson's No. 283,653 (1883) and in the British and German patents of Strauss (1892). These general claims, as a whole, are aptly described by Mr. Wiles, the expert examined on behalf of the appellant, in his description of claim 13:

"In this claim, as well as in each of the five preceding claims, the elements are mentioned in general terms, the form of the parts and the construction of the locking mechanism not being referred to as a limitation, and the form of the sheets being only limited by the descriptive statement that they are formed with broken outlines adapted to co-operate with the posts, in order that the posts may hold the sheets in place."

The contention on the part of the appellant for a construction of these claims is thereupon stated by the witness, in reference to claim 8, as follows:

"The terms of the claim are such as to include any combination comprising the back pieces, the telescoping posts, and the locking mechanism, provided the parts of the posts are held permanently in their co-operating relation, no matter what the form of the posts or the construction of the locking mechanism may be."

And subsequently occurs the further statement that the particular locking mechanism is not an essential feature, and "any mechanism which serves to hold the back pieces rigidly in their adjusted positions" would be considered a locking mechanism, "so long as it allows the binder to expand without becoming separated."

Of this contention it is sufficient to remark that the claims so broadened in their scope would conflict with numerous devices shown in the prior art, as indicated above; and while infringements of the terms by the appellee would thus appear, the claims would not sustain an action, being too broad, and hence invalid. On the other hand, with the claims construed in conformity with the specifications, and thus limited, as the authorities require, to the specific device set forth, the actual invention can be protected without interference with the structures which are open to all; and in such view it remains only to ascertain whether the appellee so infringes.

In common with the Leslie patent, and with its predecessors as well, the Hoffmann combination has the four elements of (1) back pieces, (2) connecting telescopic posts, co-operating with (3) a cut in the side edges of the sheets, and (4) a locking mechanism.

1. The back pieces are unquestioned, as of the common type.

2. The posts are represented by so-called "vertical casings," chambered one within the other, open on one side, and connected, respectively, with the back pieces at either end, so that they slide telescopically, to permit expansion and contraction of the binder; and these casings are adapted both to protect and engage "the rear edges or projections on the rear part of the leaves." They differ from the Leslie post in their simplicity, and in the absence of any means to prevent separation of the back pieces, which is made distinctive in the Leslie post. Aside from this departure in the function of the post,

the difference in the form and mode of operation is more marked than that between Leslie's structure and those of the prior art; for instance, as shown in the Waide telescopic post (No. 484,349), or that of Morehouse (No. 464,731), in the Strauss British patent, and in the Leslie exhibit prior device.

3. The "broken outline" in the edge of the sheet in the appellee's device differs from that of Leslie merely to conform to the difference in the shape of the co-operating casings or post; but the exact triangular cut of Leslie is shown in the same relative position in the Strauss British patent of 1892, and an equally analogous provision appears in Paxson's patent of 1883 (No. 283,653) and in Waide's patent of 1892 (No. 484,349).

4. In the patent granted to the appellee a locking mechanism is placed centrally between the posts, as in the Leslie patent; but it is of different construction, and not made automatic by the use of a spring, as shown in the Leslie lock. The function is identical, as it well may be wherever a lock is required; and, moreover, the Leslie lock is a mere duplication of his prior device. In the structure as manufactured by the appellee, this lock is so far changed that it serves to hold the back pieces from separation, and thus supplies the want of such provision in the mechanism of the posts. This provision is named by the experts on behalf of the appellant as "a third telescoping post, midway between the ends," and stress is placed upon this device as performing the same function claimed for the Leslie telescopic posts in that regard, although obviously differing in the means employed, which is quite analogous to that shown in Waide's patent, No. 484,349. It was, however, clearly open to the appellee, whenever it seemed desirable to hold the back pieces from separation, to adopt a simple expedient to that end, provided the specific means devised by the appellant was not so taken. A function not being patentable, the mere fact of the performance of this function by the new means operating in a new way cannot serve constructively to make it an infringement of the means not used, where the invention is of the limited character shown in this patent.

Paraphrasing the apt remarks which conclude the opinion by Mr. Justice Shiras in *Boyd v. Hay-Tool Co.*, 158 U. S. 260, 267, 15 Sup. Ct. 837, 39 L. Ed. 973, if the patent in suit contained an invention entirely new, and first adapted to the ends sought, the differences shown in the appellee's device and patent might be regarded as formal and evasive; but coming, as Leslie did, in the train of the numerous inventors that had preceded him, we must conclude that he is entitled only to the specific device shown, and this is not found in the appellee's structure. Consequently no infringement is shown. The applications for both patents were pending in the patent office at the same time, and the decision of that office that no interference was found in the claims on the part of the appellee, and the subsequent grant of both patents, with the modifications in the Leslie claims as shown in the record, are strongly corroborative of this view of non-infringement; and, upholding such view, it is unnecessary to pass upon the question of the validity of the claims in suit. The decree dismissing the bill for want of equity is affirmed.

GOOD SHOT V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,353.

1. JURISDICTION OF CONVICTION OF INFAMOUS CRIME.

The circuit courts of appeals have no jurisdiction of cases of convictions of capital crime.

2. JURISDICTION—TEST OF CONVICTION OF CAPITAL CRIME.

The test which determines whether or not a case is one of conviction of a capital crime is not the penalty which is actually imposed, but it is that which may be imposed. If the crime may be punished with death, and there is a conviction, it is a case of a conviction of a capital crime.

3. MURDER OF AN INDIAN BY AN INDIAN A CAPITAL CRIME.

The murder of one Indian by another is punishable with death, under section 5339, Rev. St., and section 9, c. 341, p. 385, 23 Stat. The power of the federal courts to punish this offense with death was not revoked by 29 Stat. 487, c. 29.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of South Dakota.

S. H. Wright, for plaintiff in error.

William G. Porter (James D. Elliott, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff in error, Good Shot, an Indian of the Sioux tribe of Indians, was indicted in the district court of the United States for the district of South Dakota for the crime of murder, in that he maliciously slew another Indian of that tribe, at the Pine Ridge agency, in the state of South Dakota. He was tried and convicted of this crime, but the jury returned a verdict to the effect that they found him guilty as charged in the indictment without capital punishment. A motion is made to dismiss the writ of error on the ground that this court is without jurisdiction to consider the case it presents. Section 5 of the act of March 3, 1891, creating the United States circuit courts of appeals (26 Stat. 826), as amended by the act of January 20, 1897 (29 Stat. 492), provides that appeals or writs of error may be taken from the district courts or the existing circuit courts directly to the supreme court in cases of conviction of a capital crime. Section 6 of that act provides that the circuit courts of appeals shall exercise appellate jurisdiction in all cases other than those provided for in the preceding section of the act. It is claimed, in opposition to the motion to dismiss, that the verdict and judgment in this case do not present the case of a conviction for a capital crime because the penalty inflicted is not death. But the test of jurisdiction under this statute is not the punishment which is imposed, but that which may be imposed. The plaintiff in error was charged with the crime of murder. The jury found that he was guilty as charged in the indictment, but relieved him from the penalty of death. He was not the less convicted of a capital crime because the extreme penalty

of the law was not inflicted upon him. *Fitzpatrick v. U. S.*, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078; *Mackin v. U. S.*, 117 U. S. 348, 351, 6 Sup. Ct. 777, 29 L. Ed. 909; *In re Claassen*, 140 U. S. 200, 205, 11 Sup. Ct. 735, 35 L. Ed. 409.

Another objection to the granting of the motion is that the murder of one Indian by another is not punishable by death, under the acts of congress. It is conceded that chapter 341, § 9, of the act of March 3, 1885 (23 Stat. 385), confers jurisdiction upon United States courts to punish this crime with death. But the claim is that the act of January 15, 1897 (29 Stat. 487), repealed that part of the act of 1885 which conferred upon the courts the power to punish the crime of the murder of one Indian by another with death. A careful perusal of the latter statute, however, discloses no such repeal. The power to punish this crime conferred by the act of 1885 is left untouched. *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228; *In re Gon-shay-ee*, 130 U. S. 343, 9 Sup. Ct. 542, 32 L. Ed. 973; *Bad Elk v. U. S.*, 177 U. S. 529, 20 Sup. Ct. 729, 44 L. Ed. 874.

The crime with which the plaintiff in error was charged was punishable with death. He was convicted of that crime. The act creating the circuit courts of appeals gave jurisdiction to the supreme court to review all cases of convictions of capital crimes. It gave jurisdiction to this court only in cases in which jurisdiction was not conferred upon the supreme court. The case at bar was not one of these cases, and the writ of error must be dismissed.

MINNEAPOLIS BREWING CO. v. MCGILLIVRAY et al.

(Circuit Court, D. South Dakota, S. D. October 8, 1900.)

1. INTOXICATING LIQUORS—STATE REGULATIONS—INTERSTATE COMMERCE.

Sess. Laws S. D. 1897, c. 72, designated in its title as an act to provide for the licensing, restriction, and regulation of the business of the manufacture and sale of liquors, and which not only imposes a license on all manufacturers and dealers, but also contains provisions imposing regulations and restrictions upon the business, and requires all licensees to give bond to comply with such provisions, is not merely a revenue measure, but is a law enacted in the exercise of the police powers of the state, within the meaning of the Wilson act (26 Stat. 313), which provides that liquors transported into a state as a subject of interstate commerce shall on their arrival therein be subject to the operation and effect of the laws of such state enacted in the exercise of its police powers; and hence the fact that said state statute requires a wholesale dealer in liquors who maintains a warehouse in the state to pay a license does not render it unconstitutional, as an attempt to regulate interstate commerce, as applied to a dealer who manufactures his liquors in another state, and ships them therefrom to his warehouse, and there sells them only in the original packages.

2. SAME—INTERSTATE COMMERCE—LIMIT OF POLICE REGULATIONS BY STATE.

The purpose of the Wilson act (26 Stat. 313) was to place liquors which have been transported into a state as subjects of interstate commerce, on their arrival therein, on an exact equality, so far as relates to the right to sell the same, with liquors manufactured in the state; and to that extent only did congress, by such act, give its consent that the state might, in the exercise of its police powers, impose regulations and restrictions upon the sale of such liquors in the original packages.

3. SAME—VALIDITY OF STATUTE DISCRIMINATING IN FAVOR OF DOMESTIC LIQUORS.

Sess. Laws S. D. 1897, c. 72, § 1, imposes a license tax upon the business of selling only brewed or malt liquors at wholesale of \$600 per annum; "said license to be paid in each township, precinct, town or city in which said wholesaler has or operates a warehouse or depository." It further provides that "no person, firm or corporation having a manufacturer's license in this state on brewed or malt liquors under this act shall be liable to pay a wholesale dealer's license on the product of such manufactory." The manufacturers' license under such act is \$400. *Held*, that such act, in permitting a manufacturer in the state to maintain warehouses for the sale of his product without license, while requiring a license on each warehouse maintained for the sale of brewed or malt liquors produced in other states, imposes a discriminating tax upon interstate commerce, which renders the provision for a license on wholesale dealers unconstitutional and void.

4. STATUTES—CONSTITUTIONALITY.

The constitutionality of a statute is not determined by what has been actually done thereunder, but by what may be done by virtue of its provisions.

5. EQUITY JURISDICTION—ENJOINING ENFORCEMENT OF STATUTE—ADEQUATE REMEDY AT LAW.

A federal court of equity has jurisdiction of a suit to enjoin the enforcement of a state statute which is unconstitutional and void, and under which the authorities threaten to seize complainant's property and destroy his business unless he pays a license thereby imposed; the remedy at law in such case being inadequate.

6. JURISDICTION OF FEDERAL COURTS—SUIT AGAINST STATE—ENJOINING ENFORCEMENT OF STATUTE.

A suit to enjoin the officers of a state from enforcing an unconstitutional statute which subjects the complainant to a seizure of his property, and the closing of his place of business, for his failure to pay a license imposed by such statute, is not an action against the state, within the meaning of the eleventh amendment to the constitution, and is one of which a federal court of equity has jurisdiction.

7. INJUNCTION—GROUNDS—CRIMINAL PROSECUTION.

A court of equity has no jurisdiction to enjoin the commencement of criminal prosecutions against a complainant, although the statute under which their institution is threatened is unconstitutional.

In Equity. On demurrer to bill.

E. T. Taubman (Albert C. Cobb and J. O. P. Wheelwright, of counsel), for plaintiff.

John L. Pyle, Atty. Gen., John H. Perry, and C. J. Porter, for defendants.

CARLAND, District Judge. The above-entitled action has been submitted on general demurrer to the bill. The bill alleges the following facts: The plaintiff is a corporation created, organized, and existing under and by virtue of the laws of the state of Minnesota, and having its principal place of business in the city of Minneapolis, in said state. That the defendants are citizens of the state of South Dakota, D. A. McGillivray being the sheriff of the county of Lake. McGovern is the chief of police of the city of Madison, in the state of South Dakota; C. J. Porter is the state's attorney in and for said Lake county; and the defendants Bingham, Buxton, and Schuster constitute the board of county commissioners of said county, and are

the officers upon whom the duty is cast by law of enforcing the provisions of chapter 72 of the Session Laws of South Dakota for the Year 1897. That at all times mentioned in the bill the plaintiff was, and now is, engaged in extensively manufacturing and selling beer and other malt liquors, having its brewery or place of manufacture in the city of Minneapolis. That for more than a year last past plaintiff has owned and maintained, and still owns and maintains, in the city of Madison, in the county of Lake, in the state of South Dakota, a warehouse or depository in which, during said times, it has been storing, in original packages, a portion of the product of its said brewery, under the circumstances and for the purposes herein-after detailed. That at frequent intervals, in the ordinary and usual course of its business, during the times aforesaid, it has been shipping from its brewery in Minneapolis to its said warehouse at Madison, in barrels, kegs, and bottles, a portion of its manufactured product, for storage there until sold by plaintiff, as a wholesaler, to its various customers in South Dakota in the same original packages in which it was so put up, shipped, and stored. That plaintiff has no brewery or place of manufacture within the state of South Dakota, and it has not made, nor does it propose to make, any sales there, except from the product of its brewery at Minneapolis, and in original packages. That plaintiff's business, as it has always been conducted and carried on in said city of Madison, and as plaintiff in the future intends to conduct and carry it on, consists solely in its maintaining said warehouse for the purposes hereinbefore set forth, and in the removal of the beer stored therein for sale and delivery in original packages by plaintiff, as a wholesaler, among its customers in the state of South Dakota. That in order for plaintiff to safely and economically transport its said product from the state of Minnesota to the state of South Dakota, for sale and distribution there among its customers in original packages, and in order that said product may be preserved and kept from becoming spoiled in transit, it is necessary to have said warehouse in said city of Madison; and, for the purposes hereinbefore stated, for more than one year last past said plaintiff has been conducting said business and maintaining said warehouse at said city of Madison, and intends and desires so to do in the future, and would now be so conducting said warehouse and said business, except for the unlawful and wrongful acts of the defendants as hereinafter set forth. That during the times aforesaid it has had, and now has, a resident agent at said city of Madison in charge of said warehouse, and in the sale and distribution of the product from time to time stored therein. That plaintiff's said business at said city of Madison, connected with the maintenance of said warehouse, and for the sale of its said product stored therein and distributed therefrom, has been exceedingly profitable to plaintiff, and that with the year ending July 1, 1900, its sales of beer stored in said warehouse and distributed therefrom exceeded \$10,000, from which it derived a profit of more than \$2,000; and, if plaintiff is allowed to continue in the operation and maintenance of said warehouse and in the conducting and operation of its said business at said Madison without being molested or disturbed by the defendants, its annual profits therefrom will exceed

the sum of \$2,000. That plaintiff has invested in said warehouse, in the construction of the same, and in the expenses incidental thereto, a sum exceeding \$1,500, and that said warehouse is not adapted or suitable for any purpose except the one to which it has heretofore been put by plaintiff. That since the 1st day of July, 1900, the defendants, in their official capacity aforesaid, and claiming the right so to do under and pursuant to the provisions of chapter 72 of the Session Laws of South Dakota for the Year 1897, have demanded of plaintiff that it pay for continuing to carry on its said business at said city of Madison, and for the continued operation and maintenance of its warehouse at that place, the license fee of \$600 specified in section 1 of said act upon the business of selling only brewed or malt liquors at wholesale, and that plaintiff declined and refused to pay said fee upon the ground that said statute so requiring its payment was unconstitutional and void. That upon the refusal of plaintiff to pay said license fee, and for the alleged reason that it did not pay the same, the defendants, claiming to act in their official capacity as aforesaid, and claiming to be authorized by the statute aforesaid, wrongfully and unlawfully threatened to close said warehouse so operated and maintained by this plaintiff at said city of Madison as aforesaid, and wrongfully and unlawfully threatened to prosecute criminally this plaintiff and its said local agent under section 5 of said act, and to so prosecute for each violation committed on each day if said warehouse was continued to be operated as aforesaid by plaintiff, or if plaintiff continued to transact the business theretofore transacted by it at said Madison. That plaintiff, by reason of said threats, and in order to avoid a multiplicity of criminal suits against plaintiff and its local agent, and the expense and cost that would have been necessarily incurred in connection therewith, and in order to prevent having a large amount of its manufactured product stored in said warehouse without being able to sell or dispose of the same as it had been in the habit of doing since the 1st day of July, 1900, has closed its said warehouse, and has ceased to ship to it or store therein any of its product, and has ceased to use it as a distributing depot. That plaintiff is desirous of at once opening up its said warehouse at said city of Madison, and of using and employing the same in the manner and for the purposes only for which it has heretofore been used and employed by plaintiff, and it is about so to do; and, unless the defendants are restrained and enjoined from so doing, because of plaintiff's refusal and failure to pay said unlawful license fee they, the said defendants, will permanently close said warehouse, and subject plaintiff and its said local agent at Madison to a multiplicity of suits and innumerable criminal prosecutions, and utterly ruin and destroy plaintiff's said business at said city of Madison. The plaintiff prays that said statute of the state of South Dakota may be adjudged to be unconstitutional and void, and that the defendants be permanently restrained and enjoined from attempting to enforce payment from plaintiff of said unlawful license fee of \$600, and from in any wise interfering with plaintiff's said warehouse at said city of Madison, and its said business connected therewith.

The title of chapter 72 of the Session Laws of South Dakota for the Year 1897 is as follows:

"An act to provide for the licensing, restriction and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors."

Section 1 of said act is as follows:

"That in all townships, precincts, towns and cities of this state there shall be annually paid the following license upon the business of the manufacturing, selling or keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale, or manufacturing in this state, distilled, brewed or malt liquors, or mixed liquors, as follows: * * * Upon the business of selling only brewed or malt liquors at wholesale, \$600 per annum, said license to be paid in each township, precinct, town or city in which said wholesaler has or operates a warehouse or depository; upon the business of manufacturing brewed or malt liquors, \$400 per annum. * * * No person, firm or corporation paying a manufacturer's license in this state on brewed or malt liquors under this act shall be liable to pay a wholesale dealer's license on the product of such manufactory. * * *

Section 2 provides as follows:

"* * * Wholesale dealers shall be held and deemed to mean and include all persons who sell or offer for sale or deliver such liquors or beverages in quantities of five gallons or more at any one time to any person or persons."

Plaintiff claims that said chapter 72 is unconstitutional and void: First, that it is repugnant to that clause of the constitution of the United States providing that the congress shall have power to regulate commerce among the several states; second, that it is repugnant to that clause of the constitution of the United States declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states; third, that it is repugnant to that clause of the constitution of the United States declaring that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; fourth, that it is repugnant to that clause of the constitution of the United States in which it is declared that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, the supreme court lays down the following propositions as being beyond dispute:

"First. Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the states, provided always, they do not transcend the limits of state authority by invading rights which are secured by the constitution of the United States, and provided, further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union. Second. Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the constitution of the United States to congress, and hence that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the constitution of the United States. Third. It is also certain that the settled doctrine is that the power to ship merchandise from one state into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation

to the contrary notwithstanding; that is to say, that the goods received by interstate commerce remain under the shelter of the interstate commerce clause of the constitution until by a sale in the original package they have been commingled with the general mass of property in the state. This last proposition, however, whilst generically true, is no longer applicable to intoxicating liquors, since congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale in the original packages of intoxicating liquors shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in original packages except in conformity to lawful state regulations. In other words, by virtue of the act of congress the receiver of intoxicating liquors in one state, sent from another, can no longer assert a right to sell, in defiance of the state law, in the original packages, because congress has recognized to the contrary. The act of congress referred to (26 Stat. 313, c. 728) was approved August 8, 1890, and is entitled 'An act to limit the effect of the regulations of commerce between the several states and with foreign countries in certain cases.' It reads as follows: 'That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.'"

In *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632, the supreme court said:

"That law [the act of congress above quoted] was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce. When that law provided that all fermented, distilled, or intoxicating liquors transported into any state or territory, remaining therein for use, consumption, sale, or storage therein, should, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and should not be exempt therefrom by reason of being introduced therein in original packages or otherwise, evidently equality or uniformity of treatment under state laws was intended. The question whether a given state law is a lawful exercise of the police power is still open, and must remain open, to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors, and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors, and be valid. But the state cannot, under the congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

The supreme court again says in the case of *Vance v. W. A. Vandercook Co.*, 170 U. S. 447, 18 Sup. Ct. 677, 42 L. Ed. 1104:

"The plain purpose of the act of congress having been to allow state regulations to operate upon the sale of original packages of intoxicants coming from other states, it would destroy its obvious meaning to construe it as permitting the state laws to attach to and control the sale only in case the states absolutely forbade sales of liquor, and not to apply in case the states determined to restrict or regulate the same."

Counsel for plaintiff claim that chapter 72 of the Session Laws of South Dakota for the Year 1897, in effect, is not a law enacted within the police power of the state, but that it is merely a revenue measure,

enacted for the purpose of collecting revenue, and therefore not within the permission granted by congress to the states to regulate the sale of intoxicating liquors. I have carefully examined the whole act, and, after considering its various provisions and its title, I am unable to come to the conclusion that it is clearly without the police power of the state; and certainly, if there exists any doubt upon the question, it should be resolved in favor of the law being within the police power. Its title states that the law is enacted to provide for the licensing, restriction, and regulation of the business of the manufacture and sale of spirituous and intoxicating liquors. It is true, the law fixes a license fee for the sale of intoxicating liquors, by imposing a certain annual license fee upon different kinds of dealers in intoxicating liquors, but this fact does not necessarily render it a revenue measure. A license fee may be lawfully connected with a measure within the police powers of a state which has for its object the preservation of the peace, good order, health, morality, or security of the people. In support of this contention counsel cite the recent case of *Pabst Brewing Co. v. City of Terre Haute* (C. C.) 98 Fed. 330. In that case the court decided that the ordinance of the city of Terre Haute imposing a license fee was purely a revenue measure; and, the court having reached that conclusion, of course was bound to hold it unconstitutional, as being a burden upon interstate commerce, and not within the permissive powers contained in the act of congress of 1890. But the act of the legislature of South Dakota now under consideration is a very different law, in its whole scope and purpose, than the ordinance of the city of Terre Haute. By referring to some of the provisions of certain sections of the law, and the headnotes to those sections, we gather that the law was not intended as a revenue measure merely:

Section 1 fixes the amount of the annual license for different dealers in intoxicating liquors. Section 2 defines who shall be considered retail dealers and wholesale dealers. Section 3 provides for the filing of a statement in advance of obtaining a license. Section 4 prescribes the duties of the county treasurer in relation to the enforcement of the act. Section 5 provides a penalty for the violation. As section 5 directly bears upon some features of this action, it will be quoted in full. It reads as follows:

"If any person or persons shall engage or be engaged in any business requiring the payment of license under section one (1) of this act without having paid in full the license required by this act, and without having the receipt and notice for such license posted up as required by this act, or without having made, executed and delivered the bond required by this act, or shall in any manner violate any of the provisions of this act, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, if there is no specified penalty provided therefor by this act, shall be punished by a fine of not less than \$50 nor more than \$500 and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days or by both such fine and imprisonment in the discretion of the court; and in case such fine shall not have been paid at the time such imprisonment expired, the person serving out such sentence shall be further detained in jail until such fine and costs shall have been fully paid as provided by statute; and any person or persons engaged in any business requiring the payment of a license under section 1 of this act who, after paying the license so required, shall be convicted of a violation of any of the provisions of this act shall

thereby, in addition to all other penalties prescribed by this act, forfeit the license so paid by him or them and be precluded from continuing such business for the remainder of the year or time for which said license was paid and be debarred from again engaging in any business requiring the payment of a license under section 1 of this act or from becoming a surety or sureties upon any bond required under section 6 of this act from the time of such conviction. Each violation of any of the provisions of this act shall be construed to constitute a separate and complete offense, and for each violation on the same day or on different days the person or persons offending shall be liable for the penalties and forfeitures herein provided and be precluded and debarred from continuing or engaging in any business requiring the payment of a license under this act as aforesaid. And it shall be the duty of the sheriffs, marshals, constables and police officers to forthwith close all saloons and other places where the business of manufacturing, selling or keeping for sale any of the liquors mentioned in section 1 of this act is being conducted upon which business the license required by section 1 has not been paid in full and in which the receipt mentioned in section 4 of this act shall not be posted up and displayed."

Section 6 provides for the execution of a bond, and its form. The condition of the bond is as follows:

"That he will not directly or indirectly by himself, his clerk, agent or servant, at any time sell, furnish, give or deliver any spirituous, malt, brewed, fermented or vinous liquors, or any mixed liquors, or any mixture or compound, any part of which is spirituous, malt, brewed, fermented or vinous liquors, to a minor or to any adult person whatever who is at the time intoxicated, nor to any person in the habit of getting intoxicated, nor to any person when forbidden in writing to do so by the husband, wife, parent, child, guardian or employer of such person, or by the supervisor of the township, mayor of the city or president or trustee of any town, or member of the board of county commissioners of the county in which such person shall reside or temporarily remain; that he shall also pay all damages, actual and exemplary, that may be adjudged to any person or persons for injuries inflicted upon him or them either in person or property, or means of support or otherwise, by reason of his selling, furnishing, giving or delivering any such liquor."

Section 7 further defines the duty of the county treasurer. Section 8 provides for the prosecution of violations of the act by the state's attorney. Section 9 provides that the treasurer shall make certain reports. Section 10 provides for the punishment of willful neglect of any officers charged by the act with any duty. Section 11 provides it shall be unlawful to sell to certain persons, such as minors, intoxicated persons, or any person in the habit of getting intoxicated, or to any person when forbidden in writing so to do by the husband, wife, parent, child, guardian, or employer of such person, or the supervisor of the township, or the president or trustee of a town, mayor of the city, board of county commissioners of the county, where said person shall reside or temporarily remain. No person under the age of 21 years shall be licensed to sell intoxicating liquors, and it shall be unlawful for any person having a license to sell intoxicating liquors to employ as a bartender any person under the age of 21 years. Section 12 provides that windows and doors of buildings in which intoxicating liquors are sold shall be unobstructed by screens, blinds, paint, or other articles, and that the windows shall not be located in such a manner as to prevent the free and unobstructed view from the street into the entire room or place where any of the intoxicating liquors mentioned in section 1 are to be sold. There shall be no partition of any kind in the room where the liquor busi-

ness is conducted, and no games of cards, dice, billiards, or pool, or any other game of skill or chance whereby money or any other valuable thing is usually wagered, are to be played in the room or place wherein intoxicating liquors are to be sold, or in any other room or place adjacent thereto. Section 13 provides that a minor shall not be allowed to enter, visit, or remain in such room, or place, unless accompanied by his or her father, mother, or guardian. Section 14 provides that all places where intoxicating liquors are sold shall be closed on Sunday and on all election days, and on each week-day night from and after the hour of 11 o'clock until 5 o'clock in the morning on the succeeding day. Said section also provides that it shall be the duty of sheriffs, marshals, and police officers to close all saloons, houses, or places found open in violation of the provisions of this act. Section 15 provides for the punishment of the violation of the previous section. Section 16 provides how damages shall be recovered by parents who may suffer damages by reason of the violation of such law. Section 17 further describes the duties of officers. Section 18 prescribes the duties of justices of the peace and police justices. Section 19 describes the persons liable for the violation of the same. Section 20 makes it unlawful to adulterate any spirituous or alcoholic liquors. Section 21 provides for the payment of a city license. Section 22 provides that a license may be refused in certain cases. Section 23 prescribes for the submission to the voters of the township, town, or city in this state of the question as to whether intoxicating liquors are to be sold at retail. Section 24 provides for application to be made in writing. Section 26 provides that intoxicating liquors shall not be sold within a certain distance of any public or private school. Section 27 provides that pharmacists may sell for certain purposes.

Upon a consideration of the whole of this act, it clearly appears that it is an act within the police powers of the state, and within the permission granted by congress to legislate in relation to commerce, when connected with intoxicating liquors. But the state cannot, even in the exercise of its police power, discriminate against interstate commerce, and if this act, in its effect, treated the wholesaler of malt liquors who manufactures within the state the same as it treats the wholesaler of malt liquors who manufactures without the state, there could be no fault found with this law, in my opinion; but I am unable to find otherwise than that there is a clear and unlawful discrimination against malt liquors manufactured without the state, in favor of those manufactured within the state, and that this discrimination is so great as to impose a substantial burden upon interstate commerce, as connected with the sale of malt or brewed liquors manufactured without the state. The vital question in this case is, therefore, not whether this law is within the police powers of the state, but, admitting it to be so, whether it unlawfully discriminates against an article of interstate commerce manufactured without the state. Section 1, hereinbefore quoted, imposes—

"Upon the business of selling only brewed or malt liquors at wholesale \$600 per annum, said license to be paid in each township, precinct, town or city in which said wholesaler has or operates a warehouse or depository."

In the same section it is provided as follows:

"No person, firm or corporation having a manufacturer's license in this state on brewed or malt liquors under this act, shall be liable to pay a wholesale dealer's license on the product of such manufactory."

The effect of these two provisions is this: A license fee of \$600 per annum must be paid by any person, in every township or precinct where he has a place of sale, if his malt or brewed liquor is manufactured without the state. On the other hand, any person who manufactures brewed or malt liquors in this state, and has paid a manufacturer's license, is entirely exempted from paying a wholesale dealer's license in malt liquors on his product, although he may have a dozen different depositories in the state, where he wholesales malt or brewed liquor. Or, to state it in other words, any person who desires to sell brewed or malt liquors manufactured in another state at wholesale in this state must pay a wholesaler's license of \$600; but any person who shall desire to sell at wholesale brewed or malt liquors manufactured by him in this state under a manufacturer's license is entirely exempted from paying the license required of wholesalers. This would seem to be a clear discrimination against an article of interstate commerce manufactured in another state, and is clearly such a substantial burden imposed upon that commerce as to render the law under consideration void in so far as it imposes a license fee of \$600 on the wholesaler of malt liquors. The effect of this discrimination can be illustrated by supposing that the complainant desired to establish in 20 different places in this state a depository for the sale of malt or brewed liquors manufactured by itself outside of this state. It would be necessary, under the law, for the plaintiff to pay \$12,000 per annum for this privilege, whereas any person who paid a manufacturer's license of \$400 per annum in this state could establish the same number of places to sell malt or brewed liquors at wholesale without paying anything. It must be borne in mind that the act of congress of 1890, giving the states permission to pass laws within their police power in relation to the sale of intoxicating liquors, whether in original packages or not, did not and could not do away with the requirement of the constitution of the United States prohibiting a discrimination by any state against the products of interstate commerce manufactured in other states. Therefore the following decisions, whether made before or after the act of 1890, are pertinent, and fully sustain the proposition that the law in question, in so far as it imposes a license fee of \$600 per annum upon the plaintiff for wholesaling its brewed or malt liquors in this state, manufactured in the state of Minnesota, is void, for the reason that no such license fee is required of persons who manufacture beer in this state, and pay a manufacturer's license: In *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347, the supreme court decided: That a license tax required for the sale of goods is in effect a tax upon the goods themselves, and that a statute of Missouri which required the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same in the state, and requires no such license

tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the state, is in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states. That the power to regulate commerce was vested in congress to insure uniformity of commercial regulation against discriminating state legislation. It covers property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with and become a part of the general property of the country, and protects it, even after it has entered a state, from any burdens imposed by reason of its foreign origin. And in *Guy v. City of Baltimore*, 100 U. S. 434, 25 L. Ed. 743, the supreme court decided that a state cannot, in the exercise of her taxing power, impose upon the products of another state, brought within her limits for sale or use, a more onerous burden or tax than upon like products of its own territory, nor discriminate against a citizen by reason of his being engaged in thus bringing or in selling them; and that an ordinance of the city of Baltimore whereunder vessels laden with the products of other states are required to pay, for the use of the public wharves of that city, fees which are not exacted from vessels landing thereat with the products of Maryland, is in conflict with the constitution of the United States; and that such fees, so exacted, must be regarded, not as a compensation for the use of the city's property, but as a mere expedient or device to foster the domestic commerce of Maryland by means of unequal and oppressive burdens upon the industry and business of other states; and that, so far as it may be necessary to protect the products of other states and countries from discrimination by reason of their foreign origin, the power of the national government over commerce with foreign nations and among the several states reaches the interior of every state of the Union. In *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691, the supreme court decided that a tax imposed by statute of the state of Michigan upon an occupation, which necessarily discriminates against the introduction and sale of the products of another state, or against the citizens of another state, is repugnant to the constitution of the United States; that the police power of a state to regulate the sale of intoxicating liquors and preserve the public health and morals does not warrant the enactment of laws infringing positive provisions of the constitution of the United States; that a state statute which imposes a tax upon persons who, not residing or having their principal place of business within the state, engage there in the business of selling or soliciting the sale of intoxicating liquors to be shipped into the state from places without it, but does not impose a similar tax upon persons selling or soliciting the sale of intoxicating liquors manufactured in the state, is a regulation in restraint of commerce, repugnant to the constitution of the United States, and the defect is not cured by a subsequent enactment imposing a greater tax upon all persons within the state engaged in the business of manufacturing or selling such liquors therein. In *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 128, the supreme court had under consideration a statute of

the state of Michigan (Pub. Acts 1887, No. 313, p. 445) almost identical in its language and provisions with the one now being considered. Section 1 of the Michigan act provided:

"That in all townships, cities and villages of this state there shall be paid annually the following tax upon the business of manufacturing, selling or keeping for sale, by all persons whose business, in whole or in part, consists in selling or keeping for sale, or manufacturing, distilled, or brewed or malt liquors or mixed liquors, as follows: Upon the business of selling or offering for sale spirituous or intoxicating liquors, or mixed liquors by retail, or any mixture or compound, excepting proprietary patent medicines, which in whole or in part consist of spirituous or intoxicating liquors, and any malt, brewed or fermented liquors, \$500 per annum; upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail, \$300 per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, \$500; or at wholesale and retail, \$800 per annum; upon the business of manufacturing brewed or malt liquors for sale, \$65 per annum; upon the business of manufacturing for sale spirituous or intoxicating liquors, \$800 per annum. No person paying a tax on spirituous or intoxicating liquors under this act shall be liable to pay any tax on the sale of malt, brewed or fermented liquors. No person paying a manufacturer's tax on brewed or malted liquors under this act shall be liable to pay a wholesale dealer's tax on the same."

The supreme court in this case said:

"Under the statute in question, which is entitled 'An act to provide for the taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering spirituous or intoxicating liquors and malt, brewed or fermented liquors or vinous liquors in this state, and to repeal all acts or parts of acts inconsistent with the provisions of this act,' an annual tax is levied 'upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail,' of \$300, and 'upon the business of manufacturing brewed or malt liquors for sale, \$65 per annum.' The manufacturer of malt or brewed liquors made outside of the state of Michigan cannot introduce them into the hands of consumers or retail dealers in that state without becoming subject to this wholesale dealer's tax of \$300 per annum in every township, village, or city where he attempts to do this. The manufacturer in the state need only pay the manufacturer's tax of \$65, and is then exempt from paying the tax imposed on the wholesale dealer."

And the law of Michigan, for this discrimination, was held unconstitutional and void.

Numerous other cases could be cited in support of the position here taken, but it is sufficient for this court that the supreme court has declared the law in the language herein quoted.

It was objected at the argument that the bill of plaintiff was fatally defective in not alleging that there were persons engaged in the manufacture of malt or brewed liquors within the state of South Dakota, and selling the same at wholesale. This objection is not well taken. The question is not what is actually being done under a statute that determines its constitutionality, but what may be done under and by virtue of its provisions.

It was also urged on the argument, that it did not appear from the bill that the amount in controversy in this action was sufficient to give the court jurisdiction. I do not think that this position can be successfully sustained. The value of the plaintiff's warehouse, which it is alleged is useless for any other purpose, together with the destruction of plaintiff's business, which is shown to be a profitable

one, shows the amount in controversy to be within the jurisdiction of this court.

It is also urged that the case is not one over which equity has jurisdiction, for the reason that the complainant has an adequate remedy at law. I do not think the complainant would have a plain, speedy, and adequate remedy at law for the damages it would suffer, providing the defendants are allowed to seize and close its place of business. There might be a recovery for seizure of the warehouse, but the damages resulting from the destruction of plaintiff's business could not be compensated in an action at law. Again, the law provides that each day's business without the payment of the license fee constitutes a separate offense, and the law imposes heavy penalties for its violation. The jurisdiction of this court to restrain the officers of the state in the enforcement of an unconstitutional statute is well established. In the case of *Reagan v. Trust Co.*, 154 U. S. 389, 14 Sup. Ct. 1051, 38 L. Ed. 1020, the language of Justice Lamar in the case of *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, is quoted with approval, as follows:

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Litchfield v. Webster Co.*, 101 U. S. 773, 25 L. Ed. 925; *Allen v. Railroad*, 114 U. S. 311, 5 Sup. Ct. 925, 962, 29 L. Ed. 200; *Board v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185."

In *Vance v. W. A. Vandercook Co.*, supra, the jurisdiction of the United States circuit court for the state of South Carolina to issue an injunction enjoining the state officials of that state from interfering with the plaintiff in shipping its products from the state of California to the state of South Carolina, to its agents there, for the purpose of selling the same in original packages, was sustained for the reason that a law which provided that a citizen of South Carolina could not purchase intoxicating liquors from a nonresident without first having the same inspected was unconstitutional. The allegation of the bill in that case was that the defendants and other persons claiming to act as state constables and officials threatened "to seize, take, and carry away, detain, convert, and sell, to the manifest wrong, damage, and injury of your orator and its trade and business," its shipments of intoxicating liquor into that state. In *Reagan v. Trust Co.*, 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. Ed. 1028, the jurisdiction of the circuit court of the United States to restrain by injunction the officers of a state was sustained, where the law under which said officers were claiming to act was unconstitutional. Also, in the case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed.

819, the jurisdiction of the circuit court of the United States for the district of Nebraska to restrain certain officers of the state of Nebraska from enforcing an unconstitutional statute was also sustained. The case of *North v. Peters*, 138 U. S. 271, 11 Sup. Ct. 346, 34 L. Ed. 936, was an appeal from the supreme court of the territory of Dakota; and the supreme court in that case sustained the jurisdiction of a court of equity to perpetually enjoin one North, as sheriff of Lincoln county, from levying certain writs of attachment upon the property of Peters; the writs having been sued out by P. M. Lund & Co., and were about to be levied upon property in the possession of Peters, as having been conveyed by the former owner with intent to defraud creditors. Peters was in business at Canton. The court below found that the sale was valid, and that Peters was the lawful owner of the property. The supreme court, in the case last cited, said:

"The main ground relied on by the appellant is that the relief sought should be refused because the appellee had a plain, adequate, and complete remedy at law, to wit, either the action of trespass or replevin. The answer to this is that the measure of damages in an action of trespass could not have exceeded the value of the property seized, with interest thereon from the date of the seizure, and that the only remedy in an action of replevin would have been limited to a recovery of the property, and damages for its detention, with costs. It does not need argument to show that neither of these actions would afford as complete, prompt, and efficient a remedy for the destruction of the business, which, with the goods levied upon, constituted the appellee's entire estate and pecuniary resources, as would be furnished by a court of equity in preventing such an injury."

The case of *Watson v. Sutherland*, 5 Wall. 74, 78, 79, 18 L. Ed. 580, is, in its material facts, similar to this case. In that case a bill was filed by one Sutherland to enjoin the further prosecution of certain writs of fieri facias levied by the sheriff, Watson, on a lot of goods claimed to belong exclusively to the plaintiff, so as to prevent what the plaintiff alleged to be an irreparable injury, to wit, the ruin of his business as a merchant. The defense set up was, as in this case, that the injunction should have been refused, because the action of trespass furnished a complete and adequate remedy at law. In answer the court (Mr. Justice Davis delivering the opinion) said:

"How could Sutherland be compensated at law for the injuries he would suffer, should the grievances of which he complains be consummated? * * * Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings in limine, brings the parties before it, hears their allegations and proofs, and decrees either that the proceedings shall be unrestrained, or else perpetually enjoined."

From a consideration of all the cases, I am of the opinion that this court has jurisdiction of the case presented by the bill, as a court of equity, and that that portion of the law in controversy which provides that a wholesale dealer in malt or brewed liquors shall pay a license fee of \$600 per annum in each town or city where the business is carried on is unconstitutional and void, for the reason that persons who pay a manufacturer's license of \$400 in this state are exempted from paying a wholesaler's license.

The only question that now presents itself is as to the relief that this court has the power to grant the complainant in this action. It is alleged in the bill that defendants, claiming to act in their official capacity, threaten to close said warehouse so operated and maintained by this plaintiff at said city of Madison aforesaid, and wrongfully and unlawfully threaten to prosecute criminally this plaintiff and its said local agent, under section 5 of said act, and to so prosecute for each violation committed on each day, if said warehouse was continued to be operated as aforesaid by plaintiff, or if plaintiff continued to transact the business theretofore transacted by it at said Madison. In so far as this bill seeks to enjoin the commencement of criminal proceedings, it cannot be maintained. A court of equity possesses no such power. This is settled by a uniform current of authorities in England for two centuries, and in this country from the foundation of its jurisprudence. In the case of *In re Sawyer*, 124 U. S. 210, 8 Sup. Ct. 487, 31 L. Ed. 405, the supreme court uses the following language;

"The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government. * * * Mr. Justice Story, in his Commentaries on Equity Jurisprudence, affirms the same doctrine. Section 899. And in the American courts, so far as we are informed, it has been strictly and uniformly upheld, and has been applied alike whether the prosecutions or arrests sought to be restrained arose under statutes of the state or under municipal ordinances."

See, also, *Hemsley v. Myers* (C. C.) 45 Fed. 283; *Wagner v. Drake* (D. C.) 31 Fed. 849.

This court in this action has, in my opinion, the right to restrain the defendants from closing the complainant's warehouse and place of business, as provided in section 5 of the act under consideration, for the nonpayment only of the license fee required of a wholesale dealer in malt liquor; and, within this limitation, the order will be that the demurrer be overruled, with leave to defendants to answer on or before the next rule day.

SCHMIDT v. WEST.

(Circuit Court, D. Indiana. October 22, 1900.)

No. 9,884.

L. CANCELLATION OF INSTRUMENTS—FORGED NOTE—ADEQUACY OF REMEDY AT LAW.

A federal court of equity has jurisdiction of a suit for the cancellation of a forged note brought by the purported maker against the payee, who is alleged to be asserting the validity of such note and attempting to negotiate the same, where under the state statute an action to recover on said note will not be barred for more than 11 years; the complainant's remedy at law in such case by defending against the note when sued

thereon not being as practical and efficient as that in equity, and therefore not adequate and complete, so as to exclude the jurisdiction of equity.

2. FEDERAL COURTS—EQUITY JURISDICTION—STATUTORY REMEDY AT LAW.

The jurisdiction of a federal court of equity cannot be abridged by a state statute giving a remedy at law, even when such remedy is adequate and complete; and a statute providing for the perpetuating of testimony cannot be held to furnish the purported maker of a forged note with the means for providing for an adequate defense to such note in case an action at law should be brought thereon after his death.

In Equity. On demurrer to bill.

Roberts & Johnston and Elliott, Elliott & Littleton, for complainant.

W. S. Swengel and Kealing & Hugg, for defendant.

BAKER, District Judge. This is a suit for the cancellation of a promissory note, a copy of which follows:

"\$5,000.00.

February 13, 1897.

"Five years after date I promise to pay to the order of Elizabeth West five thousand dollars. Six per cent. interest until paid. Value received.

"George Schmidt."

It is alleged that the defendant is pretending and claiming, and for six months last past has represented and stated to divers persons, that said written instrument is the genuine promissory note of the complainant, executed by him to her for a valuable consideration, and that it is a valid obligation for the full sum of \$5,000; that she has at divers times attempted to sell and transfer said paper writing to other persons for value, and unless restrained she will sell and transfer the same, for value, to some person having no knowledge of its real character, who will purchase the same believing it to be genuine; that the name of George Schmidt, signed to said paper writing, is not his genuine signature; that he did not sign his name to said paper, nor did he ever authorize any person to sign his name there-to for him, and that he is not now, and never was, indebted to the defendant in the sum of \$5,000, or in any other sum whatever; and that said pretended note is a forgery. The defendant has demurred to the bill on the ground that it cannot be sustained in a court of equity, because the complainant has a plain, adequate, and complete remedy at law.

Among the most ancient and familiar subjects of equity jurisdiction are suits for the cancellation, reformation, and rescission of written instruments. The absence of a plain, adequate, and complete remedy at law is the test of equity jurisdiction, and the application of this principle to a particular case must depend on the character of the case, as disclosed in the pleadings. In *Boyce v. Grundy*, 3 Pet. 210, 213, 7 L. Ed. 655, it is said:

"The supreme court has often been called upon to consider the sixteenth section of the judiciary act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

A few of the many cases in which this principle has been affirmed and applied are *Watson v. Sutherland*, 5 Wall. 74, 78, 18 L. Ed. 580; *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260; *Kilbourn v. Sunderland*, 130 U. S. 504, 514, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Tyler v. Savage*, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82.

Testing the case made in the bill by this rule, it seems apparent that the remedy at law cannot be as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. The note, on its face, appears to be a fair and valid obligation. It will not mature until February 13, 1902. After its maturity the holder of it may choose any time within the ensuing 10 years to bring suit upon it. She has it in her power to delay bringing suit until February 12, 1912. Before suit is brought the complainant may be dead, and the evidence to prove the forgery may be lost or unavailable. The complainant has no remedy at law, and can have none, until the defendant or her assignee shall, after the maturity of the note, elect to bring suit upon it. It is against good conscience that the defendant should have the right for more than 11 years to hold this forged note as a menace and threat over the head of the complainant. The demurrer admits that the note is a forgery, and that, to the injury of complainant's credit, she is giving out in speeches that it is a valid obligation; and that she is attempting to sell and assign it as a genuine note. Remedial justice is active, rather than passive, and the law is open to no such reproach as would justly be cast upon it if it were to be held that the complainant can secure no relief until such time during the next 11 years as the defendant may see proper to bring suit upon the note. It would seem to make no difference whether the note is negotiable by the law merchant, or whether, like the note in question, it is negotiable under the statute. Whatever may be its character, if it be a forgery it may be defended against as successfully while in the hands of an innocent indorsee for value as while in the hands of the original payee. In this respect, if the note in question were payable in a bank in this state, it would not, if a forgery, be entitled to any greater consideration or protection than a note not payable in bank. The injury from its indorsement is no greater in the one case than in the other.

It is further insisted that the court cannot entertain jurisdiction as the complainant may at law defeat the note when sued upon it, and that such defense may be prepared for whether suit be brought in his lifetime, or thereafter against his personal representatives, under the statutory provisions in this state for taking and perpetuating testimony. It is apparent that the statutory right does not supersede or abridge the original and inherent jurisdiction of federal courts of equity. That the rightful jurisdiction of this court cannot be abridged by any statute of the state is too firmly settled to be open to question, and the mere right of a defense at law when it may suit the pleasure of the holder of the forged note to bring suit cannot be considered an adequate remedy. The difficulty of anticipating and meeting in advance fabricated evidence, which the forger of a note would not likely hesitate to resort to in order to sustain its pretended validity, at once suggests the inadequacy of any at-

tempt to ultimately defeat such a note by preserving evidence therefor under the statute. It may well be doubted whether a defense at law is an adequate remedy in any case in which it cannot be used until the wrongdoer, or one claiming under her, sees proper to put the machinery of the law in motion to enforce her pretended right. For there would be not only no adequate remedy, but no affirmative remedy whatever, available to the complainant, unless a court of equity may entertain jurisdiction and grant appropriate relief for the wrong. Demurrer overruled. Leave to answer in 30 days.

UNITED STATES v. RILEY.

(District Court, S. D. New York. December 21, 1899.)

ABATEMENT AND REVIVAL—SUIT FOR FORFEITURE FOR VIOLATION OF CUSTOMS LAWS—DEATH OF DEFENDANT.

An action by the United States to enforce a forfeiture of the value of imported goods because of fraudulent undervaluation, under section 9 of the customs administration act of June 10, 1890, is one highly penal in character, and abates on the death of the defendant, and cannot be revived against his legal representatives.

At Law. On motions to revive actions.

Henry L. Burnett, U. S. Dist. Atty., and Arthur M. King, Asst. U. S. Atty., for the motion.

Kellogg, Rose & Smith, opposed.

BROWN, District Judge. The above four actions were commenced in 1893 and 1894 on account of the fraudulent undervaluation of various consignments of imported goods, amounting altogether to upwards of \$80,000. The goods having been delivered to the defendant, the above suits were brought under the ninth section of the act of congress of June 10, 1890, for the forfeiture of the value of the goods. The defendant died in April, 1899, and his son Lester H. Riley having been appointed administrator, the plaintiff now moves that said actions be revived against the administrator.

The present case cannot be distinguished from that of *U. S. v. De Goer* (D. C.) 38 Fed. 80, in which this court held that penal actions, like the present, abate with the defendant's death and cannot be revived against the executor or administrator. The principles of that decision were applied and acted upon in these same cases on a previous motion to set aside the summonses. *U. S. v. Riley* (D. C.) 88 Fed. 480. In both cases it was considered that the previous decisions of the supreme court, particularly those in *Schreiber v. Sharpless* (D. C.) 17 Fed. 589, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65, and *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, were decisive that penal actions of this kind, for the recovery of a penalty or forfeiture, are abated by the death of the defendant.

A distinction is sought to be raised in the present case founded upon the decisions cited in the case first above referred to (*Hambly v. Trott*, 1 Cowp. 376; *U. S. v. Daniel*, 6 How. 11, 13, 12 L. Ed. 323; *Jones v. Van Zandt*, 4 McLean, 604, Fed. Cas. No. 7,504), to the effect

that where a benefit has accrued from the tort to the wrongdoer's estate an action will lie for the property or benefit received. But in the first of these cases, Lord Mansfield expressly says,

"So far as the tort goes, an executor will not be liable; * * * but so far as the act of the offender is beneficial, his assets ought to be answerable and his executor shall, therefore, be charged."

To the same effect are the subsequent cases.

This doctrine does not, however, help the present actions, since they are not to recover duties, or for benefits to the estate, but for the forfeiture of the whole value of the importations. By means of the fraudulent undervaluation, a certain sum was no doubt saved to the defendant from the duties which ought to have been paid, and would have been paid to the government upon a proper valuation of the goods; but the amount of duties thus saved is but trifling in comparison with the value of the goods which was forfeited, and for which the above actions are brought. The administrator may be liable to the government for the amount of duties thus saved. It is not necessary that I should examine further into that question, or decide upon it one way or the other. The present actions not being actions for duties, but for a forfeiture alone, the government must either recover, as in an action of debt, the whole value of the goods forfeited, or nothing. Such actions, it seems to be well settled, cannot be revived.

Motion denied.

VOLK v. B. F. STURTEVANT CO.

(Circuit Court of Appeals, First Circuit. October 19, 1900.)

No. 334.

MASTER AND SERVANT—INJURY OF SERVANT—ASSUMED RISK.

An employé, a part of whose duty for more than two years had been to sweep and clean out the bottom of an elevator shaft several times a week, who was injured, while performing such duty, by the descent of the car upon him, must be held to have assumed the risk of such injury, where the danger was obvious, and no change had been made in the mode of operating the elevator during the time of his employment. *Smith v. Baker* [1891] App. Cas. 325, doubted.

In Error to the Circuit Court of the United States for the District of Massachusetts.

For former opinion, see 39 C. C. A. 646, 99 Fed. 532.

Edward H. Savary, for plaintiff in error.

Walter B. Farr and M. F. Dickinson, Jr., for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a suit at common law, wherein the circuit court directed a verdict for the defendant, and the plaintiff thereupon sued out this writ of error. The suit was commenced by Lawrence Esch, who afterwards deceased, and the present plaintiff intervened as administratrix of his estate. The first count in

the declaration, omitting the allegations of the details of the injuries done, reads as follows:

"And the plaintiff says that on December 5, 1898, he was in the employ of the defendant as a workman, and, in the regular line of his duty, was in the bottom of an elevator well, and cleaning it out, at the works of the defendant, situated in that part of Boston, in said district, called 'Jamaica Plain'; that it was the duty of the defendant to reasonably protect him in his work; that the defendant failed in this duty, in that at said time and place it negligently failed to reasonably provide that he should be protected from the elevator car, which ran in said elevator well, coming down upon him when he was rightfully at the bottom of said elevator well, and injuring him, in consequence of which the said elevator car did come down upon him at said time and place, while in the exercise of due care, and he was shocked, bruised, hurt, and injured thereby."

There are other counts, but they only state the same cause of action in somewhat different phases; and, in view of the conclusions which we have reached, the first sufficiently states the plaintiff's contention, and describes the utmost that she can claim with reference to the matters of fact to be deduced from the proofs in the case. It appears that Esch had been in the employment of the defendant as a sweeper and cleaner about two years and a half prior to his injury, and that it was a part of his duty to clean out several times a week underneath the elevator car at the place where he was injured. The proofs show no condition of affairs leading up to his injury which was not within the observation and apprehension of any man of ordinary understanding. It also appears that the elevator car and its appurtenances, and the manner in which it was operated, were, at the time he was injured, in all respects the same as they had been during the time that Esch had been employed as sweeper and cleaner, and that there were no circumstances which prevented Esch from fully observing the conditions as they existed at the time of the injury, and had existed. Therefore the case comes plainly within the rules with reference to the assumption of risks by employes, of which a late statement is in *Railway Co. v. Archibald*, 170 U. S. 665, 672, 673, 18 Sup. Ct. 777, 42 L. Ed. 1188.

The plaintiff in error undertakes to except this case from the general rules on the alleged grounds that this was not a risk of the kind which the servant assumes, because it was one from which Esch could not have protected himself, and the master might have guarded him, while it is only those risks which can be obviated by a reasonable measure of precaution which are assumed. The facts of the case do not support a claim that it was impossible for Esch to have protected himself. The rules as to the assumption of risks by employes have been several times quite fully stated by the supreme court,—with the rest, in *Tuttle v. Railway Co.*, 122 U. S. 189, 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Railroad Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 34 L. Ed. 235; and *Railway Co. v. Archibald*, already referred to,—and, while there are admitted exceptions to those rules, the supreme court has recognized none as claimed by the plaintiff in error. Indeed, in many cases on this topic passed on by that court, in which the defense of assumption of risks by the employé was maintained, the circumstances were such as to have

required extreme care on the part of the employé. In this particular the plaintiff relies on *Smith v. Baker* [1891] App. Cas. 325; but in *McPeck v. Railroad Co.*, 25 C. C. A. 110, 79 Fed. 590, 595, we held that the rule of that case is certainly not that of the federal courts. We may also add that in *McPeck v. Railroad Co.* the employé of the defendant was working on the defendant's track, and was injured by a passenger train which was late. The circumstances of that case, and the principles applicable to them, defeat the plaintiff in error, although it was not there necessary that they should be fully stated.

The plaintiff in error also relies on an exception to the refusal of the circuit court to admit evidence in her behalf to the effect that a swinging guard or fence might have been used, of a character which would have protected Esch from liability to injury; but the witness had already testified that such a guard was not in use in outside elevators, to which class the elevator here in question belonged, thus bringing the evidence offered within our observations made with regard to *Mather v. Billston*, 156 U. S. 391, 399, 15 Sup. Ct. 464, 39 L. Ed. 464, in *Whitney v. Railroad Co.* (C. C. A.) 102 Fed. 850. However, we need not consider this further; because the evidence, if admitted, would not have availed the plaintiff in error, under the rules which we have cited relating to the assumption of risks by employés.

The judgment of the circuit court is affirmed.

DUVIVIER v. FRENCH et al.

(Circuit Court of Appeals, Seventh Circuit. June 13, 1900.)

No. 660.

1. LIBEL—GRAVAMEN OF ACTION—SUFFICIENCY OF DECLARATION.

The gravamen of an action for libel is not the injury to the plaintiff's feelings, but damage to his reputation in the eyes of others, and a declaration is insufficient which fails to show that the alleged libelous article was understood by its readers to refer to the plaintiff.

2. SAME—PLEADING—OFFICE OF INNUENDO.

In a declaration for libel, where the alleged libelous publication does not show on its face that it has reference to plaintiff, facts extrinsic to the article, necessary to identify him as the person referred to, cannot be embodied in an innuendo.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The action in the court below was in case for damages growing out of the publication of an alleged libel. The declaration is as follows:

"A. Devin Duvivier, plaintiff in this suit, by his attorney, Kenesaw M. Landis, complains of Florence French and Musical Courier Company, a corporation, etc., defendants, of a plea of trespass on the case.

"For that the said plaintiff is a subject of Her Britannic Majesty, the Queen of England, and the said defendant, Florence French, is a citizen and resident of the State of Illinois, and the said Musical Courier Company is a corporation organized and existing under and by virtue of the laws of the State of New York, and is a citizen and resident of said last named state.

"And for that whereas, the plaintiff, from, to-wit: the year A. D. 1872,

until the year A. D. 1891, was continuously engaged in the city of London, England, in the practice of his profession as a teacher of the art of singing, and the plaintiff did, during said period and until the plaintiff removed from said city of London, have as pupils, studying the art of singing, under the direction of the plaintiff, a large number of women and girls.

"And for that whereas, the plaintiff, from, to-wit: the month of October, A. D. 1891, to the present time, has been continuously, and now is engaged in the practice of his profession, as a teacher in the art of singing, in the city of Chicago, in the State of Illinois, and the plaintiff, during the said period last aforesaid, has had, and now has, as pupils studying the art of singing, under the direction of the plaintiff, a large number of women and girls.

"And for that whereas the plaintiff, before, and at the time of, the committing by the defendants, of the several grievances hereinafter mentioned, was a person of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of persons seeking instruction in the art of singing and of his neighbors and other worthy citizens of this state; yet the defendants, well knowing the premises, but wickedly and maliciously intending to injure the plaintiff and to bring him into public scandal and disgrace, on to-wit: the eighth day of September, A. D. 1897, at, to-wit: the District and Division aforesaid, wickedly and maliciously did compose and publish and cause to be composed and published of and concerning the plaintiff in a certain newspaper, called the Musical Courier, whereof the defendant, Florence French, was then and there the reporter and correspondent, and whereof the defendant, Musical Courier Company, was then and there the publisher and proprietor, a certain false, scandalous, malicious defamatory and libelous article containing (among other things) the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the plaintiff, that is to say:

"Curiosity led me (meaning the defendant, the said Florence French,) to peruse the pamphlet entitled 'Some Remarks on the Voice' (meaning a lecture delivered by the plaintiff and published by the plaintiff in pamphlet form). It is merely a reproduction of the salient points of a lecture given at the Illinois Music Teachers' Convention. The remarks are such as found in any ordinary publication treating of singing and appear to be copied verbatim. The only *raison d'être* for this pamphlet is evidently the opportunity it offers for a vile gratuitous insult and wholesale abuse of a very estimable, conscientious, talented teacher, who is no disciple of quackism—Mr. Karleton Hackett (meaning and intending thereby to imply and charge that the plaintiff was, and is, a disciple of quackism.)

"This well-known teacher happens to enjoy the respect and esteem of those who understand honesty and scrupulousness (meaning and intending thereby to charge and imply that the plaintiff does not understand honesty and scrupulousness); moreover he, (meaning Mr. Karleton Hackett) is a gentleman, a state of being which it is possible the author (meaning the plaintiff) of the voice remarks cannot appreciate (meaning and intending thereby to charge that the plaintiff was not, and is not, capable of conducting himself in a polite and gentlemanly manner and that the plaintiff did not, and does not, conduct himself in a polite and gentlemanly manner and that the plaintiff was not, and is not, capable of conducting himself with propriety and that the plaintiff did not, and does not, conduct himself with propriety). I (meaning the said Florence French) notice that in the preface of this pamphlet (meaning the pamphlet so published by the plaintiff as aforesaid) that this erstwhile teacher (meaning the plaintiff) at a famous London School (meaning the Royal Academy of Music) says he (meaning the plaintiff) has 'found it very necessary to modify one's European notions as to the relations existing between masters—no, teachers and pupils. This remark (meaning 'he has found it very necessary to modify one's European notions as to the relations existing between masters—no, teachers and pupils') may be indorsed with the remark that this discovery is very beneficial for the pupils. Possibly had the discovery been made earlier Chicago would now possess one singing teacher the less and London one singing teacher the more,' (meaning and intending thereby to charge that the plaintiff's conduct towards his pupils during the plaintiff's professional labors, as teacher of the art of singing in

the city of London, England, as aforesaid, was improper and immoral, and meaning and intending thereby to charge that the plaintiff's relations to his pupils during the plaintiff's professional labors as teacher of the art of singing in the said city of London as aforesaid, were improper and immoral, and meaning and intending thereby to charge that the plaintiff's conduct towards his said pupils and that the plaintiff's relations to and with his said pupils during the plaintiff's professional labors, as teacher of the art of singing in the city of London as aforesaid, were so improper and immoral, that it became, and was necessary for the plaintiff, by reason of said alleged improper and immoral conduct and relations as aforesaid, to abandon his professional labors as such teacher aforesaid in the city of London aforesaid, and to leave and go away from said city of London).

"By means whereof and the committing of which said several grievances by the defendants the plaintiff has been, and is, greatly injured in his good name and reputation and brought into public scandal and disgrace and has been, and is otherwise injured, to the damage of the plaintiff of ten thousand (\$10,000) dollars.

"Therefore he brings his suit," etc.

To this declaration the defendants in error filed a general demurrer, which demurrer was, by the circuit court, sustained; and upon this action of the circuit court, sustaining the demurrer, the error relied upon to reverse the case is predicated.

Kenesaw M. Landis, for plaintiff in error.

Sigmund Zeisler, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

After the foregoing statement of the case, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. It is not sufficient, therefore, that the plaintiff should understand himself to be referred to in the article. It is necessary, to constitute libel, that others than the plaintiff should be in a position to understand that the plaintiff is the person referred to.

The article upon which the action in the court below was based, stripped of innuendos, and of averments in the way of inducement, is as follows:

"Curiosity led me to peruse the pamphlet entitled 'Some Remarks on the Voice.' It is merely a reproduction of the salient points of a lecture given at the Illinois Music Teachers' Convention. The remarks are such as found in any ordinary publication treating of singing, and appear to be copied verbatim. The only *raison d'être* for this pamphlet is evidently the opportunity it offers for a vile, gratuitous insult and wholesale abuse of a very estimable, conscientious, talented teacher, who is no disciple of quackism, Mr. Karleton Hackett.

"This well-known teacher happens to enjoy the respect and esteem of those who understand honesty and scrupulousness; moreover, he is a gentleman, a state of being which it is possible the author of the 'Voice Remarks' cannot appreciate. I notice that in the preface to this pamphlet this erstwhile teacher at a famous London school, says he has 'found it very necessary to modify one's European notions as to the relations existing between masters—no, teachers and pupils.' This remark may be indorsed with the remark that the discovery is very beneficial for the pupils. Possibly had the discovery been made earlier, Chicago would possess one singing teacher the less and London one singing teacher the more."

The article in these words, and in these words alone, went to the readers of the Musical Courier. It contains in itself no guide to the identity of the person spoken of, except that, whoever he was, he was the author of the pamphlet named; and the inference derivable from the statement that the pamphlet is a reproduction of a lecture given at the Illinois Music Teachers' Association; and that its author was formerly a teacher in a famous London school, and is now a teacher of singing in Chicago.

It is averred in the inducement that the plaintiff was formerly a teacher in a London school, and is now a teacher of singing in Chicago; but this alone is not sufficient to identify the plaintiff with the person spoken of, for in a city of the size of Chicago there may be many singing masters who formerly were teachers in London schools.

No facts are averred disclosing that any reader of the Courier had ever heard of the pamphlet, or of the lecture, or that any one, not even its publishers, knew that the plaintiff was the author of the pamphlet. Indeed, it is not averred that the plaintiff was the author of the pamphlet. The article, therefore, furnishes no knowledge that may be said, either directly or by reasonable inference, to lead up to the identification of the plaintiff with the person spoken of in the article; and the declaration contains no averment of knowledge, extrinsic to the article, that may, with reasonable certainty, connect the article with the plaintiff. For all that appears on the face of the declaration, the readers of the article in the Courier may, each and all, have reasonably supposed that the article referred to some one other than the plaintiff.

It is true that the declaration avers that the defamatory language was used of and concerning the plaintiff, but, as has already been said, it is not enough, to constitute libel, that the plaintiff knew that he was the subject of the article, or that the defendants knew of whom they were writing; it must appear upon the face of the declaration that persons other than these must have reasonably understood that the article was written of and concerning the plaintiff, and that the so-called libelous expressions related to him.

It is true, also, that in an innuendo it is stated inferentially that the pamphlet was originally a lecture delivered by the plaintiff, and by him published in pamphlet form; but an averment of fact extrinsic to the article, and essential to an identification of the article with the person complaining, cannot be embodied in an innuendo. 13 Enc. Pl. & Prac. 54.

The office of an innuendo is to deduce inferences from premises already stated, not to state the premises themselves. An innuendo is not an issuable averment. Facts extrinsic to the article, and essential to a reasonable identification of the plaintiff with the person referred to, must be set out in the inducement. *Id.* 52; *McLaughlin v. Fisher*, 136 Ill. 111-116, 24 N. E. 60.

Let this whole article be read without knowledge that the plaintiff was the author of the pamphlet, or without knowledge of the facts reasonably connecting the plaintiff with the authorship of the

pamphlet, and no one would know that the plaintiff was the person referred to in the article. This want of information, in the absence of the essential introductory averment, must be assumed to have been the state of mind of the readers of the article.

For these reasons, we see no error in the ruling of the Circuit Court sustaining the demurrer, and it is, therefore, affirmed.

HARDER & HAFFER COAL MIN. CO. OF SULLIVAN COUNTY, IND., v.
SCHMIDT.

(Circuit Court of Appeals, Seventh Circuit. October 2, 1900.)

No. 651.

1. MASTER AND SERVANT—INJURY OF SERVANT—OBVIOUS DANGER.

Where the condition of the roof in a coal-mine entry was called to the attention of the superintendent, who did not regard it as dangerous, and dissuaded the employé who spoke of it from his apprehension, the owner cannot claim that the danger was so obvious that an employé who was injured by the falling of the roof either assumed the risk or was guilty of contributory negligence.

2. SAME—UNSAFE PLACE—MINERS.

A miner who is permitted by his employer, either expressly or impliedly, to go to a certain place in the mine, and there receives injuries from causes of which he had no previous knowledge, but which were known to the employer, and should, in compliance with his duty to provide a reasonably safe place for his employés, have been obviated, may recover from the master for such injuries.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The defendant in error was the plaintiff in the court below, and obtained a verdict and judgment against the plaintiff in error, defendant below, in the sum of two thousand eight hundred and ninety-five dollars damages for personal injuries received by the defendant in error in the mines of the plaintiff in error. The principal error relied upon is that the court refused, at the conclusion of the testimony, on motion of the plaintiff in error, to instruct the jury to find a verdict for the plaintiff in error.

The evidence was somewhat contradictory, but the facts found by the verdict of the jury, upon the instructions given, and supported by a sufficient weight of evidence, may be stated as follows:

The plaintiff in error was, on the 20th of December, 1894, a corporation under the laws of Indiana, conducting a coal mining business in Sullivan county in that state.

The general plan of the mines, so far as it need be considered, is, in substance: A long horizontal passageway called the "main entry" runs north and south past the foot of the hoisting shaft. This passageway is used for drawing cars of coal to the shaft. Other similar passageways used for the same purpose are cut at right angles to the main entry or passageway, and they also run in a horizontal direction, and the coal cars are drawn in them from the "rooms" where the miners excavate the coal, over to the main entry, where they turn and traverse the main entry to the hoisting shaft. These latter passageways, which run east and west, or at right angles to the main passageway or entry, are high enough for a man to walk in and wide enough for cars to be pulled through, averaging from six to nine feet in width.

From these east and west passageways the miners bore into the coal veins at regular intervals or distances along the passageway, and make what are called "rooms." The room is made by excavating or removing the coal, and it is in these rooms that the actual mining work of dislodging coal is per-

formed. Before the room is made, there is a piece of technical work performed called "turning the room," which means making a doorway from the passage into the room. This is done by picking or blasting a hole about four feet wide and four feet high into the side of the passageway, a distance of about six feet. When the miner clears out such a hole he may then remove the coal lying beyond and open up the area called the "room."

Sections 7472 and 7479 of the Mining Act of Indiana (Burns' Rev. St. 1894) are as follows:

"7472. Duties of Bosses.—That the mining boss shall visit and examine every working place in the mine at least every alternate day while the miners of such place are, or should be at work, and shall examine and see that each and every working place is properly secured by props or timber, and that safety in all respects is assured, and, when found unsafe, he shall order and direct that no person shall be permitted in an unsafe place, unless it be for the purpose of making it safe. He shall see that a sufficient supply of props, caps and timber are always on hand at the miners' working places. He shall see, also, that all loose coal, slate and rock overhead wherein miners have to travel to and from their work are carefully secured."

"7479. Mining Boss—Duties.—That in order to secure the proper ventilation of each coal mine, and promote the health and safety of the persons employed therein, the owner, operator, agent or lessee shall employ a competent mining boss, who shall be an experienced coal miner and shall keep a careful watch over the ventilating apparatus and the air ways, and shall see that, as the miners advance their excavations, all loose coal, slate and rock overhead are carefully secured against falling therein on the traveling and airways. He shall measure the air current at least once a week at the inlet and outlet, and at or near the face of the entries; he shall keep a record of such measurements which shall be entered in a book kept for that purpose, the said book to be open for the inspection of the mine inspector. He shall, also, on or about the first day of each month, mail to the inspector a true copy of the air measurements given, stating, also the number of persons employed in or about said mine, the number of mules and horses used and the number of days worked in each month. Blanks for this purpose shall be furnished by the state to the inspector and by the inspector to each mine boss."

In the operation of these mines the miners were paid sixty cents a ton for the coal mined and loaded, and two dollars for turning the room. In a general way, a miner, with his help or buddy, worked a room, each other miner, with his help or buddy, working some other room; but occasionally a miner had more than one helper, especially when he wished to help one who was waiting for a place as an employee.

The plaintiff, Herman Schmidt, was a practical coal miner of about twenty-four years experience, but had been employed in the defendant's mine for about two weeks. With his buddy, he was engaged in mining coal from one of the rooms.

On the day when the accident occurred the mine was shut down to such an extent that there could be no service of the coal cars. At the breakfast table that morning Schmidt was told by another miner, Ferdinand Yochem, that Yochem was about to start a new room about a thousand feet distant from the room assigned to Schmidt, and that if Schmidt and his buddy would help in turning this new room, the two dollars would be divided between them. To this Schmidt agreed. They went separately to the mine, the superintendent having been told by Schmidt that he was going to his room to finish picking up some loose coal, so that the room would be ready for the cars when they started again; and having been told by Yochem that he was going to the place assigned for the turning of the new room.

There was some dispute on the trial whether the superintendent had been told by Yochem that Schmidt would assist him in the turning of the room. The testimony of Yochem on that subject was as follows:

"Q. Did or did you not have any conversation with the superintendent about whom you should have to help you?"

"A. Well, I said to Lawrence [the superintendent] I take Fenger [Yochem's buddy] with me to this place and he said all right."

"Q. You said nothing about Schmidt? Did you say anything to him about Schmidt or Neuroth?"

"A. Yes, I told him in the morning I go down, I said to Schmidt and Neuroth you got lots of coal, you come down and help me in my place, and he said all right, I have nothing against it."

"Q. When you were talking with the superintendent was Schmidt there?"

"A. No, sir, Schmidt he was away before me at the boarding house."

The instructions given to the jury by the court upon this point were as follows:

"If you believe from the evidence that the plaintiff was engaged by the defendant to work in its mine in a certain room, and that the duties of the plaintiff did not call him to assist Yochem and Fenger, then the Court instructs the jury, that, unless they further believe from the evidence, that plaintiff was authorized or permitted by the defendant or some servant of the defendant's in charge and authority over the plaintiff to go to the place where he was injured, and that the condition of such place was unknown to the plaintiff, then the jury should find the defendant not guilty."

"The Court instructs the jury that if you believe from the evidence, that Herman Schmidt went to the place where Yochem and Fenger were at work, to aid them in firing the shot, without any instruction or authority or permission, expressed or implied, from the defendant or its duly authorized agent, to go there, and was injured by reason of his going there to assist in firing such shot, or to see that the same was afterwards properly fired, then the Court instructs you as a matter of law, to find the defendant not guilty."

There was no timbering or other protection to the passageway of the mine, and none at the place where the new room was to be turned. Immediately above this point was a fissure or seam in the ceiling of the passageway of such a nature that a portion of the rock in the seam was supported by the piece of the wall which was to be blasted away to make the doorway. The danger imminent from this fissure could have been avoided by the putting in of appropriate timbers. Yochem and the mine boss talked of this rock the day before, Yochem saying that the place "looked no good," but the mine boss saying that it could not fall down; that it was solid rock. Schmidt's attention, so far as the evidence goes, was not called to this fissure.

After doing a little work, on the morning of the injury, in his own room, Schmidt and his buddy went to the place where Yochem proposed to turn the new room. The blast was set, and Yochem and Schmidt, with their buddies, withdrew until it was fired off. Shortly afterwards they returned, Schmidt being in advance, when the rock overhanging the seam fell, and caused the injuries for which the action was brought. Had the gangway at this place been properly timbered, the rock would not have fallen.

Some of the counts of the declaration proceed upon the common law obligation of the mining company to furnish a safe place in which the employees may work, and some of them upon the special statutes hereinbefore set out.

The bill of exceptions does not show that any exceptions were taken, after instructions, before the withdrawal of the jury, and the brief filed by the plaintiff in error does not set out specifically any instructions given, or instructions refused, or any evidence admitted, or evidence ruled out, upon which error is predicated.

O. W. Dynes, for plaintiff in error.

Cyrus J. Wood, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and BUNN, District Judge.

After stating the facts as above, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

Indisputably the plaintiff in error was bound by law to furnish to its employees safe gangways and working places. The statutes of Indiana are, in this respect, only supplemental to the common law

obligations. If, as the jury found, the plaintiff in error failed in the performance of this duty, causing the injury for which the action is brought, the action is maintainable, unless Schmidt was there without invitation, or had notice of the dangerous character of the place. The two inquiries thus suggested constitute the fighting ground of this case.

The evidence discloses that the imminence and nature of the danger was called to the attention of the mining boss by Yochem; that Yochem was assured that his apprehensions were unfounded; and that Schmidt had no knowledge of their existence. Whatever may be the exemption of the employer from liability for injuries caused by a danger that is obvious to the injured, such exemption will not be accorded where the nature of the menace is so uncertain as to cause discussion between the employees and the employer, with the result that the employer dissuades the employee of his apprehension; and especially so where the particular employee injured is without any knowledge of its existence. This disposes of the question of contributory negligence, and of any question growing out of the assumption of risk by the defendant in error.

It is not necessary, in this case, to determine, as a matter of law, growing out of his general employment, whether Schmidt was, at the place and time of the injury, within the protection of the general rule imposed upon employers to provide a safe place for their employees. The jury found, as a matter of fact, that Schmidt was present by the permission, either express or implied, of the superintendent. The evidence was somewhat uncertain whether the superintendent told Yochem, on the morning in question, that Schmidt might assist him. Yochem was an illiterate witness, and his answer might be interpreted to mean, either that he had told Schmidt to help him, and Schmidt said it was all right; or that he had told the superintendent that he had so told Schmidt, and the superintendent had said it was all right. But there is testimony of no uncertain kind that Yochem was permitted more than one helper, and, therefore, Schmidt was present, on the morning in question, under this general permission. The instructions of the court upon these issues were certainly as favorable as the plaintiff in error could demand, and we can see no reason why the verdict of the jury should not now be controlling.

The case made out, then, is that of an employee, permitted by the employer to go to a certain place in the mines, and there receiving injuries from causes of which he had no previous knowledge, but which were known to the employer, and which should, in compliance with its duty to provide a safe place to work in, have been obviated. Such a case is, of course, maintainable.

The judgment will be affirmed.

WHITTLE et al. v. ST. LOUIS & S. F. RY. CO.

(Circuit Court, W. D. Arkansas. October 22, 1900.)

COST—LEAVE TO SUE IN FORMA PAUPERIS—FEDERAL STATUTE.

Before a federal court should permit an action to be prosecuted in forma pauperis, under Act July 20, 1892 (27 Stat. 252), it should be reasonably satisfied that plaintiff is likely to recover something by his action; and where an action has been once tried, and a judgment for plaintiff reversed by the appellate court, which held that on the evidence adduced a verdict should have been directed for defendant, leave will not be granted the plaintiff to continue the action as a poor person, under such statute, unless a showing is made that some new evidence will be produced on another trial.

On Motion by Plaintiffs for Leave to Continue Suit as Poor Persons.

In 1893 this action was instituted to recover damages for the death of the husband and father of plaintiffs. A trial was had, and a judgment entered on the verdict of a jury for the sum of \$8,000. The cause being removed by writ of error to the United States circuit court of appeals for this circuit, that court reversed the judgment of the court below; the majority of the court holding: "The circuit court erred, we think, in refusing, upon the testimony contained in this record, to charge the jury, as it was requested to do, that the deceased was guilty of contributory negligence, and that there could be no recovery for that reason." *Railway Co. v. Whittle*, 40 U. S. App. 23, 20 C. C. A. 196, 74 Fed. 296. After the entry of the mandate of the court of appeals, plaintiffs filed this motion in the court below to be permitted to continue the prosecution of this action as poor persons. The affidavit accompanying the petition, and upon which it is based, does not allege that plaintiffs have any new evidence, but only "that they believe that they are entitled to the redress sought by their suit," and also that "they are too poor to pay the costs of the suit, or to give security for the same."

Ira D. Oglesby, for the motion.

B. R. Davidson, opposed.

TRIEBER, District Judge (after stating the facts). The act of congress of July 20, 1892 (27 Stat. 252), provides:

"Any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action."

It is unnecessary to determine in this cause whether, as contended by counsel for defendant, it is not too late to file a petition for leave to sue in forma pauperis, after the cause has been tried once, and upon error reversed by the appellate court, as the petition must be refused on other grounds, about which there can be little controversy. Section 4 of the act provides:

"The court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action

is frivolous or malicious. Judgment may be rendered for costs at the conclusion of the suit, as in other cases: provided, that the United States shall not be liable for any of the costs thus incurred."

This clearly demonstrates that, before such leave will be granted, there must be some kind of a showing made to the court that there is reasonable cause to believe that, if permitted to prosecute the suit in forma pauperis, the plaintiff is likely to recover something by his action. *Whelan v. Railroad Co.* (C. C.) 86 Fed. 219; *Brinkley v. Railroad Co.* (C. C.) 95 Fed. 345, affirmed by the United States circuit court of appeals for the Sixth circuit in 40 C. C. A. 689, 100 Fed. 1006; *Columb v. Manufacturing Co.* (C. C.) 76 Fed. 198. In the last-cited case the court, in construing this act, say, "In view of the revisory powers vested by the fourth section, the clerk should not ordinarily assume to act under the statute without prior conference with the court."

While ordinarily, in cases of this kind, for damages resulting from the killing of a person by a railroad train, the question of liability should be submitted to a jury, and the court would not require a very strong showing of negligence on the part of the company, yet in view of the fact that the appellate tribunal, whose judgments are conclusive on this court, has held that, upon the evidence submitted at the trial of this cause, it was the duty of the trial court to direct a verdict for the defendant, it is the duty of plaintiffs, when applying for leave to retry the cause as poor persons to make some kind of a showing tending to prove that some new evidence to establish such negligence on the part of the railway company as would warrant the submission of that fact to the jury would be produced at the next hearing. If no other evidence is to be introduced than was at the former trial,—and there is no allegation in the petition that there would be,—the duty of the trial court would be, in obedience to the mandate of the appellate court, to direct a verdict against the plaintiffs. Hence there is nothing before the court to warrant the belief that, if a new trial is had, plaintiffs could recover. The petition is refused.

In re BAKER.

(Circuit Court of Appeals, First Circuit. May 29, 1900.)

No. 294.

1. BANKRUPTCY—PETITION FOR REVIEW—PRACTICE.

A proceeding in the circuit court of appeals, under Bankr. Act 1898, § 24b, to review proceedings of a district court, sitting in bankruptcy, in matter of law, is required by General Orders No. 37 to follow as nearly as may be the rules of equity practice established by the supreme court; and the petition must in some way set out enough of the tenor of the record in the district court to present the issue of law which it seeks to raise.

2. SAME—PARTIES.

A circuit court of appeals cannot revise the proceedings of a district court in bankruptcy, on petition therefor filed under Bankr. Act 1898, § 24b, without an issue made and presented by parties who have a substantial interest in the controversy, or at least without a proper opportunity given therefor; and, where it appears that a creditor against

whom a petition for review is filed has no longer any interest in the question sought to be raised, the petition will not be heard until other creditors who may have an interest are brought in by proper notice.

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

Benjamin H. Greenwood, for petitioner.

Byron B. Johnson, for defendant.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This case was on the trial list for the April session, and has been submitted on briefs. It is a petition filed by Margaret E. Baker against Byron B. Johnson, under section 24b of the bankrupt act approved on July 1, 1898 (30 Stat. 553), for a revision of the proceedings of the district court for the Massachusetts district sitting in bankruptcy. An answer was put in by Johnson, and the petition and answer constitute the whole case before us. By the terms of the statute, the proceeding in this court is in equity, and it must present matter of law, and nothing else. By General Orders and Forms in Bankruptcy 37, 172 U. S. 666, 18 Sup. Ct. x., it must follow, as nearly as may be, the rules of equity practice established by the supreme court. By a rule of this court entered on May 31, 1899, the time of pleading to a petition is limited, and some other provisions in reference to pleadings are made; but the rule contains nothing inconsistent with General Order 37. Although, under Equity Rule 26, the old prolixity is not required, yet, following the guidance of the recognized precedents for bills of review for alleged errors in law, this petition should have presented, in some way, enough of the tenor of the record in the district court to enable us to perceive the issue of law which it seeks to raise. This it fails to do. As, also, the answer does not admit unequivocally the allegations of the petition, this defect becomes fundamental. Under the circumstances, the record does not now present an issue of law, as required by the statute. Consequently the submission on briefs must be annulled, the case stricken from the trial list, and the petitioner must take proceedings to properly present the issue of law intended to be raised, or the petition must be dismissed.

In addition to this, it appears by the answer to the petition supplemented by the petitioner's suggestion of record, that Johnson, the respondent, has been paid, and has no longer any interest in the controversy. If he was the sole creditor, the petitioner has no longer any interest in the bankruptcy proceedings, and the petition presents only a moot question. At any rate, we cannot revise the proceedings of the district court without an issue made and presented by parties who have a substantial interest in the controversy, and who can suitably represent it, or at least without proper opportunity given therefor. Under these circumstances, before the case can proceed further the petitioner must apply for an order of notice on the creditors, if there be any, or on such of them as have an interest in the controversy, and cause the order to be properly served.

This order will be made on the petitioner filing a proper motion therefor, accompanied with an affidavit which sets out the facts fully enough to enable us to understand the form the notice should take, and the persons against whom it should issue.

Ordered, for the reasons stated in the opinion passed down this day, the submission of this case on briefs is annulled, and the petitioner has leave to proceed as stated in the opinion.

On October 9, 1900, the following final decree was entered: "On this case being called for argument, it appearing that the petitioner has not complied with the terms of the opinion passed down May 29, 1900, the petition is dismissed, without costs."

In re SMOKE.

(District Court, S. D. New York. August 17, 1900.)

BANKRUPTCY—PREFERENCES—KNOWLEDGE BY DEBTOR OF INSOLVENCY.

Payments made on account of debts in the regular course of business by one who does not at the time know or believe himself to be insolvent, and who intends no preference by such payments, do not constitute preferences within the meaning of Bankr. Act 1898, § 57g or 60a, even though it should afterwards appear that the debtor was insolvent, and such payments were made within four months of the commencement of bankruptcy proceedings.

In Bankruptcy.

Myers, Goldsmith & Bronner, for creditor.
Maurice L. Hyman, for bankrupt.

BROWN, District Judge. In my judgment sections 57g and 60a have no reference to payments made on account of debts in the regular course of business by one who, as in this case, does not know or believe himself at the time to be insolvent and who intends no preference by such payment, even though it should afterwards appear that the debtor was at the time insolvent, and the payment was within four months of the commencement of bankruptcy proceedings. The above sections ("g" and "a") contain no time limit. The phrase "transfer of property" in section 60a is not intended to cover such a mere payment of money in good faith, and in the ordinary course of business by one believing himself solvent. Such a payment I think is not a preference.

Above ruling affirmed on this ground.

In re BLACK.

(District Court, W. D. Pennsylvania. October 22, 1900.)

No. 1,000.

BANKRUPTCY—EXEMPTIONS—EFFECT OF WAIVER IN NOTE.

Under Bankr. Act 1898, § 70a, and its other provisions relating to exemptions, exempt property claimed by the bankrupt constitutes no part of the assets in bankruptcy, and no title thereto vests in the trustee; nor is the court given jurisdiction and control over such property, where the

exemption is allowed by the laws of the state, by the fact that a creditor holds notes in which the bankrupt waived the benefit of the exemption laws.

In Bankruptcy. On question certified for review by J. M. Force, referee.

Billing & Fish, for creditor.

Frank Gunnison, for bankrupt.

BUFFINGTON, District Judge. In this case the bankrupt duly claimed an exemption of personal property to the extent of \$300. To the allowance of such claim, Thomas Miller, administrator of Bull, a creditor, excepted on the ground that, in the note which evidenced Bull's debt, Black, the maker, had waived the right to such exemption. These exceptions were dismissed by the referee. At the request of the creditor, the referee has certified the question to this court for review. After due consideration, we have reached the conclusion that no error was committed by the referee. Section 6 of the bankrupt act provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force," etc.

By the Pennsylvania act of April 9, 1849 (Purd. Dig. p. 831, pl. 29), it is provided:

"In lieu of the property now exempt by law from levy and sale on execution issued upon any judgment obtained upon contract and distress for rent, property to the value of three hundred dollars (\$300.00) * * * owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent."

Though the literal terms of the statute only extend to an exemption "from levy and sale on execution or by distress for rent," yet, under the practice as recognized by the supreme court of this state, such exemption, when duly claimed, is allowed in assignments for the benefit of creditors. See *Peterman's Appeal*, 76 Pa. St. 116; *Larkins' Estate*, 132 Pa. St. 554, 19 Atl. 283; *Murr's Appeal* (Pa. Sup.) 19 Atl. 1073. It would seem, therefore, if the insolvent estate of this bankrupt were being administered as an assigned estate by the courts of this state, such exemption, if duly excepted and claimed, would be allowed.

The claim, then, being one recognized by state law, we will next inquire as to its enforcement by the bankrupt court. Section 70, cl. a, of the bankrupt law, which provides for vesting the trustee, by operation of law, with the property of the bankrupt, expressly excepts exempt property from such vested property. Section 7, cl. 8, makes it the duty of the bankrupt to claim such exemption as he is entitled to. Section 47, cl. 11, makes it the duty of the trustee to set apart the bankrupt's exemption, and report the items and estimated value to the court. Section 2, cl. 11, makes it the duty of the court to determine the bankrupt's claim to exemption. As the right of the bankrupt to claim his exemption is personal,—one that, under a statute like this, must be asserted (see opinion of Chief Justice Waite in *Re Solomon*, 2 Hughes, 164, Fed. Cas. No. 13,166),—it would seem the bankrupt court took the property pending the making of a

claim and the claim's determination; but, when such a claim is made, the control of the bankrupt court over it ceases. See opinion of Mr. Justice Bradley in *Re Bass*, 3 Woods, 382, Fed. Cas. No. 1,091. Of the present law it may be said, as was said of the law of 1867 by Justice Bradley in that case:

"It is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. * * * The exemption is created by the state law, and the assignee acquires no title to the exempt property."

The fact that one of the creditors of the bankrupt's estate holds notes in which the debtor has, by contract, waived the benefit of such exemption law, does not affect the latter's right to the statutory exemption from the bankrupt estate. This contract right of exemption waiver, personal to the creditor, has never been enforced by him; and the fact that such an unexercised right existed in favor of a certain creditor cannot serve to vest this court, sitting as a court of bankruptcy, with jurisdiction and control over exempt property which congress has expressly excepted from its jurisdiction. We are therefore of opinion it was the trustee's duty to allow the bankrupt his statutory exemption

In re TROTH.

(District Court, S. D. Ohio, W. D. September 24, 1900.)

No. 2,660.

BANKRUPTCY—COMPENSATION OF REFEREE.

Under general orders in bankruptcy No. 35, par. 2 (32 C. C. A. xxxiv., 89 Fed. xiii.), which provides that "the compensation of referees prescribed by the act shall be in full compensation for all services performed by them under the act or under these general orders," a court is not authorized to allow compensation to a referee in addition to that prescribed in Bankr. Act, § 40a, because of services performed on a reference to him of an application for discharge as authorized by general order 12, par. 3 (32 C. C. A. xvi., 89 Fed. vii.).

In Bankruptcy. On application of referee for additional allowance.
Herbert Jenney, for bankrupt.
Geo. B. Gardner, referee, in pro. per.

THOMPSON, District Judge. The referee in this case has received as compensation for his services the statutory fee of \$10, and commissions on dividends to the amount of \$22.69, and has been allowed for expenses \$45.35. He now asks an additional allowance for expenses of \$4, and additional compensation for extra services of \$24. The \$4 item is for printing notices, traveling expenses, and telephone messages, and will be allowed, but the additional compensation for services must be refused. The referee has rendered faithful service in the case, and the additional compensation asked for is not unreasonable, but the law does not authorize its allowance. On the contrary, the law expressly provides that:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time

the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition." Bankr. Act, § 40a.

The case was referred to him to take testimony and report the facts upon the specifications filed in opposition to the petition of the bankrupt for discharge, and the court was inclined to regard this service as not being within the scope of the ordinary duties of the referee prescribed by the bankrupt act, and for which extra compensation might be allowed, as allowances are made to master commissioners of the court upon references to them; but the orders in bankruptcy established by the supreme court forbid any such construction of the law. Order 12, par. 3 (32 C. C. A. xvi., 89 Fed. vii.), provides that:

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge. But he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts."

And order 35, par. 2 (32 C. C. A. xxxiv., 89 Fed. xiii.), provides that:

"The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders."

Under the general orders the referee may be required to ascertain and report the facts upon applications for a discharge, but the compensation prescribed by the act shall not only be in full compensation for all services under the act, but for all services under the general orders. The additional compensation asked for, therefore, must be refused

FALTER et al. v. REINHARD et al.

(District Court, S. D. Ohio, E. D. September 28, 1900.)

No. 374.

1. BANKRUPTCY—APPOINTMENT OF TRUSTEE—UNDUE INFLUENCE OF BANKRUPT.

It is the policy of the law and the courts to have the affairs of bankrupts administered by a trustee, who will have in view the interests of the creditors only, and not those of the bankrupts or their friends, and the election of a trustee should not be approved where it was accomplished by the vote of an attorney in fact holding proxies obtained from creditors through the solicitation of the bankrupts, and against the votes of a large majority of the other creditors.

2. SAME—REFEREE—REFUSAL TO RECOGNIZE PROXIES.

Ordinarily a creditor whose claim has been allowed should be permitted to vote for trustee in person or by proxy, and any question as to whether his vote was improperly influenced should be reserved until the referee is called upon to approve the election; but where a referee refused to receive the votes of an attorney holding proxies because it was shown that they had been given at the solicitation of the bankrupts, and in the interest of their choice for trustee, and a different trustee was elected by a large majority of the votes cast by the creditors present, such election will not be set aside at the instance of the bankrupts, where one or two only of the creditors whose votes were refused join in the objection, and whose votes would not be sufficient to change the result.

8. SAME—OBJECTION TO ACTION OF REFEREE.

An attorney in fact, who was refused the right to vote for a trustee on proxies obtained from creditors, has no interest or standing which gives him a right to object to the action of the referee on behalf of his principals.

In Bankruptcy. On petition for review of certain orders of the referee made in the course of proceedings for the election of trustee.

T. E. Steele, for plaintiffs.

D. B. Sharp, for defendants.

THOMPSON, District Judge. The petition is filed by John F. McGill, a creditor of the bankrupts, and August Neydon, who claims to represent 240 other creditors of the bankrupts. The creditors whom he claims to represent are not parties to this proceeding, nor does it appear that they have authorized Neydon to represent them. Neydon is not a creditor, and has no interest in the controversy, and is not a proper party. He was the attorney in fact of 241 creditors, including McGill, authorized by letters of attorney to vote for them in the election of a trustee, and complains that his letters were rejected, and his right to vote thereunder was denied, by the referee; but, if any one was prejudiced by this action of the referee, it was the constituents, and not their attorney.

The questions arising upon the rulings and action of the referee, as shown by the certificate, are:

"(1) Whether or not a referee presiding at the first meeting has power to hear and determine the question of the right of a creditor's proxy to vote for the choice of trustee upon his offer to vote, and the same being challenged by other creditors.

"(2) If a referee has such power, whether or not a creditor's proxy, who, under authority of a special letter of attorney, offers to vote at the creditors' meeting for the choice of trustee, shall, upon objection thereto by other creditors, be permitted to vote, when such letter of attorney has been obtained by interference of the bankrupt, and the casting of such vote will result in the appointment of a trustee who is the choice of the bankrupt."

It appears from the certificate that, when Neydon offered to vote as the proxy of the creditors, the vote was challenged by other creditors, upon the ground that his letters of attorney were procured through the influence and efforts of the bankrupts, for the purpose of controlling the election of the trustee. Thereupon the referee, after hearing the evidence offered by the parties, sustained the challenge, and refused to permit Neydon to vote, who, if permitted to vote, would have cast the votes of the creditors for whom he was proxy in favor of Walter Zinn. One hundred and eighty-nine votes were cast, representing allowed claims amounting to \$103,126.11. Of these, Fred C. Rector received 173 votes, representing allowed claims to the amount of \$87,697.79, and was declared to be the choice of the creditors for trustee, and his election as such was approved by the referee. The two hundred and forty-one rejected votes represented allowed claims to the amount of \$73,850.13. The evidence heard by the referee, and which is certified here, shows conclusively that Walter Zinn, who, as receiver of this court, was in possession of the property of the bankrupts, was a candidate for trustee, and was the

choice of the bankrupts; that Neydon was an employé of the bankrupts; and that the letters of attorney were procured through the efforts and influence of the bankrupts and the receiver. A letter was sent to the creditors, of which the following is a copy:

"Established, 1868.

"Reinhard & Co., Bankers. John G. Reinhard, Cashier.

"Columbus, O., August 11, 1900.

"Please call at the bank with your bank book and certificates of deposit at your earliest convenience, not later than August 20th. It is necessary for you to make affidavit to the amount of your claim. We have made arrangements to have the same done without expense to you. We also wish to talk with you about the affairs of the bank.

"Very truly yours,

Reinhard & Co."

In response to this letter, a great many creditors called at the bank, where they found Fairbanks, the attorney of the receiver, Neydon, a clerk of the bankrupts, Gale, a notary public, and, usually, one of the Reinhards. Here their proofs of claim were prepared, and they were sworn by Gale. They were then importuned, in the language of Neydon, to give their proxies to Neydon to enable him to vote for Zinn, who was represented to them as a suitable man, and one whose election would be not only in their interest, but in that of the Reinhards. The proxies which were rejected were procured in this way, and represented the choice of the bankrupts and the receiver, and not the free and unbiased choice of the creditors who gave them; and had these votes been cast and counted for Zinn, resulting in his election as trustee, it would have been the duty of the referee to have ordered a new election. The investigation of the affairs of bankrupts should be conducted in the interest of the creditors and by those who have no other interests to serve. The investigation of preferential or fraudulent transfers of the property of the bankrupts should be made by a trustee who will have in view the interest of the creditors only, and not the interest of the bankrupts or of their friends.

Ordinarily, the creditor whose claim has been allowed should be permitted to vote in person or by proxy, and any question as to whether his vote has been improperly influenced should be reserved until the referee is called upon to approve the election, when the parties can be fully heard and a new election ordered, if it appear that the creditors have been prevented from exercising a free and unrestricted choice. But the creditors who were represented by Neydon are not here complaining. Notwithstanding the publicity which has attended this contest, but one creditor has appeared and made complaint, and the attorneys prosecuting this proceeding do not claim to represent but a very few in number of those who gave letters of attorney to Neydon. The evidence shows that some of these letters of attorney were given reluctantly, and the indifference of others may be presumed from their failure to complain. Other than that of McGill, whose vote would not change the result, the only interests represented here are those of the bankrupts and the receiver.

There was a fair expression of the choice of those creditors who took sufficient interest in the election of the trustee to attend the meeting and cast their votes, and in the absence of direct complaint

from the others, and a showing which would give them a standing in court, the election which was made should not be set aside at the instance of the bankrupts and the receiver. The receiver was the choice of the bankrupts and the beneficiary of their favor in securing the proxies which were rejected, and should not be elected trustee. His election under such circumstances would be opposed to the policy consistently enforced by the courts, which forbids that the choice of the creditors should be unduly influenced or controlled in the interest of the bankrupts. Aside, however, from the question of policy, there could be no objection to Mr. Zinn. He is a reputable citizen, and a business man of acknowledged ability, whose competency for the position is not questioned. For the reasons given, the rulings and orders of the referee complained of will be approved and confirmed.

BEADLESTON et al. v. UNITED STATES.

(District Court, S. D. New York. July 13, 1899.)

CUSTOMS DUTIES—DRAWBACKS—BEER BOTTLES.

Imported bottles, corks, and tin foil re-exported as cases or coverings for beer made in this country are not "materials * * * used in the manufacture of articles manufactured or produced in the United States," within the meaning of section 25 of the tariff act of 1890, and the exporter is not entitled to a drawback of the duties paid thereon under said section.

Suit to Recover Drawbacks on Imported Articles Re-exported.

Stephen G. Clarke, for petitioner.

Arthur M. King, Asst. U. S. Atty.

BROWN, District Judge. The question is, are the bottle, the cork and the tin foil "materials" "used in the manufacture" of the "article" exported? The article is labeled "Imperial Beer Brewed Specially for Export—Gold Label," etc. Mere cases or coverings are not deemed a part of the "article exported," and do not enter into its "manufacture." Notwithstanding the evidence as to steaming, I think on full consideration that the "article" is essentially the beer, without reference to the bottle; that the bottle is not a material part of the identity of the beer or of its quality or marketable identity as beer, but only a convenient case for offering it to the public in a specific recognizable form, which serves no other essential use. As such I think the bottles, corks, etc., are not entitled to a drawback under the act of October 1, 1890. *Wheeler v. U. S.* (D. C.) 75 Fed. 654.

Judgment for defendant.

UNITED STATES v. CLIFFORD.

(Circuit Court, D. West Virginia. October 18, 1900.)

1. POST OFFICE—OFFENSES—INDICTMENT FOR MAILING OBSCENE MATTER.

An indictment for violation of Rev. St. § 3893, prohibiting the mailing of publications of a certain described character, must charge specifically that the publication mailed by defendant was of the character declared nonmailable by the statute, and it is not sufficient to merely set out a copy of such publication, leaving its nonmailable character to be inferred therefrom; nor is the defect cured by the conclusion of a subsequent count, "contrary to the form of the statute."

2. SAME—DESCRIPTION OF OFFENSE—KNOWLEDGE.

An indictment under Rev. St. § 3893, which charges that the defendant "did knowingly deposit and cause to be deposited" in a post office, for mailing, certain newspapers containing an article claimed to be nonmailable under said section, is fatally defective on demurrer where it fails to charge that the defendant knew at the time that the papers contained matter prohibited by the statute.

On Demurrer to Indictment.

Joseph H. Gaines, for the United States.

Faulkner & Walker, for defendant.

JACKSON, District Judge. The defendant is indicted, under section 3893, Rev. St., for a violation of that statute. It is not clear to my mind whether this indictment was intended by the district attorney to contain one or two counts. In the view I take of it, I shall treat it as containing two counts. To this indictment a demurrer is filed.

The first count charges that the defendant on the 2d day of June, 1899, within the jurisdiction of this court, "unlawfully, did knowingly deposit, and cause to be deposited, at the city of Martinsburg, in said district, in the post office of the said United States there, for mailing and delivery, certain printed newspapers, to wit, fifty printed newspapers, then and there addressed to divers persons, respectively, which said persons are to the grand jurors aforesaid unknown, and each then and there containing, amongst other things, the following matters in point; that is to say." Thereupon the pleader sets out in full the article said to have been mailed by the defendant. It will be observed that there is no allegation in this count of the indictment that alleges a violation of the statute upon which this indictment is found. The statute inhibits the mailing of any obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character. It does not allege that the papers mailed were nonmailable matter, but merely relies upon a copy, which I suppose was taken from the paper, as evidence that it was nonmailable matter, without specifically charging that it was a violation of the statute. I have carefully examined the precedents and forms of indictments drawn upon this statute, and I have not found one that does not specifically allege that the matter complained of was in violation of it. The counsel for the defendant insists that the indictment is defective for the want of an allegation

that the matter was nonmailable matter. It is also urged that the indictment is defective for the reason that it only charges that the defendant "did knowingly deposit, and cause to be deposited," certain newspapers in the mail, addressed to divers persons, and that there is no allegation that the defendant knew at the time that he deposited said papers that they contained offensive matter, inhibited by the statute. It is a well-settled principle of law that an indictment should describe the offense with such certainty that the court may judicially see that an offense under the statute has been committed. The acts which constitute the alleged crime should be set forth with such reasonable certainty that the prisoner may be advised of what he is called to plead to. 2 Hawk. P. C. p. 323, § 60, says that "the want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime cannot be supplied by any intendment or implication whatsoever." The offense, under the statute, must be stated so as to bring the defendant precisely within the act. *State v. Foster*, 3 McCord, 442; *Respublica v. Tryer*, 3 Yeates, 451. It must be apparent from what I have said that this count of the indictment is defective, for the reason that it does not declare that the papers that were deposited in the mail were non-mailable matter, and therefore in violation of the statute. It may be contended that the general conclusion at the end of the second count would cover this defect. I do not think so. The first count should conclude, just as the second count concludes, "contrary to the form of the statute," etc. For this reason, I am clearly of the opinion that the first count in the indictment is defective.

But there is another objection to the indictment, which, in my judgment, is more serious than the one just passed upon, and that is that it is not alleged that the defendant well knew the contents of the article in the newspaper when it was by him deposited in the mail. This is a material fact, and it must appear upon the trial of the case that he had such knowledge before he can be convicted. Certainly he ought not to be convicted unless it appears from the evidence that he had knowledge of its contents. The mere depositing of a paper is not of itself a violation of law. It is the depositing and mailing of a paper, with knowledge of its contents, such as is described in the statute, which constitutes a violation of the law. The indictment should allege that when the defendant deposited the paper he knew of its contents, and that it contained an article, the mailing of which was inhibited by the statute. It does not necessarily follow that the depositing of a paper by the defendant renders him liable, in the absence of guilty knowledge of its contents. If it is necessary, to secure the conviction of a man for violation of this statute, by proof that the paper contained matter inhibited by the statute, then he should have notice of what the prosecution intended to prove, by an allegation in the indictment that he well knew its contents, and that the paper contained matter forbidden by the statute to be mailed. In the case of *U. S. v. Reid* (D. C.) 73 Fed. 289, Judge Severens, who presided upon that occasion, seems to agree with me on this point. The language employed in that indictment was some-

what similar to that employed in the one under consideration. He remarks that:

"It will be observed that, while the language charges an unlawful and conscious depositing in the mails of the offensive matter, it does not, in terms, charge that the respondent knew that that which he so deposited contained offensive matter. It is undoubtedly an element of the offense prescribed by the statute on which this indictment is framed that the party charged must have known the character of the publication when it was deposited by him in the mail, and the ground of the present objection is that it is nowhere charged in this indictment that the respondent had such knowledge."

There is no such allegation in this indictment.

I have examined with considerable care the questions presented by the demurrer, and I find that the precedents furnished by the common-law writers, and the decisions of the courts upon those precedents, as well as the rulings of our own courts under this statute, seem to hold that an indictment of this character is open to objection when it does not allege that the party had knowledge of a material fact that constitutes the body of the offense. There is but one case that has fallen under my eye that seems to support the theory of the prosecution in this case, and that is the case of *U. S. v. Clark* (C. C.) 37 Fed. 106. To the indictment in that case there was no demurrer interposed, but there was a motion made to arrest the judgment after the verdict of guilty. Such was the fact, also, of the case of *Rosen v. U. S.*, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606. In both cases there was a motion to arrest the judgment after the verdict. Those decisions seem to have been controlled by section 1025 of the Revised Statutes, providing that the proceedings on an indictment in the courts of the United States shall not be affected "by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." And the court holds that a defect in an indictment of the character of the one under consideration should be regarded, after the verdict, and under the circumstances attending the trial, as one of form, instead of one of substance. There appears to be some conflict in the decisions of the federal courts upon the question whether the use of the words "unlawfully and knowingly" applies only to the depositing of the mail matter, or whether it applies to the character of the matter deposited. There is no decision by the supreme court of the United States upon this question, unless the case of *Rosen v. U. S.*, supra, should be regarded as authority upon this point. In that case the point was not expressly ruled by the court, but it remarked that "it was not unreasonable to suppose that the defendant was, and must have been, aware of the nature of the contents at the time he caused it to be put into the post office for transmission and delivery." But this was after verdict. This would seem to me to be a conclusion of law, and I know of no authority that justifies a court in overruling a demurrer for the reason that a jury might, by inference, reach a conclusion that the party knew he was guilty of the crime of which he stood charged without notice.

Another ground of demurrer assigned to this indictment is that the published article is not within the prohibition of the statute; and the case of *Swearingen v. U. S.*, 161 U. S. 446, 16 Sup. Ct. 562, 40 L. Ed.

765, is relied upon to support that position. In that case the court held that while the language used in that publication was "coarse, vulgar, and, as applied to an individual, libelous," yet it "was not of such a lewd, lascivious, and obscene tendency" as was "calculated to corrupt and debauch the minds and morals of those into whose hands it might fall"; but I am inclined to the opinion that the import of the language used in the publication now under consideration, while it is "coarse and vulgar," had a tendency to excite the passions and to corrupt the morals of those who read the article, and of persons whose minds are open to such influence. Much might be said on this subject, but at this time I will not enter upon any particular discussion of the contents of the paper alleged to have been mailed, as being offensive to the moral sense of society, and whether the publication had a tendency to corrupt and deprave the morals of persons whose minds are open to such influence; but when it appears, as in this paper, that in one instance it charges a party with "skulking in the bushes with a noted prostitute," and in another instance charges "a female with being stark naked," and said it could be "proved by scars on her body," it would seem that the use of such language is calculated to deprave the morals, and, more or less, to excite sensual desires and lascivious thoughts. It is suggested, however, that the language used in this paper is one of a libelous character, and that it does not strictly fall within the purview of the statute. I have no question in my mind that the language employed, as applied to the individuals referred to, is libelous, and that possibly a prosecution for a libel might be maintained. It might be libelous, and yet fall within the inhibition of the statute. Upon this question I will withhold any opinion, as there are other grounds that are fatal to this indictment. In the view I take of this indictment, whether it is one continuous count or two counts, the objections taken to it are fatal, and I am therefore of opinion to sustain the demurrer.

BARSTOW v. McCLAIN et al.¹

(Circuit Court, S. D. Ohio, W. D. June 3, 1899.)

No. 5,257.

PATENTS—INVENTION—SWEAT PADS.

The Barstow & Hanna patent, No. 353,913, for a sweat pad for horse collars, is void for lack of invention, the article described being in structure merely an imitation of the collar itself.

In Equity. Suit for infringement of patent. On demurrer to bill. Redmond & Hays and Arthur E. Georgi, for complainant. George J. Murray, for defendant.

THOMPSON, District Judge. This is a bill for the infringement of letters patent No. 353,913, issued to Stephen Barstow and W. C. Hanna, December 7, 1896, for an improvement in sweat pads for

¹ Affirmed May 17, 1900, by the United States circuit court of appeals for the Sixth circuit without written opinion.

horse collars, which said letters patent are brought into court, and a copy thereof, with the specifications and drawings, is attached to the bill. The defendant demurs to the bill on the following grounds, to wit:

"(1) That the complainant does not state that the invention had not been in public use or on sale in this country for more than two years before the date of the application. (2) That there is no allegation in said bill of complaint that said invention had not been patented or described in any foreign country before the alleged date of said invention. (3) That there is no allegation in said bill that said alleged invention had not been patented or described in any printed publication before the date of said invention. (4) That the said letters patent upon which the suit is brought are void for want of invention apparent on the face of the patent, in view of the common knowledge of people throughout the country, of which the court can take judicial notice, but only shows an aggregation of old parts, none of which perform any new function in the combination from what they did when operating separately."

The first three grounds of the demurrer are conceded by counsel for the complainant to be well taken, but the fourth assignment, which raises the question of the validity of the patent, is contested. The claims of the patent are:

"(1) A sweat pad for horse collars, consisting of two stuffed wings and two stuffed ribs lying forward of said wings, with a narrow flexible space intermediate each of the main wings and the stuffed ribs, said narrow spaces being free from stuffing, substantially as described, and for the purposes set forth. (2) A sweat pad for horse collars, consisting of a top flexible portion without stuffing, each of the two sides of said top being provided with a stuffed wing, two flexible stuffed ribs extending from points near the sides of the top downward to a length nearly equal to the length of the wings, and a flexible space, not stuffed, intermediate each of the wings and ribs, substantially as described, and for the purposes set forth."

And it is explained in the specification that:

"When the pad is placed in position on a horse's neck and encircled by a collar, the stuffed ribs, B, B¹, extend forward outside the collar. This permits the forward end of the collar to rest and occupy a seat in the grooves, C, C¹, whereby the wings, A, A¹, are kept under the collar, and the ribs, B, B¹, left free to move in unison with the horse's neck, thereby preventing the animal's neck from rubbing or coming in contact with the collar."

It is earnestly urged that until "the time of this invention" these objects had not been successfully accomplished; that is to say, no device had been invented "whereby the main portion of a sweat pad, or part immediately in front of the horse's shoulder, when in use, may be more securely kept in place under the collar, and also to prevent the front part of the collar from rubbing or coming in contact with the horse's neck."

A fore-roll to prevent the front part of the collar from rubbing or coming in contact with the horse's neck is found in other sweat pads, and is not new; and the only question for consideration is whether there is patentable invention in that feature of the device the purpose of which is to keep the after-roll in place under the collar. The device is practically a reproduction of the essential features of the horse collar itself. The character of the material is different, but there is a fore-roll and a larger after-roll with the groove between. In the collar the groove furnishes a seat for the hames, and in the pad it furnishes a like seat for the fore-roll of

the collar; and the purpose in the one case is to keep the hames in place, and in the other to keep the fore-roll of the collar in place, and prevent the pad from slipping forward or back from under the collar. In effect, there are two collars,—one of soft material resting on the neck and shoulders of the horse, and the other of hard material resting upon the first one, holding it in place, and being itself held in place by the hames and gears. This form of pad is a copy of the collar, and is not new, and there is no invention in any of the differences between the two. But it is said a further question remains as to whether the use is a new or an analogous one,—whether there is “a mere application of an old contrivance in the old way to an analogous subject, without any novelty or invention in the mode of applying such old contrivance to the new purpose,” or whether there is a new use involving invention. The alleged new use is suggested by the collar, to which the pad is a supplement, and is imitative, not original. There are other patented devices in use for securing the sweat pad to the collar, but none are suggested by the form of the collar itself. Here there is imitation, not invention. I think, therefore, that the fourth assignment is also well taken, and the demurrer will be sustained, and the bill dismissed, at the complainant's costs.

THE MERMAID.

(District Court, D. Washington, N. D. October 19, 1900.)

SEAMEN—FORFEITURE OF WAGES BY DESERTION—VALIDITY OF CONTRACT.

A seaman cannot be bound for service on a ship during a particular voyage or for a definite period of time, so as to be chargeable with desertion, which will forfeit his wages, because he leaves the ship before the completion of the voyage or the expiration of such time, unless he signs shipping articles, as prescribed by Rev. St. § 4511, which definitely state the nature of the voyage. Articles which provide for a voyage to ports to be determined by the master, and for a return for discharge to a port of the United States, also to be determined by the master, do not comply with the statute, and are void.

In Admiralty. Suit by seaman to recover wages.

Palmer & Brown, for libellant.

R. S. Jones, for claimant.

HANFORD, District Judge. The libellant's demand for wages is resisted on the ground that, having shipped for a voyage from Port Blakely to Cape Nome, in the district of Alaska, he deserted from the vessel before she had reached her destination at Cape Nome, in violation of his shipping contract to serve as a common sailor on a voyage to Cape Nome and return to a port to be selected by the master. A seaman's contract for service on a particular voyage or for a definite period of time is not valid unless he signs shipping articles as prescribed by section 4511, Rev. St. U. S. See *Diochet v. The Occidental* (D. C.) 87 Fed. 486; *The Occidental*, 101 Fed. 997. Seamen employed on ships as sailors, without having signed shipping articles, are not bound to remain in the service of the ship, and therefore cannot be charged as deserters; nor does the law permit a forfeiture of their

wages for desertion. The answer in this case does not allege that the libelant signed shipping articles, and therefore it is not sufficient as a defense; and if shipping articles had been signed for a voyage from Port Blakely to Cape Nome, in the district of Alaska, and return to a port to be selected by the master, the contract would be void for indefiniteness, because it does not designate any port or place for termination of the voyage and of the contract for service. Furthermore, there is a variance in the proof; for the shipping articles introduced in evidence, which were signed by the libelant, do not specify a voyage to Cape Nome and return to a port to be selected by the master, but describe the voyage and term of service as follows:

"To ports in the district of Alaska, within the Behring Sea and Arctic Ocean, and also other ports and places in any part of the world, as the master may direct, and back to a final port of discharge in the U. S., for a term of time not exceeding six (6) calendar months."

The attempt to bind the libelant by a contract in this form is a plain violation of the statute, because the nature of the intended voyage is not indicated. Within the terms of the agreement, the vessel might proceed from Cape Nome to any island or place in the tropics, or spend the season cruising for whales in the Arctic Ocean, or she might be employed in any branch of foreign or domestic trade. In this particular the contract differs widely from the contracts which were upheld by this court in the cases of *Diochet v. The Occidental* (D. C.) 87 Fed. 485, and *The C. F. Sargent* (D. C.) 95 Fed. 179.

I do not regard drunkenness as any excuse for desertion, and I would not hesitate to declare a forfeiture of wages in this case, for desertion, if the libelant had bound himself by signing lawful shipping articles; but, for the reason stated, I hold that he is entitled to his wages for the time he served in the vessel, after deducting the amount which the evidence shows was paid to him.

ROSS v. MERCHANTS & MINERS TRANSP. CO.

(Circuit Court of Appeals, First Circuit. October 19, 1900.)

No. 335.

COLLISION—BURDEN OF PROOF—BARGES IMPROPERLY ANCHORED.

The rule is strict in behalf of a vessel injured in collision while at anchor, where properly anchored; but there is no presumption in favor of barges which were unnecessarily anchored where they swung into and obstructed the narrow channel of a river, and were left there at night with no one to attend to their lights. *The D. H. Miller*, 22 C. C. A. 597, 76 Fed. 877, distinguished.

Appeal from the District Court of the United States for the District of Rhode Island.

Edward G. Benedict (Robert D. Benedict and Dexter B. Potter, on the brief), for appellant.

Frank Healy (Archibald C. Matteson and Daniel H. Hayne, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and JOWELL, District Judge.

PUTNAM, Circuit Judge. We have no question that we must affirm the decision of the district court, and, except for the advisability of pointing out that the result harmonizes with our prior decisions, we would have no occasion to add anything to the opinion filed by the learned judge who decided the case below. 99 Fed. 793. The general facts are sufficiently stated in that opinion. The fundamental difficulty with the libellant's case is that, under the circumstances, the burden rests on him, and he does not support it. The case affords no presumption in his favor to be overcome by the Chatham, as is ordinarily the fact in behalf of a vessel at anchor. It is sufficient to say in this particular that the only direct proofs which the case furnishes show that at the time of the collision the libellant's barges were anchored in the fairway, or so near to it that some of them swung across it, and they also show that none exhibited any light. It is true that there is evidence that lights were set on at least one of the libellant's barges at 4 o'clock in the afternoon; but the record makes it plain that from about 6 o'clock until the collision, a period of over four hours, they were not attended by any person. In fact, it is admitted that there was no person in charge of the barges or their lights after 6 o'clock. The only proofs as to the want of lights and the position of the barges at the precise time of the collision come from the Chatham. It cannot be questioned that the Chatham was properly manned and well disciplined, and that, at least until the moment before the collision, she had been proceeding down the river with great caution, although it is true that there are some surmises which, in a close case, would perhaps change the preponderance against her.

Applying to the facts the decisions which bear on them, especially those of this court, they are entirely in harmony with the conclusions of the district court. The libellant relies on *The Bridgeport*, 14 Wall. 116, 20 L. Ed. 787; but in that case the vessel injured was moored to a pier, and was altogether out of the usual course of vessels navigating. The next case he relies on is *The Virginia Ehrman*, 97 U. S. 309, 24 L. Ed. 890; but there the vessel injured was a dredge, anchored, with proper lights, and in the very place where she was required by the engineer in charge to do her work. This case was applied by us, in *The D. H. Miller*, 22 C. C. A. 597, 76 Fed. 877, to a dredge doing work, under the authority of the state of Massachusetts, in Boston Harbor, at a point inconveniently near the wharf of the colliding steamer. Then we laid down the rule as one of great strictness in behalf of a vessel properly at anchor; but this appeal differs from each of the last two cases cited, in the fact that there the vessels injured were dredges located at the places where it was necessary that they should be at work, while here the vessel injured was a barge, not engaged in work and of light draft, so that she could easily have been anchored under a bight of land, at some point clear from all possibility of endangering vessels proceeding up and down the channel. With reference to vessels at anchor, where properly anchored, the rule is strict in their behalf, but as to positions for anchoring there is no mystery. The same rules of obligation to use care (that is, to avoid endangering the usual paths of commerce) apply

as apply with reference to obstructing any other highway unnecessarily. The court below could not have been too severe in condemning the unnecessary and improper anchorage of these barges at a point endangering this narrow channel, in view of the fact that they were left through the night with no person to attend their lights, or to caution approaching vessels in case they swung into the channel, as it is clear they did.

Other cases which have been decided by this court are most pertinent to the facts at bar. In *The Columbian*, 41 C. C. A. 150, 100 Fed. 991, 997, we called attention to the well-settled rule which requires us to hold that, where it is clear that there are, on the one part, faults so gross as the faults of the barges in this case, any doubts regarding the management of the other vessel, or regarding the contribution of her faults, if any, to the collision, should be resolved in her favor. Also, at page 993, 100 Fed., and page 151, 41 C. C. A. we called attention to the rule that a violation of the statutory regulations, like the omission to maintain a light on the barges, will condemn the vessel thus negligent, unless it be shown, not merely that such violation was not one of the causes of the collision, but that it could not have been. In several cases we have also referred to the fact that the maintenance of good discipline aboard a vessel, and evident care in proceeding in difficult situations nearly to the time of a collision, justify a strong presumption that she was vigilant with reference to the immediate circumstances which brought on the catastrophe. A case strikingly in point, in view of the fact that the barges were left without any night watchman, is *The Charles L. Jeffrey*, 5 C. C. A. 246, 55 Fed. 685, in which we said, at pages 686, 687, 55 Fed., and page 247, 5 C. C. A., as follows:

"When one vessel makes a claim against another in the case of a collision, admiralty courts are bound by the same rule which forbids any other court from condemning any one in damages, except in behalf of a party who supports his demand by preponderance of evidence. If, therefore, the owners of a vessel, either through the necessities of economy or for other reasons, are not able to show such constant vigilance, especially on the part of the lookout, as is necessary to sustain the burden which rests upon every one who claims another to be in fault, inability to maintain the claim must be laid to their own misfortune and negligence, and not to the courts or the law."

In order for any one prosecuting to maintain his propositions successfully, he must not only have a good claim; but he must be able to furnish the appropriate proofs, or to point the court to presumptions which render proofs unnecessary. In the case at bar, we have seen, there are no such presumptions; and, if it were possible for us to suppose that the libellant has in fact a just cause, he must attribute his failure to maintain it to the principles stated in *The Charles L. Jeffrey*, and to the fact that, through an economical disregard of the rights of those navigating in the neighborhood of his barges, he failed to maintain a proper watch, who could have explained to the court the circumstances of the collision.

The decree of the district court is affirmed, and the costs of appeal are awarded to the appellee.

McCAFFERTY et al. v. CELLULOID CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1898.)

APPEAL—ASSIGNMENT OF ERROR—DECREE BY STIPULATION.

Where parties stipulate that in a pending case a decree shall be rendered on filing of the certified copy of an interlocutory decree entered in another cause of the same character, and a decree is entered conformably with the stipulation, an assignment of error will not lie to it.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Bill by the Celluloid Company against Robert E. McCafferty and Morris L. Holton, co-partners under the firm name of McCafferty & Holton, for infringement of letters patent No. 542,452, dated July 9, 1895, and No. 546,360, dated September 17, 1895. The following stipulation between the counsel was filed July 30, 1896: "It is hereby stipulated and agreed by and between the solicitors for the respective parties that all of the evidence taken or to be taken, and all of the exhibits introduced or to be introduced, on behalf of the defendants, and in rebuttal on behalf of the complainant, in the suit of The Celluloid Company v. The Arlington Manufacturing Company, in equity (No. 25, September term, 1895), in the United States circuit court for the district of New Jersey, shall be considered as evidence duly taken and exhibits duly introduced in this suit, and that a copy of the same may be filed in this cause as original testimony and exhibits, and that the same shall be treated and used in all respects as if regularly taken and introduced in this cause. And it is further stipulated that, upon the filing in this cause of a certified copy of any interlocutory decree entered in the said suit of The Celluloid Company v. The Arlington Manufacturing Company, an interlocutory decree of the same kind and in the same terms may be entered herein, and have the same force and effect as an interlocutory decree would have which was entered herein, after a decision by this court on final hearing." The record in the suit against the Arlington Manufacturing Company, in which a decree had been rendered, and the exhibits introduced therein were duly filed and introduced in the suit at bar. March 3, 1898, an interlocutory decree was entered in favor of complainant, and defendants appealed. Motion to dismiss was denied May 19, 1898 (*Magic Light Co. v. Economy Gas-Lamp Co.*, 38 C. C. A. 56, 97 Fed. 98), without opinion. Motion by appellants to restore the case to the docket. Decree affirmed.

John R. Bennett, for appellants.

J. E. Hindon Hyde, for appellee.

PER CURIAM. The motion by the appellants to restore the cause to docket has been considered, and is denied. The court adheres to the opinion, expressed upon the argument of the appeal, that there was no error in the decree of the court below; that decree having been rendered pursuant to a stipulation by the parties to the action that, upon the filing in the cause of a certified copy of an interlocutory decree entered in another cause, in which the complainant and the vendor of the defendants were parties, an interlocutory decree of the same kind and in the same terms should be entered in the present cause, and have the same force and effect as an interlocutory decree entered therein after a decision by the court. The court below having entered a decree conformably to that stipulation, the appellants cannot maintain an assignment of error. We find nothing in *Railroad Co. v. Ketchum*, 101 U. S. 289, 25 L. Ed. 932, inconsistent with these views. The decree appealed from is affirmed.

HUGHES COUNTY, S. D., v. LIVINGSTON.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

No. 1,337.

1. POWER TO ISSUE MUNICIPAL BONDS—ESTOPPEL FROM DENYING BY RECITALS.
A quasi municipality may not, by recitals in its bonds, estop itself from denying that it is without power to issue them, when the laws are such that there can be no state of facts or of conditions under which it would have the authority to emit them.
2. SAME.
But if the laws are such that there might, under any state of facts or circumstances, be legal power in the quasi municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances exist, and that it had lawful power to send the bonds forth, unless the constitution or the law under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances.
3. SAME—ESTOPPEL BY RECITALS OF OFFICERS.
When a municipal body has authority to issue bonds on the condition that certain facts exist, or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine, and certify the existence of those facts, or the doing of those acts, at the time of the issuing of the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them.
4. SAME—COUNTIES—CERTIFYING OFFICERS TO EXAMINE RECORD OF CANVASSING BOARD.
It is the duty of the board of county commissioners, which is required to certify that bonds are issued in pursuance of an act of the legislature, which prescribes the favorable vote of the electors of the county as a condition precedent to their issue, to examine the proper record, when it is not itself the canvassing board, and ascertain whether or not a legal proposition to issue the bonds has been sustained by the vote of the electors, and its certificate that the bonds have been issued in pursuance of the act precludes the county from defeating them in the hands of an innocent purchaser, either on the ground that no lawful proposition to issue them was submitted to the electors, or on the ground that such a proposition was not sustained by their vote.
5. SAME—RECITAL BY OFFICERS—EFFECT.
A recital of a compliance with the authorizing act by the officers of a county in a bond which they issue estops the municipal body from denying every fact connected with, or growing out of, the discharge of the ordinary duties of such officers, which under the law they were required to ascertain and determine before they issued the bonds.
6. SAME.
A recital by the officers of a county in a bond that it was issued in pursuance of an act of the legislature which authorized the county to fund its indebtedness of a certain class is a plain certificate that it was issued in place of a just and valid indebtedness of the county of the character which the authorizing act empowered the officers of the county to fund.
7. SAME—RECITAL OF ISSUE IN PURSUANCE OF LAW—EFFECT.
An authorized recital in municipal bonds that they are issued "in pursuance of" a legislative act which empowers the municipality to issue them on the conditions that a fundable debt exists, that the electors of the county have voted to issue them, that they have been duly advertised for sale and duly registered, imports that these and all other precedent conditions have been fulfilled when the bonds were sent forth, relieves the innocent purchaser of all inquiry, notice, and knowledge of the actual action and records of the officers of the municipality, and estops the municipal body from denying that such action was taken and such records

were made as authorized the issue of the bonds, unless the constitution or the act under which the bonds were issued prescribes some public record as the test of compliance with some of the conditions precedent. Laws Dak. T. 1889, c. 42.

8. SAME.

Such a recital in a bond issued by the board of county commissioners of a county is a certificate that the levy of the annual tax to pay the interest and principal of the debt evidenced by the bonds required by section 5, art. 13, Const. S. D., has been made.

9. SAME—FUNDING BONDS CREATE NO INDEBTEDNESS.

The issue of bonds to fund the debt of a municipality neither creates nor increases the debt, but simply changes its form.

10. SAME—ESTOPPEL FROM DENYING VALIDITY OF DEBT FUNDED.

The fact that the warrants in place of which funding bonds were issued were fraudulent, or that the apparent debt which they were issued to pay was fictitious, or that their proceeds were diverted from the lawful purpose specified in the bonds to illegal purposes, constitutes no defense against an action by an innocent purchaser upon municipal bonds which were issued under a statute authorizing the municipality to fund its indebtedness, and which lawfully recited that they were issued under that act and for that purpose.

11. PLEADING CONDITIONS PRECEDENT—NOT REQUIRED IF RECITED.

A complaint which sets out the bond, which contains a recital that it was issued in pursuance of a specified legislative act, and avers that the bond was issued in conformity with the enactment therein recited, and that the plaintiff is a bona fide purchaser thereof for value, is good, although it does not otherwise allege a compliance with the conditions precedent to its issue.

12. PRACTICE—REFUSAL TO DISMISS WAIVED BY INTRODUCING DEFENSE.

Any error in a refusal to grant a motion of a defendant to enter judgment in his favor or to dismiss an action at the close of the plaintiff's evidence is waived by subsequently introducing evidence and proceeding with the trial of the case on its merits.

13. GENERAL FINDING OF COURT CONCLUSIVE—ISSUES OF FACT.

Where a jury is waived, and there is testimony raising issues of fact, and the court finds generally for one party or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

14. MUNICIPAL BONDS—VENDEE OF BONA FIDE HOLDER ACQUIRES HIS RIGHTS.

The transferee of a bona fide purchaser of negotiable municipal bonds acquires all the rights of his transferor, and may invoke every presumption and estoppel arising from their negotiability and from their recitals in support of their validity which the transferor might have relied upon, even though the transferee takes them after maturity with notice of all the alleged defenses.

15. COUPONS—PRESENTATION AT PLACE OF PAYMENT UNNECESSARY BEFORE SUIT.

The fact that coupons are made payable at a particular place does not make a presentation of them for payment at that place necessary before an action can be maintained upon them.

16. SAME—INTEREST.

Coupons upon municipal bonds draw interest from their maturity until the date of the entry of judgment upon them at the rate established by the law where they are payable.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of South Dakota.

On January 19, 1899, Crawford Livingston, the defendant in error, brought an action in the court below against the county of Hughes, in the state of South Dakota, the plaintiff in error, to recover the amount due upon coupons

cut from 56 bonds issued by that county, and dated July 6, 1891. In his complaint the defendant in error alleged: That on July 6, 1891, the county of Hughes, in compliance with laws of the state of South Dakota, and in conformity with the enactments recited in the bonds, issued 224 municipal bonds. That each of these bonds was in the following words and figures:

"Number —. United States of America. \$500.00.

"State of South Dakota. Hughes County Funding Bond.

"Know all men by these presents, that the county of Hughes, in the state of South Dakota, acknowledges itself to owe, and for value received hereby promises to pay, to T. W. Pratt or bearer the sum of five hundred dollars (\$500.00), in lawful money of the United States of America, on the sixth day of July, A. D. 1911, or at any time after the sixth day of July, A. D. 1901, at the option of said county, with interest thereon at the rate of six per centum per annum, payable annually on the sixth day of July in each year, on presentation and surrender of the annexed interest coupons as they severally become due. Both principal and interest of this bond are payable at the Chemical National Bank, in the city of New York, and state of New York. This bond is one of a series of like tenor and date, numbered from 1 to 224, both inclusive, aggregating the sum of \$112,000.00, and is issued by said county of Hughes for the sole purpose of funding the outstanding indebtedness of said county incurred for constructing a court house and jail, and is issued in pursuance of an act of the Eighteenth legislative assembly of the territory of Dakota, entitled 'An act authorizing and empowering organized counties of Dakota to erect county buildings for court house and jail purposes, and to issue and dispose of bonds to provide funds to pay therefor, and to provide for the payment of principal and interest of such bonds' [Laws Dak. T. 1889, c. 42], and in accordance with an election duly called and held on the second day of June, 1891, and it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of this series of bonds have been properly done, happened, and been performed in regular and due form, as required by law, and that the total indebtedness of said county, including this issue of bonds, does not exceed the constitutional and statutory limitations. In witness whereof (that) said county of Hughes, by its board of county commissioners, has caused this bond to be signed by the chairman of said board, attested by the county auditor of said county, and caused the seal of said county to be affixed hereto the sixth day of July, A. D. 1891.

"[Signed]

John F. Hughes,

"Chairman of the Board of County Commissioners.

"Attest: Harry Ernest, County Auditor.

"Registered in my office according to law.

"Thomas H. Green, County Treasurer."

That to each bond there were attached 20 interest coupons, for \$30 each, payable at intervals of six months from the date of the bond, that these bonds and coupons were sold as commercial obligations of the county, and passed from purchaser to purchaser, until they were bought by the defendant in error. That, "at the time the said bonds of the defendant were issued and sold, the said defendant, through its officers, in order to facilitate the sale thereof to all persons who might then or thereafter purchase in open market the said obligations, prepared certificates and certified copies of the records of the defendant, duly made by its proper officers, showing the proceedings had and taken by the defendant with reference to the issue of said bonds, the purpose for which it was proposed to use the money, the amount of the indebtedness, the equalized assessed valuation, and generally all matters pertaining to the issuance of said bonds affecting their validity, showing by said certified copies and records the full right of the defendant to issue the same. Said bonds were all thereupon sold in open market to various persons, who were induced to purchase the same by reason of the recitals therein contained, and said certificates and certified copies, and the same were purchased in the ordinary course of business, before maturity, in good faith and for value, and by such purchasers in the same manner resold; and some time thereafter all of the bonds and coupons referred to in the several subdivisions of this

complaint were duly sold to this plaintiff in the ordinary course of business, and in good faith and for value, who likewise was induced to purchase the same relying upon the recitals therein contained and upon said certificates and certified copies"; and that the defendant in error, prior to the 1st day of July, 1895, in good faith and for value, in open market, before the maturity thereof, purchased the 56 bonds from which the coupons in suit were cut and the coupons themselves, and is the owner and holder thereof. That these coupons have never been paid, though payment thereof has been demanded of the plaintiff in error.

The county interposed a demurrer to this complaint, which was overruled, and then it answered. Its answer was an admission that the bonds had been issued by the county; a denial that the county ever had the power to issue them; and averments that it never had any outstanding indebtedness which was fundable under the act referred to in the bonds; that it never received any consideration for them; that they were issued to take up fictitious warrants, which were issued by its board of county commissioners without consideration, without authority, and without a compliance with the statutes; that none of the proceedings required to be taken to authorize the creation of a fundable debt or the issue of these funding bonds had ever been taken by the officers of the county; and that the records of the board of county commissioners, of the county treasurer, and of the county auditor of the county disclosed these facts. The case was tried without a jury, and the court made a general finding for the defendant in error, and entered judgment against the county.

At the trial the defendant in error proved the execution of the bonds by the proper officers of the county; his purchase of them for value in good faith, in the ordinary course of business, in reliance upon the recitals therein, and upon the opinion of an attorney at law. At the close of his evidence, a motion was made for judgment in favor of the county, and that motion was denied. The plaintiff in error offered the records of the county and the testimony of witnesses to show that the county never owed a debt fundable under the act recited in the bonds; that it never received any consideration therefor; that the bonds were issued to take up warrants which were issued by its board of county commissioners without any consideration, and were never delivered to any creditor; that the proposition submitted to the electors relative to the issuance of the bonds was not in accordance with the recitals therein contained or with the terms of the statute; that the county commissioners did not advertise the bonds for sale before they issued them, and that they did not register them, although the statutes of South Dakota required them to make such an advertisement and to register the bonds before they were issued. The court below rejected all this evidence, on the ground that the defendant in error was a bona fide purchaser of the bonds, and that the recitals estopped the county from showing their falsity to defeat his action against it. Every ruling, act, and omission of the court in the conduct of this case from the order overruling the demurrer to the order for judgment is challenged upon this writ of error. The main issues of law are presented by this statement. The grounds of the more minute specifications of error have not been set forth here, to avoid repetition, because they must be stated in the opinion where they are considered.

T. P. Estes (J. K. Lambert and C. E. De Land, on the brief), for plaintiff in error.

McNeil V. Seymour (H. R. Horner, R. W. Stewart, Edward C. Stringer, and W. P. Warner, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Many questions have been presented and argued by counsel in this case, but the main issue concerns the scope and effect of the estoppel in favor of an innocent purchaser raised by the recitals in the bonds

from which the coupons in suit were cut. These bonds were issued under an act of the 18th legislative assembly of the territory of Dakota entitled "An act authorizing and empowering organized counties of Dakota to erect county buildings for court house and jail purposes, and to issue and dispose of bonds to provide funds to pay therefor, and to provide for the payment of principal and interest of such bonds." Laws Dak. T. 1889, c. 42. That act empowered each board of county commissioners of certain counties of Dakota territory, one of which was the county of Hughes, to issue and sell the bonds of its county, upon a favorable vote of the electors thereof, for the purpose of purchasing the site for, and the erection of, a court house or jail, or both, whenever in the opinion of a majority of the board the county had insufficient or inadequate buildings for its use for a court house or jail, or both, authorized the board to let contracts for the erection of a court house or jail, or both, for the use of its county, and to have entire supervision of the construction of these buildings. It required the board, before the bonds were issued or delivered, to cause them to be advertised for sale at least once a week, for four successive weeks, in one of the leading newspapers published at the seat of government of the territory of Dakota (section 6); to cause them to be presented to the county clerk or auditor, and to be registered in a book kept by him, and known as the "Bond Register"; and to insert in each of the bonds this recital:

"Issued in pursuance of an act of the Eighteenth legislative assembly of the territory of Dakota, entitled 'An act authorizing and empowering organized counties of Dakota to erect county buildings for courthouse and jail purposes, and to issue and dispose of bonds to provide funds to pay therefor, and to provide for the payment of principal and interest of such bonds.'" Section 6.

The act not only authorized the board of county commissioners to erect a court house and jail, to issue bonds to raise money to pay for them, and to sell the bonds, but it also provided that the board of any such county might issue and sell bonds to fund an indebtedness created for that purpose. The latter provision was in section 11 of the act, and it read in this way:

"Any county in this territory which has issued warrants or other evidence of indebtedness since January first, 1887, for the purpose of building a courthouse or jail or both may issue bonds under the provisions of this act to fund such warrants or other indebtedness and if such indebtedness was authorized by a majority vote of the qualified electors of such county previous to the incurring of the same, no new election shall be had and the board of county commissioners of any such county is hereby authorized and empowered when in the judgment of such board it is deemed to the best interests of such county to issue such bonds and to apply the proceeds solely to the redemption of such warrants or other evidences of indebtedness: provided, the bonds issued under the provisions of this section shall bear a lower rate of interest than the outstanding indebtedness proposed to be funded."

The bonds here in controversy were issued under this section of the act, and they contained not only the recital prescribed by the law, but a further certificate that they were issued in accordance with an election duly held thereunder, and that all acts, conditions, and things required to be done precedent to and in the issuing of the bonds had been properly done, happened, and been performed in regular and due

form, as required by law. Numerous attempts have been made by counsel for the county to escape from the effect of these recitals, and some of them will now be considered.

The great contention of the counsel for the plaintiff in error, as is customary in cases of this kind, is that the recitals are futile, because the county had no power to issue the bonds. The argument is: Counties which had incurred a debt for the erection of a court house or jail, or both, between January 1, 1887, and the date of the approval of the act of 1889, which was February 21, 1889, and those counties only, were authorized by that act to fund their debts. The county of Hughes had incurred no such debt, and was without power to fund any debt under this act. Therefore the recitals in its bonds could not estop it from denying this want of power, and could not create the power. The major premise of the syllogism is challenged by counsel for the defendant in error, who earnestly insist that the act of 1889 authorized counties to fund any debt for the construction of a court house and jail, whether it was created after the passage of this act or before its enactment. Conceding to the plaintiff in error, however, the soundness of this premise, their conclusion does not follow. Their argument ignores the vital distinction between that total want of power which no act or recital of the municipality can remedy, and the total failure to exercise or the inadequate exercise of a lawful authority. It ignores the essential difference between a total lack of power under the laws under all circumstances, and a lack of power which results merely from the absence of some precedent facts or acts which condition either the existence or the exercise of the power. The former, it is true, cannot be affected by the estoppel of recitals, but the latter may be. A municipality or a quasi municipality may not, by the recitals in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of conditions under which it would have authority to emit them. But if the laws are such that there might, under any state of facts or circumstances, be lawful power in the municipality or quasi municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, and that it had lawful power to send them forth, unless the constitution or act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances. *Board v. Sutliff*, 97 Fed. 270, 277, 38 C. C. A. 167, 173; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 789, 792, 10 C. C. A. 637, 648, 651, 27 U. S. App. 244, 262, 265; *Chaffee Co. v. Potter*, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760; *E. H. Rollins & Sons v. Board of Com'rs*, 80 Fed. 692, 699, 26 C. C. A. 91, 98, 49 U. S. App. 399, 412; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593, 606; *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449, 453, 31 C. C. A. 585, 589, 60 U. S. App. 78, 85. The exception to this rule need not be considered in this case, because neither the constitution of the state of South Dakota nor the act of 1889 pointed out any record as the test of any limitation or

condition of the existence or of the exercise of the power of this county to issue these bonds. On the other hand, the act of 1889 expressly requires the county officers to ascertain and to certify on the face of the bonds that they were sent forth in pursuance of the act which authorizes their issue. This case falls under the general rule. And it is a just and reasonable one. Recitals are inserted in municipal bonds for the express purpose of inducing buyers to purchase them in reliance upon the truth of the certificates they contain. Purchasers universally do so. Then the salutary rule steps in, that one who by his acts or representations, or by his silence when he ought to speak out, induces another to change his situation in reliance upon those acts or representations or upon that silence, so that a denial of their plain meaning or effect will injure the latter, is estopped from making such a denial, and that rule forbids the inequitable defense that the recitals in such bonds were not true. If the legal effect of recitals is merely to declare that a state of facts or circumstances existed under which the municipality had the power to issue the bonds, this is a just and reasonable rule, and it is and ought to be uniformly applied and enforced, because such facts and circumstances are peculiarly within the knowledge of the municipality and its officers, and without the knowledge of the purchasers of the bonds. On the other hand, if the laws are such that there can be no facts or circumstances under which the municipality could have the power to issue the bonds, the purchasers are charged with the knowledge of this state of the law. They cannot be deceived by recitals that the bonds were regularly or legally issued, because they must know that there was no way in which they could have been so issued, and in such a case recitals of this character constitute no estoppel in their favor against the municipality. In the case in hand the laws of South Dakota were such that there might have been a state of facts under which this county would have had the authority to issue these bonds. Under the general laws of that state, this county of Hughes had the power, before the act of 1889 was passed, to erect a court house and a jail, to incur a debt, and to issue warrants for that purpose. If it had done these things, it would have had a lawful debt, which the act of 1889 would have given it ample power to fund. Whether or not it had such a debt when these bonds were issued was a fact peculiarly within the knowledge of its officers, a fact concerning which the purchasers of its bonds would be likely to be densely ignorant. It was therefore exactly one of those facts conditioning the existence and exercise of its power that under all the decisions it had the right, and that it was its plain purpose, to put at rest by the recitals which the legislature authorized it to insert in its bonds. Those recitals, therefore, were not futile, for the reason that the county had no power to issue the bonds, because there might have been a state of facts under which the power would have existed, and a certificate to the effect that such a state of facts did exist estops the county from denying its existence, and from defeating the bonds on the ground that the certificate was false.

2. Another argument of counsel is that the board of county commissioners of this county was its agent, with authority clearly limit-

ed by the terms of the act and the general laws of the state; that an agent with limited authority may not, by recital or certificate that he has authority, create or enlarge his power; and that the board could not, by its certificate that a fundable debt existed, extend or enlarge its authority, and thereby estop the county. But this argument ignores the great principle upon which the effect of recitals in municipal bonds is based. That principle is that one may not vest in his agent the power to determine whether or not he has authority in a given case, and silently take the benefit of his decision and his act as agent, and then deny his authority, to the detriment of strangers who have innocently acted in the belief that his power was ample. It is that when a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them. *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 637, 651, 652, 27 U. S. App. 244, 266, 268; *West Plains Tp. v. Sage*, 69 Fed. 943, 948, 16 C. C. A. 553, 558, 32 U. S. App. 725, 736; *E. H. Rollins & Sons v. Board of Com'rs*, 80 Fed. 692, 699, 26 C. C. A. 91, 98, 49 U. S. App. 399, 412; *Rathbone v. Board*, 83 Fed. 125, 131, 27 C. C. A. 477, 483, 49 U. S. App. 577, 589; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593, 606; *Brown's Ex'x v. Ingalls Tp.*, 86 Fed. 261, 263, 30 C. C. A. 27, 29, 57 U. S. App. 611, 615, 616; *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449, 453, 31 C. C. A. 585, 589, 60 U. S. App. 78, 85; *Grattan Tp. v. Chilton*, 97 Fed. 145, 148, 38 C. C. A. 84, 87; *Commissioners v. Aspinwall*, 21 How. 539, 16 L. Ed. 208; *Bissell v. City of Jeffersonville*, 24 How. 287, 16 L. Ed. 664; *Moran v. Commissioners*, 2 Black, 722, 17 L. Ed. 342; *Meyer v. City of Muscatine*, 1 Wall. 384, 393, 17 L. Ed. 564; *Lee Co. v. Rogers*, 7 Wall. 181, 19 L. Ed. 160; *Pendleton Co. v. Amy*, 13 Wall. 297, 305, 20 L. Ed. 579; *City of Lexington v. Butler*, 14 Wall. 282, 20 L. Ed. 809; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Lynde v. Winnebago Co.*, 16 Wall. 6, 21 L. Ed. 272; *Marcy v. Oswego Tp.*, 92 U. S. 637, 23 L. Ed. 748; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Moultrie Co. v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631, 23 L. Ed. 631; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. Clark*, 94 U. S. 278, 24 L. Ed. 59; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Warren Co. v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. Ed. 323; *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040. The act of 1889 required the board of county commissioners of this county to insert in these bonds when it issued them a certificate that they were issued in pursuance of this act. It thereby intrusted to them the power and imposed upon them the duty to ascertain, to determine, and to certify whether or not every fact and every act which conditioned the lawful issue of these bonds existed before they were

issued. The existence of a fundable debt was one of the facts without which no bond could be issued in pursuance of this law, and when this board certified that these bonds were so issued it acted clearly within the limits of its power, and in the discharge of a duty thrust upon it by the legislature of the state.

3. Attention is called to the fact that the canvassing board whose duty it was to determine whether the electors of Hughes county sustained the proposition to issue the bonds might, under the statutes of that state, have been composed of the county clerk or auditor and a majority of the county commissioners of the county, or of the county treasurer, the judge of the county court, and one county commissioner (Laws Dak. T. 1889, c. 42, § 3; Laws S. D. 1890, c. 84); and it is argued that the recitals in the bonds do not estop the county from showing that there was no valid election upon the proposition to issue them, because the board of county commissioners was not the canvassing board, and hence it was not its duty to determine the state of the vote upon that question. But it was the duty of that board, before it made the certificate which the statute required it to place in the face of these bonds, to ascertain and determine whether or not the electors of the county had voted to issue them. If the board was not itself empowered to canvass that vote, it was its duty to examine the return of the proper canvassing board, and to learn therefrom what the state of the vote was and upon what proposition it was cast. If a canvass and certificate of some other board was the only evidence from which the county commissioners could learn the result of the vote, the act of 1889 imposed upon it the duty to ascertain and determine whether or not that evidence existed, whether or not that canvass had been made and certified, whether or not the proposition upon which the vote was cast corresponded with the terms of the statute and the bond, and, when it certified that these bonds were issued in pursuance of the act of 1889, it certified that a legal proposition had been submitted to, and sustained by, the electors, and that a proper canvass and return of that vote had been made and filed in the appointed place. *Brown's Ex'x v. Ingalls Tp.*, 86 Fed. 261, 263, 30 C. C. A. 27, 29, 57 U. S. App. 611, 615.

4. It is said that the recitals do not estop the county from showing that it had no indebtedness which could be funded under the act of 1889, because they contain no express statement of the existence of such a debt. But, under the laws of South Dakota, the board of county commissioners is the controlling body through which the county acts, contracts, sues, and is sued, and by which the county is governed. The general laws of that state invest it with the power and impose upon it the duty to make all orders respecting the property of the county, to levy the county taxes, to liquidate the county indebtedness (Comp. Laws Dak. § 592), to superintend the fiscal concerns of the county, to secure their management in the best manner, and to keep an account of the receipts and expenditures of the quasi municipality (section 593). It is a general rule that a recital by the officers of the county in a bond which they issue estops the municipal body from denying every fact connected with, or growing

out of, the discharge of the ordinary duties of such officers, which under the law they were required to ascertain and determine before they issued the bonds. *Northern Bank v. Porter Tp.*, 110 U. S. 608, 610, 4 Sup. Ct. 254, 28 L. Ed. 258; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652, 27 U. S. App. 244, 266, 268. The existence or nonexistence of a debt which might be funded under this act was a fact which the board of county commissioners of this county was required to learn and to know in the ordinary discharge of the duties of its office. No funding bonds could have been issued in pursuance of the act of 1889, unless there was a county debt of the character described in that act to be funded. The existence of such a debt was the first fact which the board was necessarily compelled to ascertain and determine before it issued the bonds and made the certificate which they contained, and its recitals that these bonds were issued in pursuance of that act is a plain certificate that they were issued in place of a just and valid indebtedness of the county, which the act of 1889 authorized that board to fund. *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593; *School Dist. v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Mercer Co. v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Commissioners v. Beal*, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433, 28 L. Ed. 966; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; *Geer v. Board*, 97 Fed. 435, 441, 38 C. C. A. 250, 256.

5. Another contention of counsel is that these recitals do not estop the county from showing that it had no fundable debt; that the proposition submitted to the vote of the electors did not conform to the statute or to the certificate in the bond; that the bonds were never advertised for sale; and that they were never registered in the office of the county clerk or county auditor, as required by the statute,—because all these facts appear by the books and records of the board of county commissioners and of the county clerk, and every purchaser was charged with notice of these records and the facts they disclosed. But as early as 1863 the supreme court declared: “When a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper” (*Gelpcke v. City of Dubuque*, 1 Wall. 175, 203, 17 L. Ed. 520, 525); and in 1896, in *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 617, 40 L. Ed. 760, 763, that court, speaking to the question whether or not an innocent purchaser was required to go behind the statute and the certificate upon the face of the bond to ascertain whether a proper ordinance or resolution had been passed or record made to authorize its issue, said:

“As therefore the recitals in the bonds import compliance with the city’s charter, purchasers for value, having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the

power to subscribe, and to ascertain, by an examination of ordinances and records of the city council, whether those conditions had in fact been performed."

In *Board of Com'rs v. National Life Ins. Co.*, 90 Fed. 228, 231, 32 C. C. A. 591, 594, 61 U. S. App. 53, 58, after reviewing some of the cases upon this subject, this court announced its conclusion in these words:

"The result is that the recital in the bonds before us that they were issued in accordance with the provisions of the statute imports that they were issued in pursuance of a lawful and proper resolution and of honest and just action on the part of the board of county commissioners under that statute. It relieves the innocent purchaser of all inquiry, notice, and knowledge of the actual action and record of the board, and estops the county from denying that proper action was taken, and that a lawful resolution was passed."

This proposition has been repeatedly affirmed by this court, and is no longer open to debate. *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 10 C. C. A. 637, 651, 27 U. S. App. 244, 266; *Rathbone v. Board*, 83 Fed. 125, 131, 27 C. C. A. 477, 483, 49 U. S. App. 577, 589; *Board of Com'rs v. National Life Ins. Co.*, 90 Fed. 228, 231, 32 C. C. A. 591, 594, 61 U. S. App. 53, 58; *City of South St. Paul v. Lamprecht Bros. Co.*, 88 Fed. 449, 453, 31 C. C. A. 585, 589, 60 U. S. App. 78, 85; *Board of Com'rs v. Aetna Life Ins. Co.*, 90 Fed. 237, 32 C. C. A. 600, 61 U. S. App. 51; *Board v. Heed*, 41 C. C. A. 668, 101 Fed. 768; *Wesson v. Saline Co.*, 73 Fed. 917, 919, 20 C. C. A. 227, 229, 34 U. S. App. 680, 684. The legal effect of the recital that these bonds were issued in pursuance of the act of 1889 was that they were issued to fund a valid debt of the county of the character described in section 11 of that act; that a lawful proposition for their issue had been submitted to and sustained by the favorable vote of the electors of the county; that the bonds had been duly advertised for sale; that they had been properly registered; and that every other fact existed, and every other act had been done, which under the act of 1889 conditioned a lawful issue of the bonds.

In the consideration of these questions, our attention has been called again to the argument that the conclusion which we have now reached opens wide the door for faithless officials to issue unauthorized bonds of their municipality. The argument is that courts should require innocent purchasers to presume that the authorized recitals and certificates of public officials are false; that the debts which they declare are just obligations of their municipalities are void; and that they should impose upon such purchasers the duty to examine the antecedent records and proceedings of these officers to ascertain whether or not these debts are valid. The argument is suicidal. If it is the duty of an innocent purchaser to presume that the lawful certificate of public officials in the face of bonds is false, and to look to the records and proceedings of those officials to ascertain whether or not it is true, by the same mark it must be equally the duty of such a purchaser to presume that the records and proceedings are also false, and that wherever they disclose no valid debt they falsely disclose that fact, and the truth is that a valid debt exists. If this presumption of falsity is to obtain, the result will be the same, and the

debt will be presumed to be valid because the records show it to be void. The truth is that this contention is unworthy of serious consideration. The great majority of municipal officers are upright, honest, and watchful of the public welfare. The actions of honest and faithful officials must not be subjected to the suspicions which fit only those who are dishonest and faithless. Contracts cannot be made and enforced, courts cannot administer justice, business cannot be transacted upon any other presumption than that private citizens and public officials alike are innocent of wrong and faithful to their trusts until they are proved to be faithless. In the consideration of the validity of contracts of municipalities, the fact must not be overlooked that municipal officers are not the agents of the purchasers of bonds. They are the agents of the municipalities. They are not selected by the creditors of the city or of the county they represent, nor by the courts, but they are chosen by the municipalities themselves. If there is danger that such officers will violate their oaths, and corruptly barter away the rights of the people whom they represent, through the abuse of rules of action which have been established for the guidance of honest men and faithful officials, the remedy is not the punishment of innocent creditors who have purchased the negotiable securities of municipalities upon the faith of the acts of their officers, which were generally known to and acquiesced in by their citizens. It is in the election by those citizens of honest men and faithful officials.

Section 5, art. 13, Const. S. D., provides that any city, county, town, school district, or other subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due. It is said that the bonds here in question are void because no such provision was ever made for the collection of any tax to pay the interest or principal of the original debt which was funded by the bonds, or the interest or principal of the bonds themselves. There are two answers to this proposition. The first is that the certificate that the bonds were issued in pursuance of the act of 1889 is a certificate that the provision for the collection of the annual tax required by the constitution which the board of county commissioners that made the certificate was authorized to make had been already made. *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 791, 10 C. C. A. 639, 652, 27 U. S. App. 244, 260; *Board v. Sutliff*, 97 Fed. 270, 276, 38 C. C. A. 167, 172; *Dudley v. Board*, 80 Fed. 672, 676, 677, 26 C. C. A. 82, 86, 87, 49 U. S. App. 336, 344, 345; *Board of Com'rs v. E. H. Rollins & Sons*, 173 U. S. 255, 273, 274, 19 Sup. Ct. 390, 43 L. Ed. 689. Another answer is that the certificate in the bonds is conclusive that there was a just debt to be funded, and the issue of bonds to fund this debt neither created nor increased the indebtedness of the county, but simply changed its form, so that no provision was required to be made, under the constitution, for an annual tax to pay the refunding bonds or their interest. *Board v. Platt*, 79 Fed. 567, 569, 25 C. C. A. 87, 89, 49 U. S. App. 216, 220; *E. H. Rollins & Sons v. Board of Com'rs*, 80 Fed. 692, 698, 26 C. C. A. 91, 98, 49 U. S. App. 399, 411; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 278,

30 C. C. A. 38, 44, 57 U. S. App. 593, 605; Lyon Co. v. Keene Five-Cent Sav. Bank, 40 C. C. A. 391, 100 Fed. 337, 339.

7. Nor is it any defense to these bonds in the hands of an innocent purchaser that the warrants which they were issued to retire were fraudulent and void, that the apparent debt which they were issued to pay was fictitious, and that their proceeds were diverted from the lawful purpose specified in the bonds to illegal and useless ends. City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 275, 277, 30 C. C. A. 38, 41, 43, 57 U. S. App. 593, 600, 603; National Life Ins. Co. v. Board of Education, 62 Fed. 778, 785, 10 C. C. A. 637, 644, 27 U. S. App. 244, 256; West Plains Tp. v. Sage, 69 Fed. 943, 946, 16 C. C. A. 553, 557, 32 U. S. App. 725, 733; Board of Com'rs v. Aetna Life Ins. Co., 90 Fed. 222, 224, 32 C. C. A. 585, 587, 61 U. S. App. 41, 45; Board v. Howard, 83 Fed. 296, 298, 27 C. C. A. 531, 533, 49 U. S. App. 642, 645; Board of Com'rs v. Society for Savings, 41 C. C. A. 667, 101 Fed. 767.

8. It is assigned as error that the demurrer to the complaint in this action should have been sustained because it contains no averments that a fundable debt existed when the bonds were issued, or that any of the antecedent proceedings required by the act of 1889 had been taken; because it shows that certified copies of certain proceedings showing the right of the county to issue the bonds had been presented to, and relied upon, by the purchaser, the defendant in error, when he bought them; because the bonds appear on their face to be nonnegotiable; and because the complaint contains no averment that the defendant in error bought them without notice of their defects. The complaint contains an allegation that the bonds were issued in pursuance of, and in conformity with, the act of 1889, which is recited therein. We have purposely considered the effect of the recitals in the bonds, and reached the conclusion that in the hands of an innocent purchaser they estop the county of Hughes from denying that they were issued to replace such a debt as it was authorized to fund under the eleventh section of the act, and from denying that all the facts existed, all the acts were done, and all the conditions were complied with which were required to constitute an issue of these bonds in accordance with the provisions of this act and the general laws of the state of South Dakota. These conclusions dispose of the objection that the complaint does not plead these precedent facts, acts, and conditions. It pleads the bonds, and the recitals they contain, and those facts, and the fact that the defendant in error was an innocent purchaser, constitute a good cause of action. The objection that the complaint is insufficient, because it contains an allegation that certified copies of the records, showing the proceedings taken by the county with reference to the issue of the bonds, were issued by the county, and that the defendant in error was induced to purchase by the recitals in the bonds and these certified copies, is untenable, because it does not appear from the complaint that the records of the defendant were in any way irregular or insufficient to authorize the issue of the bonds, and it does appear that the copies of the records which it is alleged the defendant in error examined disclosed a right in the defendant to issue the bonds. Nor is the objec-

tion that the bonds were nonnegotiable, or the objection that the complaint contains no allegation that the defendant in error purchased them without notice of any defects therein, entitled to more extended consideration. It is said that the bonds are not negotiable because they are payable on the 11th day of July, A. D. 1911, or at any time after the 6th day of July, A. D. 1901, at the option of the county. A promissory note payable on or before a certain day is a negotiable instrument, and a fortiori a promissory note or a municipal bond payable after a certain day, and on or before a more distant date, is equally negotiable. *Simonton, Mun. Bonds*, pp. 125, 126, § 103; 1 *Daniel, Neg. Inst. (4th Ed.)* § 43. The defendant in error alleged in his complaint that he purchased these bonds in good faith for value, in open market, before the maturity thereof, in reliance upon the recitals therein contained, and the certified copies of the records showing the full right of the defendant to issue them. This is a sufficient allegation that he purchased them without notice of any defect therein. How could he have purchased them in good faith if he purchased with knowledge or notice of the gigantic fraud upon which the defendant alleged they are founded? Attention is also called to the fact that it appears from the complaint that the bonds were registered in the office of the county treasurer, while the law required them to be registered in the office of the county auditor or county clerk. The act of 1889 required the board of county commissioners to see that these bonds were registered in the office of the county auditor or county clerk before they were issued, and its recital that they were issued in pursuance of that act was a certificate that they were registered in the proper office, which the county was estopped from denying. The fact that they were also registered in the office of the county treasurer could not detract from their validity, and the averment of the fact constituted no objection to the complaint. The demurrer was properly overruled.

9. It is assigned as error that the court denied the motion of the plaintiff in error for judgment in its favor at the close of the case of the defendant in error, and that at the close of the trial it made a general finding in his favor on the ground that he was a bona fide purchaser of the bonds for value, without notice of their invalidity. The first objection was waived by the fact that the plaintiff in error introduced evidence in support of its defense. The second is foreclosed by the fact that the court made a general finding for the plaintiff in error, so that the questions of fact which the evidence presents are not before us for consideration. Any error in a refusal to grant the motion of a defendant to enter judgment in his favor at the close of the plaintiff's evidence is waived by the action of the defendant in subsequently introducing evidence on his own behalf and proceeding to the trial of the case on its merits. *Railway Co. v. Chambers' Adm'x*, 68 Fed. 148, 149, 15 C. C. A. 327, 329, 32 U. S. App. 253, 256; *Insurance Co. v. Frederick*, 58 Fed. 144, 147, 7 C. C. A. 122, 125, 19 U. S. App. 24, 31. Where a jury is waived, and there is testimony raising a controversy, and the court finds generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence. *O'Hara v. Railroad Co.*,

76 Fed. 718, 719, 22 C. C. A. 512, 513, 40 U. S. App. 471, 473; *Key West v. Baer*, 66 Fed. 440, 13 C. C. A. 572, 30 U. S. App. 140; *Lehnen v. Dickson*, 148 U. S. 71, 77, 13 Sup. Ct. 481, 37 L. Ed. 373; *Walker v. Miller*, 59 Fed. 869, 8 C. C. A. 331, 19 U. S. App. 403; *Searcy Co. v. Thompson*, 66 Fed. 92, 13 C. C. A. 349, 27 U. S. App. 715; *Insurance Co. of North America v. International Trust Co.*, 71 Fed. 88, 17 C. C. A. 616, 36 U. S. App. 291; *Association v. Robinson*, 74 Fed. 10, 20 C. C. A. 262, 36 U. S. App. 690. These rules of practice dispose of the propositions that the defendant in error was not a bona fide purchaser without notice, because he pleaded in his complaint that he relied upon the certified copies of the records of the proceedings of the county upon which the bonds were founded, because he testified that after default in the payment of some of the coupons he paid for the bonds with checks, because he testified that he repurchased bonds to the amount of about \$5,000 from a friend to whom he had sold them, and because the bonds were not presented for payment to the bank in New York where they were payable by their terms. But a perusal of the evidence has satisfied us that there was no merit in these objections in any event. The averment in the complaint that the plaintiff relied upon the certified copies of the records also alleged that these copies disclosed full power in the county to issue the bonds. This allegation was denied by the answer. The defendant in error introduced no evidence in support of it. His proof was confined to the introduction of the bonds, and the testimony of the defendant in error and his vendor to the effect that they each purchased them in good faith, without notice of any defects in them, in reliance upon the recitals contained in the bonds and the opinion of an attorney to whom the vendor had referred them for examination. The effect of this evidence was to leave the certified copies of the records as though they had never been pleaded, and the defendant in error without notice of anything which they may have disclosed. The contention that the defendant in error was not a purchaser for value, because he paid for the bonds with checks, is not only untenable, but trivial. It is undoubtedly true that a payment by check is not a payment in money unless the check is paid. But a check is a contract to pay money, and a purchase by a good promise to pay money is as much a purchase for value as a purchase by the payment of the actual currency. The testimony of Livingston that he had paid for these bonds by his checks is sufficient evidence to warrant a finding that he paid value for them. The fact that the defendant in error bought back some of the bonds after a default in payment of some of the coupons does not deprive him of the shield of an innocent purchaser. He first bought the bonds in good faith, for value, before maturity, and his vendor had bought them before him in the same way. Each of them was an innocent purchaser of the securities. The defendant in error subsequently sold 10 of the bonds to a friend, and after default was made in the payment of the interest he repurchased them. But a transferee from a bona fide purchaser of negotiable municipal bonds takes all the rights of the transferor, and may invoke every presumption and estoppel from their negotiability and their recitals, in support of their validity, which the trans-

error might have relied upon, although the transferee takes them after maturity, with notice of the alleged defenses. *Board v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 273; *E. H. Rollins & Sons v. Board of Com'rs*, 80 Fed. 692, 700, 26 C. C. A. 91, 99, 49 U. S. App. 399, 413; *Commissioners v. Bolles*, 94 U. S. 104, 109, 24 L. Ed. 46; *Commissioners v. Clark*, 94 U. S. 278, 286, 24 L. Ed. 59; *Board of Com'rs v. E. H. Rollins & Sons*, 173 U. S. 255, 275, 19 Sup. Ct. 390, 43 L. Ed. 689; *Rathbone v. Board*, 83 Fed. 125, 130, 27 C. C. A. 477, 482, 49 U. S. App. 577, 588; *Hill v. Scotland Co. (C. C.)* 34 Fed. 208; 1 *Daniel, Neg. Inst. (4th Ed.)* § 803. The fact that the bonds and coupons were not presented for payment at the bank in New York where by their terms they were payable was immaterial. There was no claim that the county had ever paid them, or endeavored to pay them; no claim that it had ever placed the money at the bank in New York to be applied to their payment. In this state of the case, the plaintiff was not required to go through the useless ceremony of presenting his coupons where there was nothing to pay them before he commenced his suit for the default of the county. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before an action can be maintained upon them. *Wallace v. McConnell*, 13 Pet. 136, 10 L. Ed. 95; *Walnut v. Wade*, 103 U. S. 683, 695, 26 L. Ed. 526.

10. It is assigned as error that substantially all the evidence which was offered by the plaintiff in error to show that there never was any fundable debt of the county for which the bonds could have lawfully been issued; that the county warrants for which they were issued were never delivered, were made without consideration, and were not even an apparent compliance with the provisions of the statutes; that the bonds were never delivered to any purchaser; and that no consideration for them was ever received by the county,—was rejected by the court below. The chief reason why counsel for the plaintiff in error insist that this ruling was error, viz. that all this evidence was competent and material to show that the bonds were illegally issued and void notwithstanding the recitals which they contained, has already been considered and overruled. This assignment of error cannot be sustained on that ground. It remains to consider a few minor suggestions and arguments in support of it. It is said that the court erred because it refused to permit the plaintiff in error to show that the bonds in suit were never delivered to any purchaser by the county or its officers. But the answer admits that the bonds were issued by the county, and alleges that they were issued fraudulently, and without authority of law, for the pretended purpose of canceling certain county warrants. In the face of the admission of the issue of the bonds, and of the proof which was then in the case that they had been bought by the defendant in error in good faith, in the ordinary course of business, it was neither competent nor material to show whether the county delivered the bonds to a purchaser, a broker, or one of its own officers when it issued them. There was no plea that they had been stolen from it, and, in the absence of any such defense, the presumption was then conclusive that they had been issued with the consent of the county.

It is contended that the records of the proceedings of the board of county commissioners and the records of the county officers were competent to show what the certified copies were upon which the defendant in error alleged in his complaint that he relied. But the position is unsound, because the certified copies were not produced or demanded, because the defendant denied that it had ever furnished them, and that the defendant in error relied upon them. No proof had been adduced to overcome that denial, and the defendant in error had testified that he had relied upon the recitals in the bonds and the opinion of a solicitor in purchasing them. In this state of the evidence, he was not chargeable with notice of the contents of the records, nor were they competent to rebut or explain anything which he had pleaded or proved.

11. The coupons were payable in the state of New York, and the legal rate of interest in that state was 6 per cent. The legal rate of interest in the state of South Dakota was 7 per cent. The court rendered judgment for the amount of the principal of the coupons, and interest thereon at 7 per cent. The defendant in error subsequently remitted an amount equal to the difference between the interest at 6 per cent. and the interest at 7 per cent., and the court below directed the modification of the judgment in accordance with such remission. It is assigned as error that the court erred in thus reducing the judgment, and that it erred in allowing any interest at all. The defendant in error had the right to satisfy the judgment below in whole or in part, and it is not perceived how the action of the court below directing the judgment to be modified in accordance with the partial satisfaction which the defendant in error filed could have been erroneous. But, in any event, it was not prejudicial to the county, and error without prejudice is no ground for reversal. There was no error in the allowance of interest on the coupons from their maturity until the date of the entry of the judgment at the rate established by law in New York, where they were payable. *Scotland Co. v. Hill*, 132 U. S. 107, 117, 10 Sup. Ct. 26, 33 L. Ed. 261. The judgment below is affirmed.

In re HEBBART.

(District Court, D. Vermont. September 20, 1900.)

No. 258.

BANKRUPTCY—VOLUNTARY PETITION—RIGHT TO WITHDRAW.

Where there are no creditors of the estate of a voluntary bankrupt who have proved their claims or who object thereto, he is entitled to withdraw his petition, and his right cannot be affected by the objections of subsequent creditors, who have acquired liens on his wages, and desire to prevent the institution of new proceedings.

In Bankruptcy. On motion by bankrupt for leave to withdraw his petition.

E. A. Ashland, for bankrupt.

J. G. Keenan and C. G. Austin, for creditors.

WHEELER, District Judge. The bankrupt has moved for leave to withdraw his petition in this cause. The motion has been sent to the referee for a report of the facts on notice to the creditors. He has reported on such notice that there was no estate, that no claims were proved, and that no trustee was appointed. In this situation the creditors would have no pecuniary interest in the opposing withdrawal. Nothing remained but the question of his discharge, and the withdrawal of the petition would obviate that. The opposition appears to have come from subsequent creditors, who have acquired liens upon subsequent wages, and who desire to have these proceedings kept on foot to prevent others being commenced, through the idea that there cannot be two sets at the same time. The question now, however, relates to the pendency of the present proceedings, without reference to future ones. As to that, he appears to have the right to withdraw as against any creditors who have a right to object. Costs are claimed, but not allowed. Leave to withdraw granted.

In re STEVENS et al.

(District Court, D. Vermont. September 20, 1900.)

1. **BANKRUPTCY—PARTNERSHIP—FIRM AND INDIVIDUAL DEBTS.**

Where a partnership and its members have been adjudged bankrupts, individual notes of a partner, executed to a creditor of the firm, and credited on a note of the firm held by such creditor, constitute prima facie payments of so much of the firm indebtedness, and are provable against the separate estate of the partner who gave them.

2. **SAME—PROOFS OF REAL NATURE OF CLAIM.**

The real nature of the transaction relating to a note given by a bankrupt firm may be shown, to determine whether the debt is one provable against the firm or the individual partners, notwithstanding the failure to enter the transaction at large on the books of the creditor.

3. **SAME—SOLVENT PARTNER OF BANKRUPT AS CREDITOR.**

On the bankruptcy of a partnership and its members, one of whom was also a member of another firm, which is solvent, because of the solvency of the remaining partner, the latter becomes an individual creditor of the bankrupt estates as to an indebtedness growing out of dealings between his firm and the bankrupt partner or the bankrupt firm for the amount which might be recovered in an action of account to settle the partnership dealings.

4. **SAME—INTEREST ON BALANCES BETWEEN PARTNERS.**

A solvent partner in a firm is not entitled to claim interest against the estate in bankruptcy of his partner on the balances in his favor shown by the partnership books, in the absence of a mutual agreement that such interest should be charged.

In Bankruptcy.

L. F. Wilbur, for claimant.

O. S. Annis, for trustee.

WHEELER, District Judge. Although the \$1,945 note was a partnership debt of the firm, the individual notes of \$500 and \$300 indorsed thereon were prima facie payments of so much made thereon by that partner, and these two notes became his individual liabilities. The payments made by the individual notes would be subject of ad-

justment between the partners the same as if made in money, and the notes would remain individual liabilities, provable against the separate estate. Although the \$1,000, which was the consideration of the \$1,000 note, was first advanced out of the money of the firm of C. P. & G. W. Stevens, it was afterwards changed, so that G. W. Stevens became liable to that firm for the money, and C. P. Stevens became liable for it upon this note to him. That extended entries of the transactions had not actually been made upon that firm's books would make no difference. Enough was done upon the books to show what should be entered, and the law would require the application of the money according to the real transaction if no entries had been made. *Hapgood v. Polley*, 35 Vt. 649. This is, therefore, an individual liability of the partners giving the note. The firm of C. P. & G. W. Stevens is not insolvent, for G. W. Stevens is a solvent partner, and there is no question between the creditors of that firm and those of the insolvent partner, for the former have all been, or will be, paid, and none of them appear here; and this is no controversy between the creditors of the other firms of which C. P. Stevens was a member and his individual creditors, but it is one between G. W. Stevens as a member of his firm and the individual creditors of C. P. Stevens. As to the partnership and individual estates involved in these bankruptcy proceedings, he is an individual creditor. The amount is what might be recovered in an action of account to settle these partnership dealings. This partnership balance is as to these individual and partnership assets an individual debt. *Bardwell v. Perry*, 19 Vt. 292. The bankrupt law changes the common-law rule only as to assets of partnerships involved in the bankruptcy proceedings. That partner claims interest on yearly balances. As to this the referee reports:

"I find that there was no agreement between said partners as to whether the yearly balances on their respective accounts on said firm's books with said firm should draw interest, and that there was never any talk between them on the subject. I find that each partner understood and expected that interest would be cast on the yearly balances in their respective accounts with said firm, either against them or in their favor, as the case might be. But I do not find that each partner understood that the other so understood this matter,—that is, I do not find any mutual understanding about it."

At common law partners are not entitled to interest on balances without an agreement to that effect. The understanding found was merely individual expectations, falling short of any mutual understanding, and more short of any agreement to reckon interest on balances. This shows that an offer to prove a practice of the claimant of charging interest on yearly balances was properly excluded. Amount of \$300, \$500, and \$1,000 notes, with interest, and of partnership balance, without interest, allowed against individual estate of C. P. Stevens.

In re STEVENS et al.

(District Court, D. Vermont. October 6, 1900.)

BANKRUPTCY—CLAIMS—SUFFICIENCY OF STATEMENT.

A claim against a bankrupt embraced a number of notes, on some of which the bankrupt was liable as maker and on others as indorser. Some were payable so many days after date, and some so many days after discount. The consideration of each was alleged to be money advanced equal to the face of the note, less the discount. It was further stated that they had become collateral to a note of others, which had been in part paid. *Held*, that it was essential that the claim should show the date of the several discounts, the exact amount advanced as the consideration for each, and should state explicitly the action taken, to fix the liability of the bankrupt on those upon which he was indorser only.

In Bankruptcy. On objection by trustee to sufficiency of claim.

Henry C. Bates, for claimant.

George Young, for trustee.

WHEELER, District Judge. The Lamoille County National Bank has filed a claim for a balance due upon 11 notes, to each of which the bankrupt firm is alleged to have been a party in various ways, as maker or indorser, and which are alleged to have become collateral, with 12 other notes, to a note of other makers, without other consideration than these 23 notes. Upon this new note \$7,162.55 has been paid by the parties liable thereon. Some of the original notes were to become due so many days after discount, and some so many days after date, and on some the firm was a party as indorser only. The consideration of each of the originals is stated to have been money advanced to an amount equal to the face of the note, less the discount; but neither the date of discount, nor the amount advanced, nor to whom, is otherwise made to appear, and where the firm was an indorser, notice of nonpayment is not stated, but as having been given or waived, in the alternative. The trustee has objected to the proof of claim for these defects. The law may apply the payment to the notes earliest in maturity, and make the date very material. *Langdon v. Bowen*, 46 Vt. 512. Neither the time of maturity of the notes running from the date of discount, nor the amount advanced upon those running from date, can be ascertained without knowing the date of discount. The amount advanced upon each note is the consideration of that note, and that consideration is by law expressly required to be stated in the proof of claim, which includes to whom, and when, it moved. And where the liability is that of an indorser, that it became fixed is an element of the claim, and must be stated directly. For each of these several necessary requirements, the objections must be sustained. Leave to amend has however been asked, and is granted. Objections sustained, with leave to amend within 30 days.

In re BURKA.

(District Court, E. D. Missouri, E. D. October 24, 1900.)

BANKRUPTCY—PROVABLE DEBTS—CLAIM ARISING AFTER FILING OF PETITION.

The rights of the creditors of a bankrupt in general relate to the date of the filing of the petition. A debt not then in existence, although arising before the adjudication, cannot be proved against his estate, nor is it released by his discharge; and the trustee takes title, under Bankr. Act, § 70, only to property or rights of property with which the bankrupt was so vested prior to the filing of the petition that he could transfer them.

In Bankruptcy. On petition to review allowance of claim

F. H. Sullivan, for trustee.

George Beck, for bankrupt's attorney.

ADAMS, District Judge. This case comes before the court on a petition for review of the action of the referee in allowing a claim contracted by a bankrupt after the filing of the petition for adjudication against him, and prior to the actual adjudication. The claim allowed by the referee was for legal services rendered by Alfred Bettman, an attorney at law, to the bankrupt, in matters unrelated to the bankruptcy proceedings. The question is whether such a claim, not in existence at the time the petition for adjudication was filed, is a provable demand, within the meaning of the bankruptcy act. Section 63 enacts that debts of the bankrupt may be proved and allowed against his estate, which are:

(1) "A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing, at the time of the filing of the petition against him; * * *" (2) "due as costs taxable against an involuntary bankrupt who was, at the time of the filing of the petition against him, plaintiff in a cause of action which would pass to the trustee and which the plaintiff declines to prosecute after notice"; (3) "founded upon a claim for taxable costs incurred, in good faith, by a creditor before the filing of the petition, in an action to recover a provable debt"; (4) "founded upon an open account or upon a contract express or implied; * * *" (5) "founded upon provable debts reduced to judgments after the filing of the petition. * * *"

It is observed that all these classes of provable debts, except the fourth, relate, by express terms of the statute, to such as were in existence at the time of the filing of the petition. The fact that the fourth subdivision contains no words of limitation is considered by claimant's counsel a warrant for his contention that his claim, which is founded on an open account, is provable, notwithstanding the fact that it was not in existence when the petition was filed. It is not apparent why this subdivision is inserted without words of limitation as to the time the claim should have accrued. Especially is this so when there seems to have been a studied effort to insert such words in relation to all the other provable claims. But I cannot construe this omission into a general provision for allowance of demands against the estate of a bankrupt, irrespective of the time when they accrued. If such construction be given to the statute, there would be no limitation even to such claims as existed at the date of the adjudication. The general language would

cover any claims that might accrue during the pendency of the proceedings, even up to the final discharge. In the absence of express provision to the contrary, I think that debts provable under the act must be such as existed at the date of the filing of the petition. That date is one to which many general provisions are referable. For instance, it is enacted in chapter 1, § 1, subd. 10, that the words "date of bankruptcy," "time of bankruptcy," "commencement of proceedings," or "bankruptcy," when used in the act with reference to time, "shall mean the date when the petition is filed." Moreover, the conclusion reached is in clear analogy with the general rule of procedure in courts charged with the administration of trust estates. According to my observation and experience, the rights of creditors of insolvent estates administered in equity generally relate to the time of the institution of the proceedings which ultimately result in the sequestration of the property which is to be administered.

It is argued by claimant's counsel that because the trustee is vested with the title not only to property which the bankrupt had at the time of the filing of the petition against him, but also to such property as he may have acquired after that, and prior to the date of adjudication, and because all such property goes into the fund for creditors, therefore all creditors having claims which originated at any time prior to the actual adjudication should participate in the fund; in other words, that, as the property which the bankrupt acquires after the filing of the petition enhances the fund for the benefit of creditors, all creditors whose rights accrued at any time before actual adjudication should participate in it. This is a plausible argument, and I presume it would be true that, if the property acquired by the bankrupt after the filing of the petition and before the adjudication did vest in the trustee, creditors whose rights accrued between those dates should share in the property of the bankrupt, like other creditors; but the argument, in my opinion, is based on false premises. Section 70 of the bankruptcy act, which is relied on by claimant's counsel in support of the argument, contains the following provisions:

"The trustee of the estate of a bankrupt upon his appointment and qualification * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition, he could, by any means, have transferred. * * *"

After a careful consideration of the provisions of this section, I am persuaded that there are two separate subjects treated of: First, the time at which the title to something vests in the trustee; second, the "something" or property the title of which is to vest in the trustee. Inasmuch as the trustee, by the provisions of the act, cannot be chosen or qualified until some time after the date of the filing of the petition, and in fact until some time after the date of adjudication, it is appropriate and fit that some time should be fixed, to which his title to whatever he gets should relate; and such, in my opinion, is the subject-matter of the first part of the section in question. Properly interpreted, the trustee is by operation of law vested with the title as of the date the bankrupt was adjudged to

be a bankrupt. The further provisions of the section, already quoted, undertake to point out the property of which by operation of law he is to become the owner, namely, all property which prior to the filing of the petition the bankrupt could have transferred. In other words, the property which the trustee acquires must have been property or rights which so existed prior to the filing of the petition that the bankrupt might have transferred them. This clearly means the property or rights of property which existed at that time. Such being the true interpretation of section 70, it affords no ground for the argument made by the claimant's counsel. Inasmuch as no property which the bankrupt may have acquired after the filing of the petition and before the date of adjudication is taken by the trustee, there is no ground for the argument that the claimant, holding a claim accrued since the filing of the petition, and before adjudication, should participate in the assets. His claim is neither provable, nor is the bankrupt discharged by the final judgment of the court from the obligation to pay such a claim.

The supreme court of the United States, by section 30 of the act, is authorized and empowered to prescribe all necessary rules, forms, and orders as to procedure, and for carrying the bankruptcy act into force and effect. In pursuance of the power conferred upon it, the supreme court adopted form No. 59 (32 C. C. A. lxxxii., 89 Fed. lviii.), which, after preliminary recitations, reads as follows:

"It is therefore ordered by this court that said — [namely, the bankrupt] be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the — day of — A. D. 189—, on which day the petition for adjudication was filed against him."

This form prescribed by the supreme court indicates the view which that court takes of the provisions of the act in relation to the discharge of a bankrupt from his debts, and according to it the bankrupt is discharged only from such debts as existed on the day the petition for adjudication was filed against him. It follows that, inasmuch as the bankrupt is not discharged from the debts which are created after the filing of the petition against him, such debts cannot be provable against his estate. In my opinion, the referee reached an erroneous conclusion in this case, and the order will be to disallow or expunge the claim in question.

In re COHN.

(District Court, D. Missouri, E. D. October 25, 1900.)

BANKRUPTCY—COMPETENCY OF WITNESS—WIFE OF BANKRUPT.

Rev. St. Mo. 1899, § 4656, which modifies the common-law disability of a married woman in the matter of testifying for or against her husband, and permits her to testify in certain specified actions, contains nothing which makes her testimony competent before a referee, in bankruptcy proceedings against her husband, in respect to property alleged to have been transferred to her in fraud of his creditors.

In Bankruptcy.

Sale & Sale, for bankrupt.

Nathan Frank, for petitioning creditors.

ADAMS, District Judge. The examination of the bankrupt before the referee disclosed the fact that, shortly before the filing of the petition for adjudication in bankruptcy against him, he had made several payments of money to his wife, claiming that he was indebted to her for money theretofore borrowed from her by him. Afterwards, on the application of the trustee, the wife, Albertine Cohn, was ordered to appear before the referee, pursuant to the provisions of section 21 of the bankruptcy act, and submit to an examination concerning the acts, conduct, and property of the bankrupt. She duly appeared, was sworn, and, after some preliminary questions and answers showing her relationship to the bankrupt, was asked the following questions: "(1) How much money was it that you received from your husband for signing that mortgage? (2) Within four months prior to the filing of the proceedings in bankruptcy against your husband in the months of December, 1899, and January, 1900, he paid to you about \$2,200, as he testified. Will you please tell us what you did with that money?" The bankrupt's attorney objected to these questions, on the ground that the witness, being the wife of the bankrupt, was incompetent to testify in the case. The referee sustained the objection, and his action in so doing is certified here for review.

Section 21 of the act in question permits the examination by the referee of any person, "who is a competent witness under the laws of the state in which the bankruptcy proceedings are pending," relative to the acts, conduct, etc., of the bankrupt. Is the wife a competent witness, under the laws of the state of Missouri, for or against her husband, in a case pending against him in which she is not a party? The answer to this question disposes of the present case.

Section 4652, Rev. St. Mo. 1899, removes the common-law disability arising from interest, merely, in the result of any suit. Section 4656 modifies the disqualification of a married woman as it existed, as a rule of public policy, at common law, in the matter of testifying for or against her husband. It enables her to testify (1) "in actions upon policies of insurance of property so far as relates to the amount and value of the property alleged to be injured or destroyed"; (2) "in actions against carriers so far as relates to the lands and property, and the amount and value thereof"; (3) "in all matters of business transactions when the transaction was had and conducted by such married woman as the agent of her husband." Apart from the enabling statute just referred to, the wife is left, as at common law, disqualified, as a matter of public policy, from testifying either for or against her husband. This statute has no relation to cases in which the wife is a party. In such cases even though her husband be joined with her, and his rights be affected by her testimony, her own rights are so involved as to permit her to testify concerning them. This has been held in repeated adjudications of the supreme court of Missouri. *Buck v. Ashbrook*, 51 Mo. 539; *Wilcox v. Todd*, 64 Mo. 388; *Joice v. Branson*, 73 Mo. 28; *State v. Evans*, 138 Mo. 124, 39 S. W. 462; and several other cases.

It would seem clear, from a reference to the statutes of Missouri, above referred to, that the wife in the case under consideration is an incompetent witness; but it is contended that the proviso to section 4656 limits the disqualification to confidential communications. This proviso is as follows: "Provided, that nothing in this section shall be construed to authorize or permit any married woman, while the relation exists or subsequently, to testify to any admission or conversations of her husband whether made to herself or to third parties." It seems to me that the proviso is primarily limited in its effective operation to the cases in that section referred to, and that its true interpretation is that even in actions on policies of insurance, or against carriers, or involving transactions in which the wife acted as agent for the husband, her disqualification should not be so far removed as to permit a disclosure of admissions or conversations made by her husband to her or in her presence. I am aware that by judicial construction the proviso has been made to apply to cases like divorce cases, in which the husband and wife are arrayed on opposite sides, but I think that such ruling by the court is occasioned as much by general considerations of public policy as by the proviso in question, and that, notwithstanding such ruling, the main purpose of the proviso is to restrain and limit the privileges granted to the wife by the enabling act found in section 4656.

I have carefully considered the cases relied upon by the bankrupt's attorney (*Harlan v. Moore*, 132 Mo. 483, 34 S. W. 70, and *Shanklin v. McCracken*, 140 Mo. 348, 41 S. W. 898), and I fail to discover any authority, in those cases or elsewhere, for the proposition that in Missouri the only disqualification of a wife as a witness is as to admissions and conversations made by the husband to her. The wife was by the common law, as a matter of public policy, totally disqualified to testify for or against her husband. That disqualification has been partially removed in Missouri, as shown by section 4656, and, except as so removed, she is still disqualified to testify for or against her husband in any case in which she herself is not a party, and her individual rights involved. This conclusion is in harmony with the decisions of the federal courts. In *re Fowler* (D. C.) 93 Fed. 417; In *re Jefferson* (D. C.) 96 Fed. 826; and In *re Mayer* (D. C.) 97 Fed. 328.

The argument based upon the necessity of the situation, namely, to compel a disclosure in case of attempted concealment of property, can have no force as against the disqualification provided for, on grounds of public policy, by the law. Indeed, that argument is shorn of nearly all its force by the fact that a suit may be instituted against the wife for the recovery of the property or for a discovery as to the facts of the case, and by such a proceeding the truth may be ascertained, and justice accomplished. The referee's action in holding Albertine Cohn to be incompetent as a witness in this case is approved.

In re MARCUS et al.

(District Court, D. Massachusetts. October 22, 1900.)

No. 2,627.

BANKRUPTCY—PROVABLE DEBTS—DECREE FOR COSTS.

Costs adjudged against a complainant, after his adjudication as a bankrupt, in a suit brought by him prior to such adjudication, do not constitute a provable debt against his estate, under Bankr. Act 1898, § 63, and he is not entitled to be protected by the bankruptcy court from arrest on an execution therefor.

In Bankruptcy. Motion for attachment for violation of a writ of protection from arrest issued to the bankrupt.

Hiram P. Harriman, for bankrupt.

James D. Thomson, for Donoghue.

LOWELL, District Judge. Marcus brought a bill in equity in the state court against Donoghue. While the bill was pending he was adjudged bankrupt upon his own petition. After the adjudication, but before discharge, a judgment was rendered in the bill in equity against him for costs. He thereupon obtained from the referee a writ of protection from arrest in all civil actions except those excepted by section 9 of the bankrupt act; that is to say, those founded upon debts or claims not provable in bankruptcy. Marcus now seeks protection against arrest upon Donoghue's execution for costs, and the court has to consider if these costs were a provable debt. To be provable, they must be included within the definition of section 63. That they are not included within the definition of subsection "a" is manifest. The bankrupt's counsel contends that they are unliquidated claims, within the definition of subsection "b"; but the phrase "unliquidated claims" seems to me not reasonably applicable to a claim for costs like that above described, and especially inasmuch as in subsection "a" are specified at some length those classes of costs which constitute provable debts. Probably the unliquidated claims mentioned in subsection "b" are those claims already mentioned in subsection "a," which have not been liquidated. In re Hirschman, 104 Fed. 69. Petition for attachment denied, without costs.

In re HINDMAN.

(Circuit Court of Appeals, Ninth Circuit. October 25, 1900.)

No. 651.

BANKRUPTCY—EXEMPTIONS—CALIFORNIA STATUTE.

Under Code Civ. Proc. Cal. § 690, subd. 6, which exempts from execution "two horses * * * and one cart or wagon, by the use of which a cartman, drayman, * * * teamster or other laborer habitually earns his living," a bankrupt whose occupation was that of a white-washer, kalsominer, paper hanger, and repairer of plastering, and who owns a horse and wagon, which he uses exclusively for the purpose of conveying his supplies, tools, ladders, etc., from his residence to the

places where he has jobs of work, and without which he could not carry on his occupation at a profit, is entitled to claim such horse and wagon as exempt.

In Bankruptcy.

George W. Chamberlain, for petitioner.

Harold F. Hobson, for respondent.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a petition to review the decision of the district judge for the Northern district of California affirming the report of the referee that a horse and wagon, the property of the petitioner, are not exempt from execution. From the evidence in the case it appears that the petitioner's trade was that of house and sign painter, but that he had not done any work as sign painter for three years, and but one job as house painter within two years; and it is claimed that upon this testimony the decision should be affirmed. It is enough to say upon this point that the petitioner's claim of exemption is not based upon this ground. It arises upon the testimony of the petitioner, reported by the referee as follows:

"I am the bankrupt. Petition in bankruptcy was filed by me on May 17, 1900. I am the owner of the horse and wagon set forth in my schedules. My occupation prior to and at the time of filing my petition was that of a laborer. Have been engaged in business for two years last past as white-washer and kalsominer, paper hanger, and repairer of plastering. I carry my tools, ladders, supplies, and materials used in my business in the wagon from my residence to wherever I have work to do. * * * Have used the horse and wagon for no other purpose than to carry my tools, ladders, supplies, and materials. My family consists of my wife and four children. * * * Do not use the horse and wagon for hire. * * * I could make no profit out of my jobs if I was compelled to hire my tools and materials delivered. Have used this horse and wagon for this purpose for eleven years, and have not during that time hired a delivery wagon."

The referee in his report found as a fact:

"That said horse and wagon were used exclusively by said bankrupt for the purpose of conveying materials and supplies to be used in jobs of paper hanging and kalsomining, and in carrying his ladders, brushes, and tools from his residence to the places where he had jobs of work to do as such paper hanger and kalsominer, and that said horse and wagon were used for no other purpose."

Did the court err in deciding that, upon the evidence and findings reported by the referee, the horse and wagon were not exempt from execution? Section 6 of the bankruptcy act of 1898 provides that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

The statute of California applicable to this case declares the following property to be exempt from execution:

"Two horses * * * and one cart or wagon, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer, habitually earns his living." Code Civ. Proc. § 690, subd. 6.

Statutes exempting personal property are remedial in their character, and should be liberally construed by the courts, because they are intended to protect the debtor, and enable him to follow his vocation, and earn a support for himself and family. In *re McManus' Estate*, 87 Cal. 292, 25 Pac. 413, 10 L. R. A. 537; 1 Freem. Ex'ns (2d Ed.) p. 606, § 208, and authorities there cited. The term "other laborer," of course, means one who labors by and with the aid of his team. *Brusie v. Griffith*, 34 Cal. 302. But it is not necessary, in order to secure an exemption of the property, that the use of the team should be the petitioner's only means of earning a living for himself and family. It is enough for him to show that he uses the team as a laborer, in a line of business similar in its character to the specific occupations named in the statute, and that such use is necessary in order to enable him to earn his living. The petitioner, in our opinion, has clearly brought himself within the exemption clause of the statute of California, and is entitled to the protection which its humane and beneficent provisions afford. The testimony and findings of the referee show that he is one who labors in a toilsome occupation; that the use of the horse and wagon is necessary to enable him to carry on that occupation; that it is the occupation which supplies the means of living for himself and family. This being true, it follows, from reason and authority, that it must be said that he is a laborer who earns his living by the use of his team as well as "by the sweat of his brow," and is therefore entitled to the exemption he claims.

In *Stanton v. French*, 91 Cal. 274, 27 Pac. 657, where the claimant and his wife were engaged in conducting a bakery upon a limited scale, and sold bread at their place of business, and the plaintiff also peddled bread throughout the town, and at the railroad depot upon the arrival of the trains, and in the interim did odd jobs with his team for hire, the court said:

"The fact that plaintiff may have, to a limited extent, applied his team to other uses, or that some portion of his living, however slight that portion, may have come from some other avenue of industry, would not deprive him of his rights as a peddler under the statute."

In *Tank-Line Co. v. Hunt*, 83 Iowa, 6, 48 N. W. 1057, 32 Am. St. Rep. 285, 2 L. R. A. 476, the court, in construing a statute similar in its provisions to the statute of California, where the debtor was engaged in selling oils, and had a place of business known as "headquarters," from which he delivered his sales by the use of a horse and wagon, which he claimed was exempt from execution because, by the use thereof in his business, it was his means of earning a living in conducting his business, among other things pertinent to the case in hand said:

"It is strenuously urged that the defendant is not a teamster nor laborer, but a merchant, and as such is not entitled to the exemption. It is true the defendant is engaged in a small way in the sale of merchandise. He has a back room of a building, used more for storage than for any other purpose, which is a base of supplies for his delivery system or business, and the business is carried on mainly by the use of the team, and it is manifest that, without the use of the team, he has no business to supply a living; for he says that the profits of completed sales at the headquarters would not pay

his rent. Any person thus engaged in receiving and distributing oils must be said to be a laborer."

The decision of the district court is reversed, and the cause remanded, with instructions to the court to enter an order herein in conformity with the views expressed in this opinion.

In re SPOONER.¹

(Circuit Court, S. D. New York. November, 1880.)

1. ARRESTS UNDER ELECTION LAWS—DELAY TO EXECUTE WARRANT.

It is an offense within Rev. St. § 5515, if an election officer intentionally delays executing a warrant for the arrest of one charged with illegally registering, until election day, in order to prevent his voting.

2. SAME—THREATS.

It is equally so to threaten to arrest for the purpose of deterring from voting.

Application to the circuit court for a warrant for the arrest of William R. Spooner, special deputy marshal, and aid to Chief Supervisor Davenport.

William H. Kip made affidavit that Spooner had stated "that there was a warrant issued for every man who had registered on 1868 papers; that these warrants would not be executed until election day, and on that day every such person would be arrested at the polls on presenting himself and offering to vote, and, being under arrest, he would not be allowed to vote." Timothy Donohue swore that he was naturalized in 1868; that he had caused the record of his naturalization to be carefully examined, and was positive that he had a legal right to vote, but that he was intimidated from attempting to vote at the election held November 2, 1880, and "unlawfully hindered, prevented, and obstructed from voting or attempting to vote at said election, through fear of arrest at the polls, and by reason of said Spooner's threats."

E. Ellery Anderson and Geo. W. Wingate, for application
Dist. Atty. Tenney, for the United States.

BLATCHFORD, Circuit Judge (orally). We think there is probable cause for issuing a warrant. Mr. Spooner is a special deputy marshal and an election officer. Section 5515 of the Revised Statutes of the United States makes it an offense for an election officer to violate any duty imposed by the laws of the United States. Under section 2022 it is his duty to arrest any man, whoever he may be, who has committed or who offers to commit any offense prohibited by the statute. Although it does not appear by Kip's affidavit that Spooner disclosed the name of Donohue, yet it is clearly stated that the warrants had been issued; that they would not be executed until election day, but that the parties named in them would be arrested on election day, when they attempted to vote, and be kept from voting. We are very clear that it is the intention of the law that every man shall be arrested just as soon as he can be, if

¹ This case has been heretofore reported in 9 Abb. N. C. 481, and is now published in the series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

he has committed an offense, and that no officer should wait until election day to execute a warrant. It is the duty of all persons—both of those who issue the warrant, and those who execute the warrant—to try to execute them immediately, if the man can be found. There is no doubt, however, that in a certain class of cases, such as we now understand are occurring in Brooklyn, where persons have illegally given false residences, and the warrants have been issued for those persons, probably they cannot be found before election day, and may never be found; and in such cases it may be necessary to execute the warrants on election day. But, in all cases where people can be found, these warrants should be executed promptly, and before election day. There is no question about that.

CHOATE, District Judge. Purposely omitting to serve warrants until election day, for the purpose of preventing people from voting, would be a breach of duty on the part of the chief supervisor or the deputy marshal.

BLATCHFORD, Circuit Judge. Of course, the court having stated that this is a proper case for a warrant, the district attorney must follow it up. The court so orders.

Dist. Atty. Tenney said that he was placed in a very peculiar position, that he understood that there were no warrants in the hands of Mr. Spooner which he had been directed to execute, and that he was sure that there would be a failure of evidence against him on that point.

BLATCHFORD, Circuit Judge. It makes no difference whether this marshal had these warrants or not. It is just as much an offense for him to threaten to arrest people on election day, to prevent their voting, as it would be to keep back a warrant and execute it on that day for that object. Perhaps, however, it is not necessary actually to produce the defendant, and take up the time of counsel and the court to-day on the examination of this question. The clear and undoubted judgment of the court on this point has been expressed, both judges concurring, and ought to be sufficient for all purposes, and it ought to be unnecessary to go through any formalities until after election. We both agree that, where a man can be arrested before election day as well as not, he ought to be so arrested. If there is any delay in arresting him, where he could have been arrested before that day, it must be presumed to be for the purpose of preventing him from voting, and consequently unlawful.

BLATCHFORD, Circuit Judge, then directed the warrant to issue.

[The proceeding was discontinued after election day.]

In re HILT.¹

(Circuit Court, S. D. New York. November, 1880.)

ELECTIONS—REGISTRATION.

The facts that the state inspector refused to allow a voter to be registered, in consequence of the United States supervisor having previously expressed the opinion that the voter was not qualified, and that the supervisor refused to return his certificate of naturalization, do not make a case for an application to the United States court for a warrant against the supervisor, but the remedy is by an application to a state court for a mandamus to the inspector.

Application to the Circuit Court for a Warrant for the Arrest of William Hilt, Jr.

E. Ellery Anderson and Geo. W. Wingate, for the application.

Before BLATCHFORD, Circuit Judge, and CHOATE, District Judge.

BLATCHFORD, Circuit Judge. The affidavit or complaint in this matter is entitled in the circuit court, which has cognizance of all crimes and offenses against the elective franchise specified in the Revised Statutes of the United States. We deem it proper to consider it as though presented to the court held by both judges. The United States circuit court having power to delegate to the district judge the exercise of its jurisdiction in certain cases, I have so delegated to the district judge the exercise of all necessary powers, for the reason that questions may arise which will require immediate action, and we deem it proper to have concurrent action. This complaint was laid before United States Commissioner Osborn, and, after consultation with the district attorney, it was referred to this court. The application is for a warrant of arrest against William Hilt, Jr., for an alleged offense against section 5506 of the Revised Statutes. This section provides:

"That any person who by any unlawful means hinders, delays, prevents or obstructs, or combines and confederates with others to hinder, delay, prevent or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting at any election in any state, * * * shall be fined not less than \$500, or be imprisoned not less than one month, nor more than one year, or be punished by both such fine and imprisonment."

It is stated and assumed that this application is intended to bring up questions in relation to supervisors of election, acting under instructions of the chief supervisor. We are of opinion that this complaint does not authorize the issuing of any warrant. It appears that Walsh came here in 1857, being about 11 years of age; that he resided in the state of New York for more than one year before 1868, and in the United States since 1857; that he was naturalized in September, 1868, in the supreme court of the state of New York, and presented himself on the 5th of October, 1880, at the proper

¹ This case has been heretofore reported in 9 Abb. N. C. 484, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

place of registration, and asked to be registered,—that is to say, he asked the state inspector to register him. He placed his certificate in the hands of the inspectors. Hilt is a supervisor, and was present and engaged in the discharge of his duties. One of the inspectors, after examining the certificate, handed it to him. It further appears that Hilt told the complainant that he could not vote on this certificate, and that Hilt refused to return it, after demand, to the complainant; and it is alleged that in consequence of Hilt's action he could not register or vote. Hilt's alleged offense appears to have been telling the complainant that he could not register, and retaining the complainant's certificate. It appears that the inspector examined the certificate; that upon what he saw and learned otherwise he refused to permit Walsh to register. There is nothing in this that makes out any offense against Hilt, or that makes him guilty of hindering the plaintiff from registering. From this affidavit it does not appear that Hilt had anything to do whatever with his registering. His expression of opinion is no obstruction. The inspectors seem to have refused to register the plaintiff, and his remedy is by a mandamus in the state courts. So far as retaining the certificate of naturalization is concerned, that fact is not an obstruction. It was the act of the inspectors in refusing to register the complainant after examining the certificate which prevented the registration of the plaintiff. The withholding of the certificate by Hilt was not, therefore, the cause of his failure to procure registration. The facts in this case do not bring up the question of the right of the supervisor to take the paper. On the face of the application, there is no case shown for the issuing of a warrant, and the application is therefore denied. This court will be prepared, however, at all times to act promptly and to take any necessary action in matters of this kind.

Mr. ANDERSON. The combined act of the inspector and supervisor in taking from the complainant his certificate, and thereby making it necessary for him to apply to the state court for a mandamus in order to enforce his right of registration, was clearly a hindrance and obstruction.

BLATCHFORD, Circuit Judge. The act complained of, having originated with the inspector, was one that concerned a local state officer, over whom the court do not deem it proper to assume jurisdiction.

UNION STEAM-PUMP CO. v. BATTLE CREEK STEAM-PUMP CO. et al.
(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

No. 812.

1. PATENTS—SUIT FOR INFRINGEMENT—ESTOPPEL BY PRIOR ADJUDICATION.

To sustain a defense of estoppel in a suit for infringement by a prior adjudication between the same parties in relation to the same patents, the proofs must show that the identical claims of the patents and parts of the patented device were involved in the two suits.

2. SAME—CONSTRUCTION OF CLAIMS—SCOPE OF INVENTION.

The claims of a patent, unless they are restricted in terms or by necessary implication, will include all changes of form, whether of size or

shape, or changes in location of the parts of a combination, if the mode of operation is not changed, and the parts still perform the same duty.

3. SAME—SEPARATE IMPROVERS—EQUIVALENTS.

In patents granted to different improvers on former constructions designed to produce the same result the invention of each is measured by his improvement. One cannot invoke the doctrine of equivalents against another merely because a part produces the same or a similar result.

4. SAME—INFRINGEMENT—STEAM VALVES.

The Frost patent, No. 428,672, for improvements in steam engines, relating particularly to steam-actuated valves controlling the admission of steam into the cylinder, was not anticipated, and is valid; but such patent is not infringed by the device shown in the Metcalf patent, No. 442,905, which does not employ a steam reservoir external to the cylinder, which is the distinguishing feature of the Frost invention.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The bill of complaint in this cause charges the infringement of rights secured by letters patent Nos. 428,672 and 431,045, issued to Richard L. Frost, as assignor to the Union Manufacturing Company, a name by which the complainant was formerly known, it having been since changed by amendment of its articles of incorporation. The first of these patents is dated May 27, 1890, and the second July 1, 1890. Both relate to the construction of steam engines, and particularly to the valves by which the admission of steam is controlled. These valves have been mainly used in the construction of engines for steam pumps. The infringement complained of consists of the alleged manufacture and sale by the defendants of steam valves made under letters patent No. 442,905, issued December 18, 1890, to Foster M. Metcalf, upon an application filed July 9, 1890. The defendants, by their answer, deny that Frost was the first inventor of the valve shown by his patents. They also deny infringement, and aver that the valves manufactured and sold by them were made under and in accordance with certain letters patent owned by them, and especially No. 394,656, dated December 18, 1888, and No. 409,851, dated August 27, 1889, both of which were granted to Elon A. Marsh. The answer further states that the defendant Battle Creek Steam-Pump Company formerly bore the name of the Battle Creek Machinery Company, and that while it bore that name it brought suit in the circuit court of the United States for the Eastern district of Michigan against the present complainant while it was known as the Union Manufacturing Company, alleging infringement by the latter of the Marsh patent, No. 394,656, by the manufacture of steam pumps such as are shown in the above-mentioned Frost patents, and that on final hearing it was found and decreed, that the Union Manufacturing Company had infringed the said Marsh patent, and an injunction was ordered against the last-named company, which is still in force. To this answer a replication was duly filed. Proofs were taken by both parties. It was held by the court on final hearing that, if the Frost patents are valid (a question not decided), they stand on such narrow ground that they were not infringed by the defendants. The bill was accordingly dismissed. The complainant has appealed. So much of the evidence as is deemed by the court to be material is stated in the opinion which follows.

Fred L. Chappell, for appellant.

Cyrus E. Lothrop, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court:

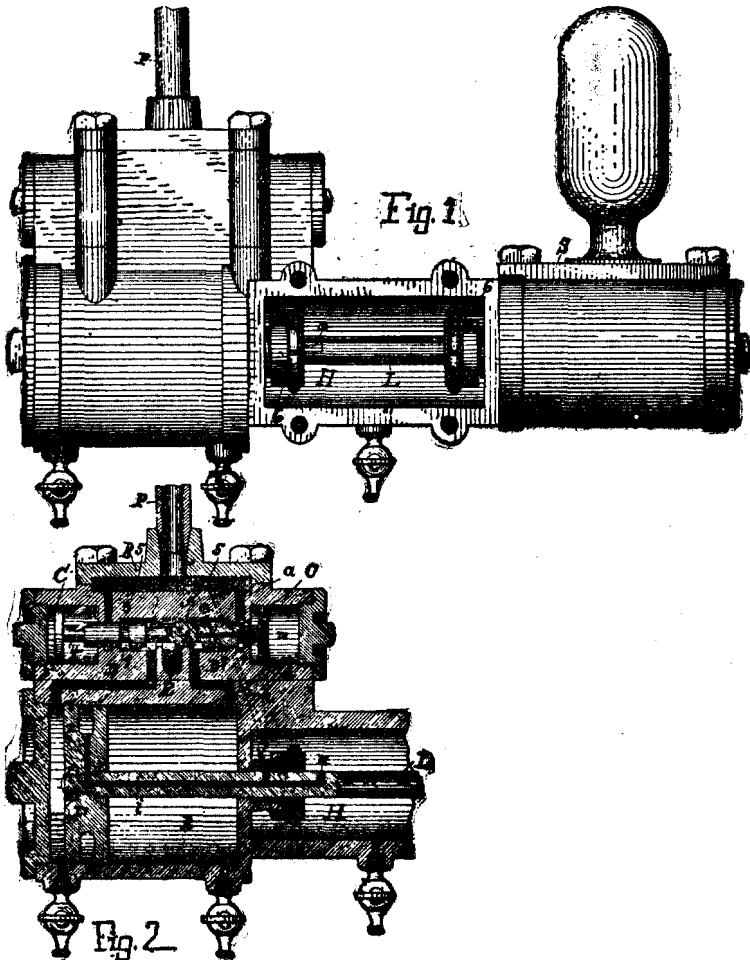
It appears from the opinion of the learned judge who heard this case at the circuit that some stress was there laid upon a decree sup-

posed to have been rendered in a former suit relating to their respective patents between these companies while they were doing business under other names, as mentioned in the preceding statement, wherein the Frost patents, Nos. 428,672 and 431,045, were declared to be invasions of rights secured by the Marsh patent, No. 394,656. The court seems to have regarded the decree in that case as settling for these parties certain questions now involved. Probably the argument in that court took a wider range than the record warranted, and the court took the statements of counsel upon some matters of fact. We find nothing in the record here which justifies the setting up of that decree as an estoppel, or as determining anything pertinent to the present controversy. The averments in the answer in regard to that suit and the nature of the questions there put in issue are quite general. The defendants offered no proof of the pleadings in that case nor of the decree rendered therein. It is suggested by the counsel for the appellees that a certified copy of the opinion of the court in such former case has been filed here for our examination, in case we desire it. In this state of things, it is quite manifest that no support is found on which to base any estoppel on any branch of the case. It may be that questions were there involved and decided concerning other claims of the patents and other parts of steam engines in steam pumps. We do not know, and estoppels must be certain.

It is necessary to look into the condition of the art at the date of Frost's inventions relating to valves in steam engines controlling the admission of steam from the steam chest into the cylinder. For a long period prior to the use of independently actuated valves, such as are here described, the customary way to control the transmission of steam from the chest to the cylinder was by a valve actuated to open and close the ports by a rod connected with an eccentric located upon the main shaft of the engine. Of course, something was to be gained if the eccentric and the rod connecting it with the steam valve could be dispensed with by the provision of means for bringing the steam directly from the chest to the actuation of the valve, instead of employing the power of the steam through the engine, the eccentric, and its rod, for that purpose. It would save the loss of some power in transmission and some cost in machinery. Prior to Frost's invention several inventors had obtained patents for devices tending to the accomplishment of this object. Among these was a patent to McPaul, No. 178,792, dated June 13, 1876; one to J. A. Tilden, No. 248,834, of October 25, 1881; one to Brazell, No. 271,181, of date February 16, 1883; and a still earlier one to Washburn, No. 98,725. Later than all these came the Marsh patents, already mentioned, of 1888 and 1889. It will not be necessary to analyze all of these in detail. It will be sufficient for the present purpose to state the progress which had been made prior to the applications for the Frost patents, and then to identify his inventions. Generally speaking, there had been patented devices for actuating steam valves of this kind, by which live steam was taken from the steam chest through ports and passages into the cylinder, or into a peripheral depression in a prolonged piston head moving through the cylinder, and from

thence to the chambers at the outer ends of the valve, the latter being provided with heads somewhat of the form of piston heads. In this latter form of construction the piston head was required to be made very long in order to take in the inlet opening in the cylinder for the steam from the steam chest (which opening was about midway of the length of the cylinder), and one of the two openings in the cylinder located near the ends thereof, respectively, through which the steam was taken alternately to the respective ends of the valve. When the piston head was at one end of the cylinder, the port to the passage to the head of the valve would be open, and steam connection was effected directly from the chest to one end of the valve. When the piston head moved to the other end, the port for the steam to the valve at that end would be opened and the port at the opposite end of the cylinder would be shut off. Thus, by the reciprocating motion of the piston, the valve was correspondingly moved over the adits for steam from the chest into the cylinder for its general work, which was, as above stated, the function of the valve when actuated by the eccentric gear. This was the form of construction in the Marsh patents. Another form was shown by McFaul's patent, in which, instead of live steam from the chest, cylinder steam—that is, steam which had been already used in the cylinder—was transmitted through passages opening from the cylinder to the ends of the valve, respectively. In this connection it is proper to notice the Barth patent of March, 1889. In this patent, also, the valve was actuated by cylinder steam taken by an opening through the piston head and rod to relief ports in the latter, from whence it passed through openings at the proper places in the cylinder head and a prolongation thereof, and thence by passages to the respective ends of the valve. There was no reservoir for holding steam after it left the cylinder until it reached its work at the ends of the valve. The same was true of the McFaul invention. Nor was it needed in either of them, for the port opened into the store of the cylinder. At the time of Frost's inventions, covered by the patents on which the suit was founded, the valve-operating devices consisted substantially of these two classes. In one of these live steam was used, which was stored in the piston head, and taken alternately from each end thereof to the ends of the valve. We judge from the evidence that the extraordinary length of the piston head required for this service, which was more than half the length of the cylinder, was a serious objection, in that it required the elongation of the cylinder to that extent. This largely increased the material of the engine and the cost of manufacturing it, and it rendered the piston head more complex and cumbersome in operation. The other class was that which took steam from the cylinder, dispensing with other store room. It seems to be established by the proofs that the use of cylinder steam is objectionable, and both parties agree that for reasons stated the use of live steam for this purpose, if not essential, is greatly to be preferred. Frost undertook to remedy these defects in the existing devices for operating the valve. He brought live steam from the chest to a reservoir outside of the cylinder, thereby restoring the piston head to its normal proportions, and he contrived means for getting the steam

through the piston, and thence to the heads of the valve, securing the necessary isochronous movements of valve and piston without incumbering the cylinder with the means employed. It seems to us that his invention was one of considerable merit, and made a distinct advance in the art to which it relates. It is entitled to protection in the field covered by it. In his application for patent No. 428,672 it was stated by Frost that "the object of the present invention consists in certain changes in the steam chest, and in providing a secondary steam chest or receiver, and in a peculiar construction of the piston in connection with said steam chest." The last two of these elements constituted the main features of his invention. The remodeling of the steam chest was merely the mechanical work made necessary by the more important changes. The following are Figs. 1 and 2 of the drawings, and so much of the specifications as are necessary to an explanation thereof:



"Referring to the lettered parts of the drawings, R is the cylinder, and F is the piston head, having an annular depression, Z, in the periphery of said piston head, as shown in Fig. 2. At B is shown the steam chest having therein what is usually termed a 'float valve,' A, said valve having enlarged heads, C, C, at each end, which play back and forth in the internal enlargements, m, in the ends of the steam chest. Referring to Fig. 2, the valve, A, is shown, having an annular depression, 4, 4, at each end, and centrally at 1 and at 3, 3, between said center and end depressions. Each end of the valve, A, has a live steam port, e, leading from the annular depressions, 4, 4, internally and longitudinally through said valve into the annular depressions, 3, 3. These several depressions, 4, 4, 3, 3, and 1, may be termed 'annular steam ports.' This valve, A, is like the one shown in my prior application herein referred to. The ports, e, through the valve, are as clearly shown at right hand in Fig. 2. At P is the ordinary steam-supply pipe, and from said pipe the live steam ports, 5, 5, lead into the interior of the steam chest and into the steam passage, h, which leads into the cylinder, H, Figs. 1 and 2. D, D, are ports leading from the steam chest into each end of the cylinder, and E is the exhaust port. Ports, d, e, lead from either end of the steam chest into the cylinder, R. The piston rod, L, passes from the cylinder, R, through the stuffing boxes, 6, 6, in the steam receiver, H, and on into the pump, S, said pump, of course, being of the ordinary construction. Each end of this rod has a steam port, i, passing longitudinally through it from the steam receiver, H, and into the piston head, F, and leading thence out into the annular depression, z, in the periphery of said head. This port, i, has two openings, y, x, into the steam receiver, H, one of which is closed by passing into the stuffing box at each end of the stroke. Fig. 2 shows these ports at one end."

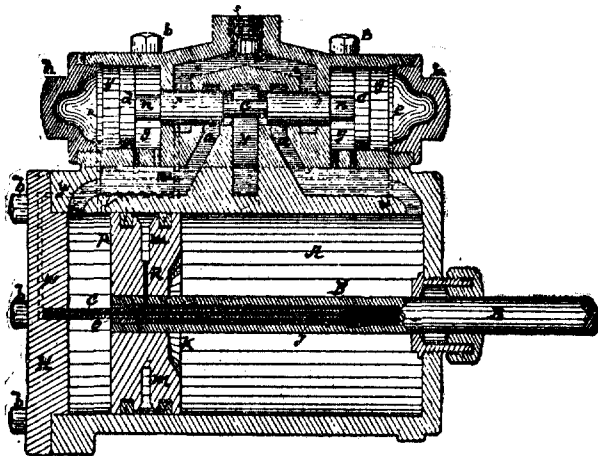
The substance of the present controversy rests upon claim 3:

"In an engine employing a steam-actuated valve in the steam chest, a steam receiver, and a piston rod extending into and having bearings in said receiver, the piston head of said rod having the peripheral depression, and a live steam passage leading through said rod and out through the head into said depression, which depression registers with the live steam ports leading to the ends of the valve, substantially as set forth."

The second Frost patent is, for the purposes of this suit, merely inert matter. Counsel for complainant contends that it is competent to be referred to as explanatory of the invention disclosed in the first patent. The suggestion is that the former may be broadened in its interpretation by reading backward from the particulars of the second patent. The meaning of this would be simply to expand, or diminish, or change the form of the parts of the combination with reference to each other according to the hints of the second patent. But there is nothing in all this. Without any auxiliary support, the claims of a patent, unless in terms or by necessary implication they are restricted, will include all changes of form, whether of size or shape, if the mode of operation is not changed. It is the character of the means employed, and not their dimensions or details of form, which denote the substance of an invention. *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Ives v. Hamilton*, 92 U. S. 431, 23 L. Ed. 426; *Elizabeth v. Pavement Co.*, 97 U. S. 137, 24 L. Ed. 1000. So, too, the mere change of the location of the parts of a combination, if the parts still perform the same duty, and by the same mode of operation, will not take the structure out of the bounds of the patent. *Northwestern Horse-Nail Co. v. New Haven Horse-Nail*

Co. (C. C.) 28 Fed. 234, 238; Roller-Mill Co. v. Coombs (C. C.) 39 Fed. 25, 33; Knox v. Mining Co., 6 Sawy. 430, 438, Fed. Cas. No. 7,907; Devlin v. Paynter, 12 C. C. A. 188, 64 Fed. 398. If, however, such changes of size, form, or location effect a change in the principle or mode of operation such as breaks up the relation and co-operation of the parts, this results in such a change in the means as displaces the conception of the inventor, and takes the new structure outside of the patent. Brooks v. Fiske, 15 How. 212, 221, 14 L. Ed. 665; Manufacturing Co. v. Brill, 4 C. C. A. 374, 54 Fed. 380, 384; Gould v. Rees, 15 Wall. 187, 193, 21 L. Ed. 39. For example, the steam receiver in the Frost patents seems disproportionately large. If this is true, it would be a matter of mere mechanical skill to reduce it to proper proportions, and the mode of operation would not be changed. Probably, too, the location of the steam receiver might be changed, as was done in his second patent, without disturbing the identity of his invention.

We come now to the consideration of the Metcalf patent, which is the gist of the infringement of which complaint is made. This patent dispenses with a steam receiver external to the cylinder, but there is that in the construction of the other members which is to some extent a substitute for it, though not an equivalent, which we will refer to presently. The following is a copy of the drawing and the substance of the specifications referring thereto:



"A represents the engine cylinder, B the piston rod, P the piston head, C the live steam supply tube, and H is the head of the cylinder, of which the supply tube, C, is a fixture. The piston rod, B, is provided with a longitudinal channel or chamber, J, reaching a suitable portion of its length from its fixed end in the piston head, where the contiguous bushing or stuffing box, o, serves the purpose of a closure of the said longitudinal chamber, and in which the tube, C, has sliding engagement, as seen. Adjacent to the inner end of the bushing, o, a steam conduit, R, rises parallel with the face of the piston head, and connects the longitudinal chamber of the rod with the live steam annular chamber, M, situated between the packing rings, l, l, of the piston head, P. Firmly fixed centrally of the head, H, of the engine cylin-

der, is situated the supply steam tube, C, whose free opposite end reaches sufficiently near the end of the cylinder to secure telescopic engagement with the channel, J, of the piston rod throughout the reciprocations of the engine piston, as clearly seen in the drawing. From the fixed end of the tube, C, opens the steam passageway, W, leading from the live steam chest or other source of supply; and near each end of the engine cylinder valve-tripping steam passages, v, v, alternately connect the piston chamber or steam reservoir, M, with the end chambers of the valve at each reciprocation of the piston, whose pulsations are thereby actuated and controlled in manner following, to wit: Steam is conveyed from the chest through the passageway, W (dotted lines), to the tube, C, of the cylinder head, H, and delivered by means of the telescopically sliding chambered piston rod, B, and connected conduit, R, into the annular chamber or steam reservoir, M, of the piston head, whence it alternately passes through the valve-tripping passages, v, v, to the respective end chambers thereof, whereby the valve is moved to reverse the action of the engine piston."

It will be seen that the steam is taken by a passage coming through the cylinder head into and through a tube extending from the head into a channel in the rod. From the open end of the tube it passes back in a space between the tube and the rod to a passage in the cylinder head, and through that to a depression in the periphery of the head. This depression registers with a port in the cylinder at each end as the piston moves in opposite directions through the cylinder. A passage leading from each of these ports takes the steam to the ends of the valve, thus giving the isochronous movement of piston and valve which is essential to all the constructions to which we have referred. The learned judge who heard the case at the circuit considered that Metcalf had dispensed altogether with a steam reservoir, but it is proper to observe that in his specification he speaks of the channel in the rod as a "chamber," and of the depression in the periphery of the piston head as "the annular chamber or steam reservoir, M, of the piston head"; and it would seem a just inference that he intended the space between the tube and the rod and that in the annular periphery of the head as furnishing the necessary storage room for steam. But, if so, the fact remains that in this patent there is no steam reservoir outside of the cylinder, which was the prime idea of the Frost patents, but, such as they are, the means for taking steam after it is brought through the passage from the chest to the respective passages leading to the ends of the valve are located, receiver and all, entirely within the cylinder; in this respect according with the earlier Marsh and other patents. It is claimed by counsel for complainant that the reservoir of Frost finds an equivalent in the storage spaces for steam in the Metcalf patent, but we think this contention cannot be sustained. Where, as in this case, the invention is for an improvement upon former constructions designed and operated to produce similar results, the invention must be measured by the improvement. Things cannot be held to be equivalents simply because they produce the same or similar results. Barth used the channeled rod for the purpose of conveying steam from the outer end of the piston head through the cylinder to registering ports for passage to the ends of the valve. But his means did not provide for the use of live steam. Marsh

brought live steam into an "annular depression" in the cylinder head, from whence it was taken by passages leading to the ends of the valve, dispensing with intermediate means. Metcalf, by using Barth's idea of conveying the steam to the valve ports and passages through the piston rod, and making the necessary adaptations, and employing, but greatly modifying, the annular depression of the Marsh cylinder head, shortened up the latter, thereby removing to a great extent the objection which it was the purpose of Frost's invention to remedy. We have no occasion to express any opinion upon the question as to whether Metcalf's invention is adequate to the purpose. But we are constrained to the conclusion that he has not employed that feature of the Frost patent which constituted the distinguishing characteristic of the latter; that is to say, the steam reservoir external to the cylinder. As this element is not employed, there is no infringement. In the case of *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343, 30 L. Ed. 1004, where the facts were quite as favorable to the claim of infringement as in this, it was held that, the patentee having pointed out as a distinguishing feature of his invention that his piston head was detached from the rod, the defendant did not infringe by using a piston head and rod rigidly connected as a substitute therefor, although he employed the other features of the first invention. It seems probable, also, that the modes of operation of the remaining parts employed in these inventions are so far different that they could not, in view of the prior art, be held to be equivalents. Sharp comment is made by counsel for complainant upon the fact, appearing in the evidence, that, immediately upon Frost's invention obtaining publicity, Metcalf was employed to bring out something which would enable the defendant to also get over the objections to the faults of the Marsh inventions; that he examined the Frost patent with much care, and that "in a few days" he produced the scheme of the patent subsequently secured by him. The circumstances alluded to are calculated to excite close scrutiny, but they do not affect the conclusion which must be formed, when the essential facts are ascertained and duly considered. Cautious attention by inventors to what others have done in the same art is not of itself a fault, but a necessity rather. It follows that the decree of the circuit court dismissing the bill should be affirmed.

METALLIC EXTRACTION CO. v. BROWN.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1900.)

No. 1,346.

1. PATENTS—CONSTRUCTION OF CLAIMS.

When language in a claim of a patent is evidently used with reference to the particular construction of the device illustrated by the drawings, without intention of limiting the claim to that particular construction, it will not be construed to effect such limitation, where to do so would be to deprive the inventor of the benefit of his actual invention, as clearly disclosed by his specification.

2. SAME—INFRINGEMENT—ORE-ROASTING FURNACES.

The Brown patent, No. 471,264, for improvements in ore-roasting furnaces, describes an invention the essential feature of which consists in constructing a supplemental chamber in which the actuating mechanism for moving the "rabblers" or ore stirrers travels; the object being, as stated in the specification, to protect such mechanism from the direct effect of the heat, dust, and fumes from the ore. *Held*, that such invention was not anticipated, and was meritorious, and that, in view of its declared object, the language of claim 1, which locates the supplemental chamber at the side of the main roasting chamber, as shown in the drawings, which illustrate the device as applied to a double-decked furnace, should not be construed as a limitation making the location an essential element of the invention, but the claims should be given a construction broad enough to cover the actual invention as applied to either a single or double decked furnace; also *held* that the patent was infringed by a single-decked furnace constructed in accordance with the Ropp patent, No. 532,031, having a supplemental chamber used for the same purpose, located beneath the roasting chamber.

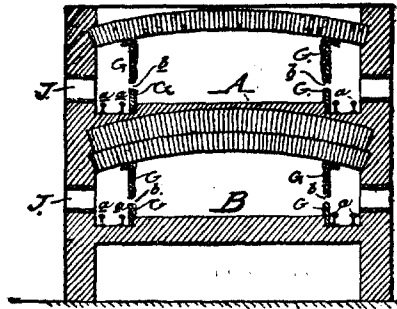
8. SAME—APPEAL—QUESTIONS PRESENTED.

An appeal taken under section 7, Act March 3, 1891 (26 Stat. 828), as amended by Act Feb. 18, 1895 (28 Stat. 666), from a decree awarding an injunction against infringement of a patent and authorizing an accounting as to damages, and which has not become final, does not raise any question as to the damages recoverable under the pleadings and proofs.

Appeal from the Circuit Court of the United States for the District of Colorado.

This is an appeal by the Metallic Extraction Company, the defendant below, from an order enjoining the infringement of United States letters patent No. 471,264, granted to Horace F. Brown, the appellee, on March 22, 1892, under an application that was filed August 14, 1891. The patent in question was issued to Brown for alleged "new and useful improvements in ore-roasting furnaces." The nature of the patented device which was adjudged to have been infringed will be readily comprehended by the drawing on the adjoining page, Fig. 1, which is copied from the patent issued to Brown, and is a cross section of a double-deck ore-roasting furnace, made in accordance with directions contained in the patent. The larger spaces, marked "A" and "B," in the drawing, represent the two chambers of the furnace, one above the other, where ore is placed for the purpose of roasting it. The narrower spaces, on both sides of the roasting chambers, marked "a, a," in the drawing, represent corridors, or, as they are termed in the patent, "supplemental chambers." They are of equal length with the central or roasting chambers, and are parallel therewith, but separated therefrom by a slotted wall or partition, indicated in the drawing by the letters G, G. In these corridors a track is laid for their full length, on which, when the furnace is in operation, wheeled carriages propelled by an endless chain are run. From each carriage an arm projects laterally through the slot in the partition to the center of the roasting chamber, and from these arms depend stirrers, or "rabblers," as they are usually termed, which reach nearly to the floor of the roasting chambers. As these carriages move along the track in the corridors the rabblers also move in the same direction, thereby stirring up the ore in the roasting chamber, and effectually exposing it to the action of the heat. In a double-deck furnace, such as the figure represents, the carriages are made to move by mechanism, which it is unnecessary to describe, through the upper corridors in one direction, and thence through the lower corridors in the opposite direction. The carriages practically form links in the endless chain by which they are actuated. By the action of the rabblers as last described, the ore in the upper roasting chamber is also gradually moved to one end thereof, where it falls through a hole in the hearth into the lower roasting chamber, and is thence moved along the floor or hearth of the lower chamber to the opposite end thereof, where it falls through another hole to the cooling floor.

FIGURE 1.



The infringing device, the use of which by the appellant was enjoined by the lower court, is made in accordance with the specifications and drawings of United States letters patent No. 532,013, issued to Alfred Ropp on January 1, 1895, under an application which was filed on February 19, 1894. The construction of the infringing device will be readily comprehended by reference to the drawing on the adjoining page, Fig. 2, which is copied from the Ropp patent. In the drawing last referred to, A represents the roasting chamber of a single-deck furnace, and B, B, the hearth. Beneath the furnace is an open chamber, E, within which a four-wheeled truck travels on an iron track. From this truck an arm, G, extends upwardly through a slot in the hearth, and attached to its upper end is a supporting bar, H, from which rabbles or stirrers depend very nearly to the floor of the hearth. When the furnace is in operation, the truck moves on its track through the chamber underneath the hearth, and carries with it the bar and depending rabbles, by which the ore in the roasting chamber is stirred, and effectually exposed to the heat. When the truck reaches the end of the roasting chamber, it is made to return over a circular track exterior to the furnace to the opposite end, and re-enter the chamber or passageway underneath the roasting chamber. In the Ropp furnace, as in the Brown furnace, the chamber in which the rabble-bearing truck moves extends the full length of the roasting chamber, and is parallel thereto.

FIGURE 2.

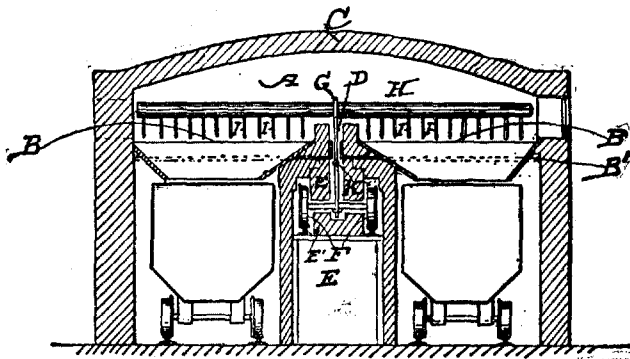


FIGURE 3.

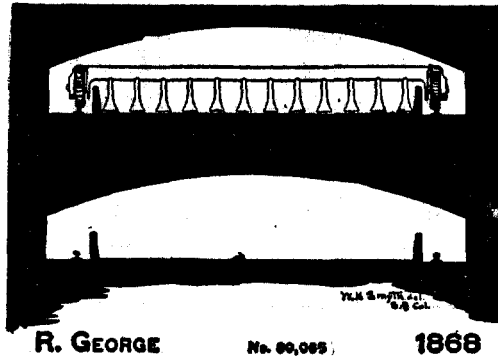


FIGURE 4.

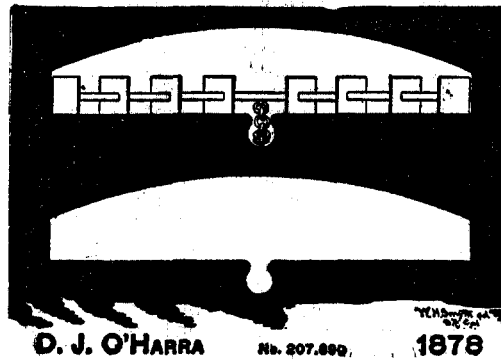


FIGURE 5.

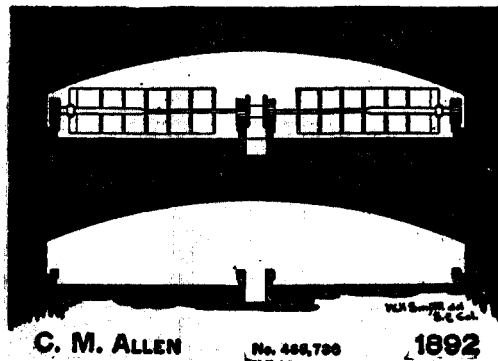
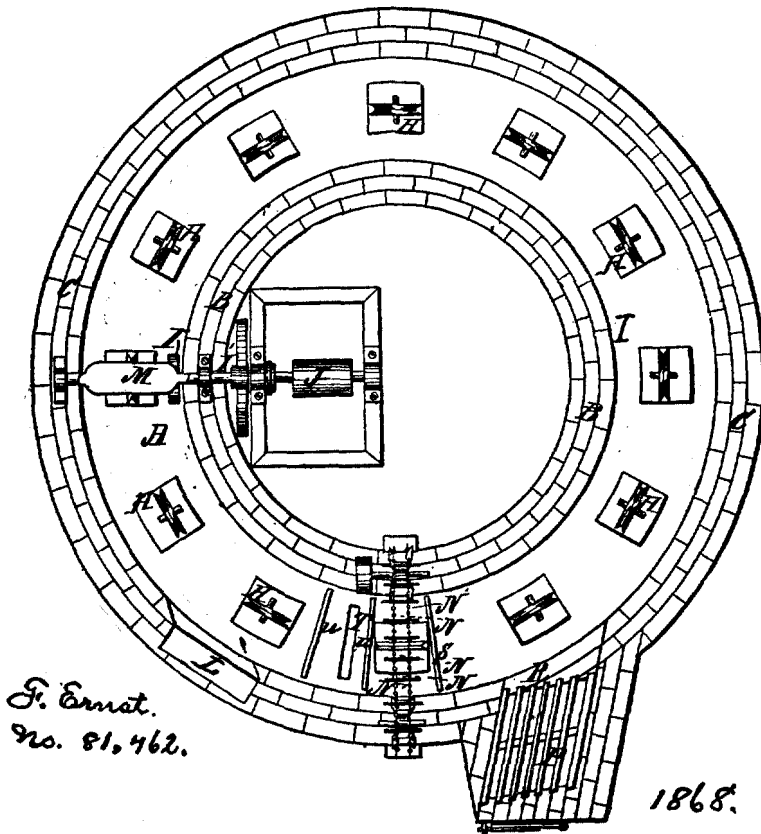


FIGURE 6.



The plaintiff below contended, and the lower court so decided, that an ore-roasting furnace constructed in accordance with the specifications and drawings of the Ropp patent infringes claims 1 and 4 of the earlier patent granted to Brown. These claims in the Brown patent are as follows:

"(1) In an ore-roasting furnace having means for stirring and advancing the ore, a supplemental chamber at the side of the main roasting chamber, and cut off from said main chamber by a wall or partition, and carriers in said supplemental chambers connected with the stirrers, but removed from the direct action of the heat, fumes, and dust, substantially as herein described.
* * *

"(4) In an ore-roasting furnace, a wheeled carrier adapted to travel within the same, having a laterally projecting arm, to which the stirrers or blades are attached, and means for operating the carriers, substantially as herein described."

John H. Miller, for appellant.

Philip C. Dyrenforth, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The decision of the case in hand hinges on the construction which shall be given to claims 1 and 4 of the Brown patent, quoted above, and principally on the construction which shall be given to claim 1. The contentions of the respective parties, stated briefly, are as follows: The appellant insists that the invention of Brown covered by his first claim must be confined to "a supplemental chamber at the side (and not underneath or above) the main roasting chamber," because the patentee has expressly limited himself to such a location of the supplemental chamber by the language of his claim, and because the margin of invention is so small, in view of the state of the art when the patent was issued, that it will not admit of a broader interpretation of the claim. On the other hand, the appellee insists that the invention covered by the first claim is so far primary that the claim should be construed liberally so as to cover the actual invention disclosed by the specification, and that it should be held to comprehend a supplemental chamber placed underneath the roasting chamber, which is designed solely to protect the chain and trucks by which the rables are operated, as well as a chamber placed at the side thereof, and designed for the same purpose. Furnaces for the roasting and desulphurizing of mineral bearing ores were in use, as a matter of course, long prior to the date of Brown's patent, and it seems that single-deck, double-deck, and possibly multiple-deck furnaces had been constructed and had been in use for some years. In whatever form they were constructed, whether with a single deck or a double deck, it appears that it had been found necessary to stir or agitate the ores in the roasting chambers so that they would be evenly and effectually exposed to the heat, and that various instrumentalities had been employed for that purpose. The design or plan of a furnace which Brown annexes to his specification is that of a double-deck furnace, and he says generally of his invention that it "relates to that class of horizontal furnaces having two separate longitudinal compartments forming hearths, one above the other, with connecting passages between them, and employing carriages drawn by chains or cables for gradually conveying the ore from the feeding to the discharge opening." Further on in his specification, he points out the difficulties that had been encountered in the operation of furnaces, which his invention was intended to obviate, and in that behalf says:

"A serious objection to many of the furnaces of the type herein shown has been that the chains and their attachments were drawn through the center of the furnaces, and were thereby exposed to the destroying action of the heat, dust, and fumes from the ore, and consequently these parts were soon destroyed. A second objection arose from the fact that the plows or stirrers traveled against the floor of the compartment, which, being usually made of brick, would not only soon be cut in channels and worn out, but the plows or stirrers themselves would also quickly be worn away. The essential part of my invention lies in constructing the furnaces so that these objectionable features are avoided, and the moving or carrying parts protected from the direct action of the heat, fumes, and dust."

He then proceeds to describe the manner in which he obviates the difficulties above mentioned, by locating the chains and the trucks

which operate the rabblers or stirrers in a supplemental chamber adjacent to the roasting chamber, and separated therefrom by a slotted wall or partition. It is noteworthy that the difficulties mentioned by Brown as having been encountered in operating ore-roasting furnaces must have been experienced in the operation of single-deck furnaces, as well as in the operation of those of the double or multiple deck pattern, and that the device suggested by Brown was as well adapted to overcome the difficulties in one class of furnaces as in the other.

It is no doubt true, as counsel for the appellant suggests, that in furnaces of the double-deck kind the supplemental chamber for housing the rabble-operating machinery, and protecting it from heat, cannot be conveniently located elsewhere than at the side of the roasting chamber, and that it cannot well be placed underneath the hearth, as in the Ropp patent. But it will not do, we think, to argue from this premise, or from the fact that Brown selected a furnace of the double-deck pattern to illustrate his invention, that he did not intend to claim the supplemental chamber, except as it might be applied to double-deck furnaces, and located at the side of the main roasting chamber. It is most probable, we think, that in formulating his first claim he casually described the location of the supplemental chamber as it appeared in the drawings of the double-deck furnace annexed to his specification, without intending to make the location of the chamber an essential part of his invention. In that part of his specification where he asserts, in substance, that the essential feature of his invention consists in constructing a supplemental chamber to protect the rabble-operating mechanism, he does not intimate that he regards the location thereof, whether it be above, below, or at the side of the roasting oven, as a matter of importance, while it is obvious, at a glance, that its location is nothing more than a matter of convenience. In a double-deck furnace it is most convenient and practicable to place the supplemental chamber at the side of the main roasting oven; in a single-deck furnace it is equally convenient to locate it underneath the hearth, making a slot in the hearth, instead of in a partition wall, through which an arm may be projected to support and carry the rabblers. On whichever side of the four sides of the roasting oven the supplemental chamber is located, it operates in the same manner and accomplishes the same object. The merit of the invention, or, as the patentee himself says, the "essential part" of it, consists in the conception of a supplemental chamber to protect certain important mechanism from the disastrous effects of heat. This conception having been formed, its location in the various kinds of furnaces to which it might be applied with equal effect, to obviate difficulties that were common to all, was purely a matter of choice or convenience.

After an examination of the various patents that were introduced by the appellant to establish the state of the art at the time of Brown's application for a patent, we do not find that any inventor had described a method of protecting the rabble-operating mechanism of an ordinary ore-roasting furnace from the direct effects of heat by placing the mechanism in a supplemental chamber adjacent to the roasting oven, and separated therefrom by a wall or diaphragm. The

patents that are chiefly relied upon by the appellant to lessen the originality and disparage the merits of Brown's invention, and to compel a narrow construction of his first claim, are the following: United States letters patent No. 81,762, issued to Frederick Ernst on September 1, 1868; United States letters patent No. 80,065, issued to Robert George on July 21, 1868; United States letters patent No. 207,890, issued to David J. O'Harra on September 10, 1878; and United States letters patent No. 468,736, issued to Charles M. Allen on February 9, 1892, under an application therefor that was filed February 28, 1891. Four drawings have been appended to the foregoing statement (Figs. 3, 4, 5, and 6), for the purpose of showing the rabble-operating mechanism which is described in these patents. By referring to the drawings, it will be observed that, in three of the patents,—those which were issued to George, O'Harra, and Allen,—the mechanism in question, to wit, the trucks, the tracks on which they run, and the chain by which the trucks are propelled, is located in the main roasting chamber of the respective furnaces, where it is exposed to the direct action of the heat and corrosive gases. In the O'Harra patent a trough is constructed in the floor of the furnace, into which the endless chain which propels the rabbles may be dropped temporarily, by lessening its tension, when the furnace is not in operation. The Ernst patent describes a furnace of an entirely different type. The furnace is circular in form, and the hearth of the roasting chamber, which is indicated in the drawing by the letters I, I, revolves between two circular walls, B, C, carrying with it its load of ore. The ore is stirred as the hearth revolves by coming in contact with plates (one of which is indicated in the drawing by the letter M), which are placed across the hearth, and have bearings in the opposite walls. In this species of furnace there is no occasion for rabble-operating mechanism, such as is found in the other furnaces, because the ends of the stirrers are fixed in the walls and have no progressive motion. In the light of the present record, it must be conceded, we think, that Brown was the first to conceive the idea of constructing a supplemental chamber adjacent to the oven of an ordinary ore-roasting furnace, and locating the rabble-operating mechanism therein, for the purpose of shielding it from the heat and prolonging its life. No other inventor prior to his time appears to have hit upon that mode of construction, and in suggesting it he appears to have made a marked advance in the art of furnace building, even if his invention cannot be properly termed a pioneer invention.

This brings us to the crucial question whether Brown's first claim may be so construed as to embrace a supplemental chamber, located, as in the Ropp patent, underneath the roasting chamber of a single-deck furnace, although the language of his claim locates it "at the side of the main roasting chamber." As respects this question, the decision in the case of *Winans v. Denmead*, 15 How. 330, 14 L. Ed. 717, seems to be very much in point. In that case Winans had obtained a patent for a new method of constructing coal cars, and in his specification had described the box of the car as circular, and had also claimed it specifically as being made in the form of the frustum of a cone. The defendant had constructed boxes for his coal cars in the form of the frustum of a pyramid, the sides thereof being recti-

lineal, and by so doing had reaped all the advantages incident to the patentee's method of construction. Inasmuch as the invention of Winans appeared to be of much practical value, in that cars of his make could carry a greater load in comparison with their weight than ordinary cars, it was held, in substance, that he was not limited to the particular form of box described in his claim, but was entitled to an interpretation of the claim that would comprehend a car box made in the form of a frustum of a pyramid, which accomplished the same new result as the patented box, by the same principle of operation. Notwithstanding the language of the claim, the court declined to hold that the patentee had limited himself to the precise form of box mentioned therein, giving as its first reason for declining to so rule that the reasonable presumption was that, having a just right to cover and protect his whole invention, he intended to do so. *Winans v. Denmead* was cited, and the doctrine enunciated therein was applied, in the recent case of *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713, where the patent under consideration was for an improvement in machines for beating rags and other fibrous material into pulp. In that case it appeared that the patentee in one of his claims had described his improvement as consisting in part "in circulating the fibrous material and liquid in vertical planes." By making slight changes in some parts of the machine described by the patent, the defendant had manufactured and was using a pulp-making machine which caused the pulp to circulate in the vat in a "horizontal plane" instead of circulating in "vertical planes." Upon an examination of the defendant's machine, the court found that he had succeeded in appropriating all that was of value in the patented device. It accordingly held the defendant guilty of an infringement of the plaintiff's patent, and declined to regard the statement contained in the plaintiff's claim as to the manner in which the pulp circulated as a limitation of the claim. *Winans v. Denmead* has been cited with approval, and the principle enunciated has been applied, in several other cases, to wit: *McCormick Harvesting Mach. Co. v. Aultman & Co.*, 37 U. S. App. 299, 16 C. C. A. 259, 69 Fed. 371, 387; *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 21 U. S. App. 244, 10 C. C. A. 194, 61 Fed. 958; *Electric Co. v. La Rue*, 139 U. S. 601, 606, 11 Sup. Ct. 670, 35 L. Ed. 294; *Devlin v. Paynter*, 28 U. S. App. 115, 12 C. C. A. 188, 64 Fed. 398.

We are unable to find in Brown's specification, considered as an entirety, or in the state of the art at the time his application was filed, sufficient reasons to warrant us in holding that he intended to claim less than what now appears to have been his full invention, and that the language of his claim locating the supplemental chamber "at the side of the main roasting chamber" was used deliberately for the purpose of limiting it. We can conceive of no reason for such a self-imposed limitation, since it is obvious that whether the supplemental chamber was placed at the side of the main roasting oven, or underneath, it would operate in the same manner and produce the same result. As we have before intimated, we think that the words stating the location of the supplemental chamber crept into the claim inadvertently, because of the style of furnace that happened to be

chosen to illustrate or embody the invention. We are accordingly of opinion that the first claim of the Brown patent should be construed to cover a supplemental chamber placed beneath the main roasting chamber, as in the Ropp device, because a supplemental chamber so placed is a mere mechanical equivalent for one located at the side thereof.

In opposition to this view, our attention is challenged to the decision in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344, where, as it is claimed, a doctrine was announced which is fatal to a recovery in the present instance. In that case the language of a claim which described the lower cords of a truss bridge as a "series of wide and thin drilled eye bars, O, C, applied on edge between ribs," was construed literally, and held not to comprehend cords made of round bars of iron flattened at the ends. A careful study of the decision, however, has served to convince us that the language last quoted was construed literally, because the court was satisfied by an examination of the specification that the patentee intended to make the form of the cords of the truss as described in his claim an essential part of his invention, and because the margin of invention in that case was so small as to necessitate a strict construction of the claim. The reasons which appear to have influenced that decision do not exist in the case in hand, because we are unable to say that Brown intended to claim less than he was entitled to claim, or that the state of the art demands a literal interpretation of his claim.

It is urged finally in behalf of the appellant that the decree which was entered by the lower court must, in any event, be modified so as to exempt it from an accounting for damages resulting from the infringement, because the appellee did not allege in his bill or tender any evidence that he had marked his machines with the word "Patented," together with the day and year the patent was granted, or prove that the defendant was duly notified of the infringement, as required by section 4900 of the Revised Statutes. In support of this proposition, the appellant cites *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576, 38 L. Ed. 426; also *Coupe v. Royer*, 155 U. S. 565, 584, 15 Sup. Ct. 199, 39 L. Ed. 263. With reference to this point, it may be said that, as this is an appeal taken under the provisions of section 7 of the act of March 3, 1891 (26 Stat. 828, c. 517), as amended by the act of February 18, 1895 (28 Stat. 666, c. 96), the decree below not having as yet become final, the appeal brings before this court for review only so much of the decree as awarded an injunction. Besides, we do not find that the attention of the lower court was directed to that clause of its decree which authorized an accounting as to the damages, and it may be that no damages will ever be claimed by the appellee or assessed in his favor. In view of these considerations, we do not deem it necessary at this time to wade through the great volume of testimony to ascertain if there was, in fact, sufficient evidence that notice of the infringement had been given to the appellant to warrant a recovery of damages as well as profits. This question may well be left open for future consideration when there shall have been a final decree which awards damages. With this reservation of the right to consider the question last mentioned, if it shall ever become necessary to do so, the decree below is affirmed.

ROSS-MOYER MFG. CO. v. RANDALL et al.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1900.)

No. 821.

1. PATENTS—CONSTRUCTION OF CLAIM.

The use of letters in a claim to describe a patented invention, which is merely an improvement of a narrow character, will limit the inventor to the elements so designated, as shown in the drawings and specification to which the letters refer, which are by such reference, in effect, incorporated in the claim.

2. SAME—INFRINGEMENT—STRAP TRIMMERS.

The Randall patent, No. 380,296, for an improved strap trimmer, is valid, but is limited to the particular construction specified in the claim and described in the drawings and specification, and as so limited is not infringed by a machine made in accordance with the Miller patent, No. 611,181, which shows a different construction of the swinging levers which hold the strap in place during the operation.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

E. E. Wood and Wm. R. Wood, for appellant.
James Moore, for appellees.

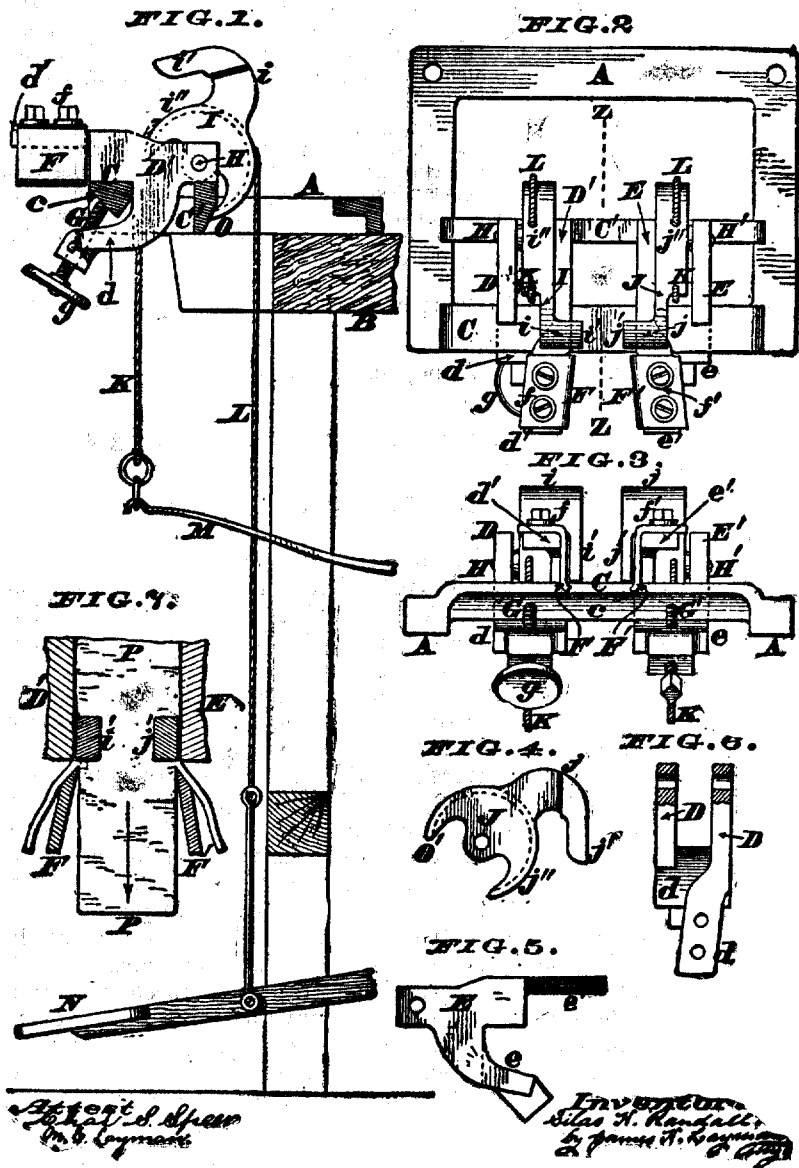
Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This action was brought in the court below for an injunction and accounting against the Ross-Moyer Manufacturing Company for infringement of letters patent granted to Silas H. Randall for an improvement in leather-trimming machines, issued March 27, 1888, No. 380,296. After hearing, the court adjudged the machine in use by respondents, and made in conformity to letters patent granted subsequent to the Randall patent to L. L. Miller, No. 611,181, dated September 20, 1898, for trace trimmer, an infringement of the Randall patent, which the court found to be a valid invention. From that decree this appeal is taken to this court.

An examination of the letters patent and models in evidence in the case make it apparent that leather-trimming machines, having the general features of the Randall patent, were old at the time of that invention. Machines having bedplates, knives, carriages for the knives, adjustable for different widths of straps, screws to lock the carriage on the guide, and levers to hold the straps in place between the knives for continuously trimming opposite edges thereof, had long been in use. The Osborn model in evidence is a machine having these various elements, permitting the strap to be threaded through the same, with levers the feet of which have a spring pressure upon the strap to hold it in position, the springs being operated by means of a torsion lever. Randall recognized that he was entering an old field, for he begins his specification with the statement:

"My invention comprises a specific construction of those machines which are employed for simultaneously trimming the opposite edges of a trace or other similar strap."

This statement recognizes that broad claims could not be granted for the invention, and the inventor, by this frank declaration, announces his purpose to obtain a patent for a specific construction of machines for the purpose stated. This construction the inventor describes by means of certain specifications and drawings, as follows:



"In the annexed drawings, Fig. 1 is a vertical section of my improved machine in condition for receiving a strap, said section being taken at the line, Z, Z, of Fig. 2. Fig. 2 is a plan of the machine, the presser feet being shown in their normal or depressed position. Fig. 3 is a front elevation of the machine, the feet being in the same position as in the preceding illustration. Fig. 4 is a side elevation of one of the levers, detached from its slide or carriage. Fig. 5 is a side elevation of said carriage, detached from the machine. Fig. 6 is a sectionized plan of a carriage. Fig. 7 is an enlarged horizontal section, showing the knives in the act of trimming the edges of a strap. A represents the frame or bedplate of the machine, which frame has suitable provision for attachment to a bench or table, B. Seen in Fig. 1, C, C', represent a pair of parallel guides running longitudinally of the frame, the front guide, C, having a chamfered edge, c, for a purpose that will presently appear. Adapted to be adjusted along these guides is a pair of precisely similar slides or carriages, consisting of side plates, D, D', E, E', extending above and below said guides, and united at bottom by webs, d, e, d' and e' are extensions at the front ends of the plates, D', E, to which extensions the knives, F, F', are attached by screws or bolts, f, f'. The slides are retained in position by screws, G, G', tapped into the webs, d, e, the points of said screws bearing against the chamfered edge, c, of guide, C, and the screw, G, being preferably provided with a small hand wheel, g, because the slide, D, is the one that is the most frequently shifted. Pivoted within these side plates, D, D', E, E', as at H, H', are swinging levers, I, J, the front ends of which are bent inwardly at i, j, and then carried down at i', j', which downward prolongations form the presser feet of the machine. Furthermore, each lever has a segmental cylindrical flange, i'', j'', concentric with the pivots, H, H', which flanges have thongs, chains, or wire cords, K, L, attached thereto. The thong, K, is secured to the front of said flanges, and the bend of said thong carries a weight or spring capable of causing the feet, i', j', to bear firmly upon the strap, P. In Fig. 1 this thong is shown coupled to the free end of a spring, M, the other end thereof being suitably secured to the frame of bench, B. Thong, L, is secured to the rear of flanges, i'', j'', and its bend is coupled to a treadle, N. O, O', are stops of these flanges, which stops bear against the rear side of guide, C', and thus limit the opening of levers, I, J. See Fig. 1. This machine is operated in the following manner: Slide, E, E', is first screwed very firmly to the frame, and near the right end of guides, C, C', after which act the other slide, D, D', is adjusted to the required width of strap, and retained in position by the screw, G; the stress of spring, M, serving to keep the presser feet, i', j', in contact with the upper surface of guide, C, as seen in Fig. 3. Treadle, N, is then depressed, thereby overcoming the stress of said spring, and causing the levers, I, J, to swing up until their respective stops, O, O', come in contact with the rear side of guide, C'. Ample room is now afforded for the insertion of the strap, P, between the opposing faces of slides, D, E, as seen in Fig. 7. Treadle, N, is then released, so as to swing down the levers, I, J, and cause their respective feet, i', j', to bear upon the opposite edges of the strap at a point very near the cutting edges of the knives, F, F'. The strap is then drawn forward in the direction of the arrow, the pressure of feet, i', j', preventing any wrinkling or buckling of the leather, while the knives trim off the edges of the strap in the usual manner. The above is a description of the preferred form of my machine; but in some cases either of the levers, I or J, may be pivoted to a fixture of the frame, instead of being hung upon a slide or carriage, as one shiftable carriage will afford a sufficient range of adjustment for all ordinary purposes."

Having thus described his machine, the claim of the patent is as follows:

"An improved strap trimmer, consisting of the frame or bedplate, A, guides, C, C', and slides, D, D', d, d', E, E', e, e', carrying the knives, F, F', and swinging levers, I, i, i'', J, j, j', j'', said slides being secured in place by set screws, G, G', all combined as herein described."

The provisions of the law regulating the granting of patents, which require an inventor to advise the world of his invention by a specific description thereof, and, by a definite claim, to obtain property in just so much of the invention as he seeks to appropriate, are essential that it may be known how much he has acquired as his own, and how far the public are to be restricted in the use of the invention. This specific description is open to be examined by all having occasion to enter that field of use or invention. In the case of *Fay v. Cordesman*, 109 U. S. 420, 3 Sup. Ct. 244, 27 L. Ed. 984, the supreme court said:

"The claims of the patent sued on in this case are claims for combinations. In such a claim, if the patentee specifies any element as entering into the combination, either directly by the language of the claim, or by such reference to the descriptive part of the specification as carries such element into the claim, he makes such element material to the combination, and the court cannot declare it to be immaterial. It is his province to make his own claim and his privilege to restrict it. If it be a claim to a combination, and be restricted to specified elements, all must be regarded as material; leaving open only the question whether an omitted part is supplied by an equivalent device or instrumentality."

See, also, *Brown v. Manufacturing Co.*, 6 C. C. A. 528, 57 Fed. 731.

Examining the claim of this patent, it is apparent that its statement describing the elements claimed by certain letters referring to the drawings and specification, can have no significance, unless the drawings upon which these letters are contained are examined in connection therewith. The inventor has told us that he claims a specific construction which his invention comprises. Having described his invention, this claim permits us to ascertain the extent of the monopoly secured. Following the letters therein used to describe his specific form of construction, we find the outlines thereof fully indicated. The claim is the same in that respect as if, instead of using the outline letters, the inventor had specifically described the parts of the mechanism thereby designated, as shown in the drawings referred to. Aside from the state of the art, which would necessarily limit the inventor to a narrow field, we find that he has recognized this fact by the statement of the character of his invention, and the minute description of the construction which he claims as his invention. In view of the other machines in evidence in the case, and after inspection of the patents and models, we conclude that the Randall invention amounts to no more than to increase the effectiveness thereof by a combination of elements which are old. The patent must be sustained upon the theory that he has arranged old elements in a new way, so as to improve the effectiveness and accuracy of the former devices serving the same purpose. In the Osborn model, as we have said, we find all these elements. Randall, however, has made an improvement of a limited character by substituting for the levers and springs of that mechanism a rising and lowering lever, which is worked by means of a treadle and spring attachment, so that the same can be readily raised when the strap is taken from or inserted into the machine, and exert a yielding pressure upon the strap, to hold it in place while being trimmed. It is not necessary in the Randall mechanism to thread the strap into the machine, but

it may be inserted edgewise between the levers, and turned over, to be held in position by the fingers of the lever. This improvement, we think, the court below properly held to be more than a mere mechanical advance, and to rise to the dignity of invention. It was within a narrow scope, however, and the inventor, by accurately and specifically describing by means of the letters just what he has invented, has limited himself to the advance which he in fact made. The use of letters in describing a patented device has been the subject of consideration in a number of cases in the supreme court as well as in this court. Sometimes the letters have been held to limit the inventor to the very device thus designated; in other cases the mere use of letters has not been held to deprive the inventor of a liberal application of the doctrine of mechanical equivalents. An analysis of the cases will show that the conclusion reached depends upon the character of the improvement under consideration. If the invention is of a pioneer character, highly meritorious in conception and usefulness, the mere use of letters has been held not to limit the inventor to the exact form of device shown, but he is entitled to a broader construction of his patent, in view of the advance which he has made in the art. However, if the field of invention is limited, and an improvement of a narrow character has been made, just sufficient to cross the line which divides mechanical improvement from patentable invention, the inventor will be allowed the specific description shown, and no more. In other words, he will be held to have invented just what his claim shows to have been the specific subject-matter of his improvement. Without stopping to analyze the cases, we think the following citations establish the rules just stated: *McCormick Harvesting Machine Co. v. C. Aultman & Co.*, 37 U. S. App. 299, 16 C. C. A. 259, 69 Fed. 371; *Weir v. Morden*, 125 U. S. 98, 8 Sup. Ct. 869, 3 L. Ed. 645; *Hendy v. Iron Works*, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. Ed. 207; and *Muller v. Tool Co.*, 47 U. S. App. 189, 23 C. C. A. 357, 77 Fed. 621.

We therefore think that Randall made a patentable improvement over the old mechanism shown, but in view of its limited character, and the statement in his specifications of the character of his invention, the claim must be limited to the elements shown and described within the letters indicating the elements thereof. In view of this construction of the patent, it remains to consider whether the machine made under the Miller patent embodies this construction. We find a considerable departure in the construction of the levers and the manner of operation thereof from those shown in the Randall patent. The swinging levers are described in the Randall claim by the levers, *i, i', i'', j, j', j''*, and in the specification are described as "swinging levers, *I, J*, the front ends of which are bent inwardly at *i, j*, and then carried down at *i', j'*, which downward prolongations form the presser feet of the machine. Furthermore, each lever has a segmental cylindrical flange, *i'', j''*, concentric with the pivots, *H, H'*, which flanges have thongs, chains, or wire cords, *K, L*, attached thereto." These levers, with their cylindrical flanges, are thus made an essential part of the combination. This cylindrical flange is essential to the lever as described and shown. The segments operate

to carry the connecting chains out and from the place of attachment, so as to raise and lower the levers with the finger ends for holding the strap in place during the trimming operation. In this segmented form the leverage during the operation is made constant and unvarying. By a complete description, Randall has made these segments an essential part of his invention. These levers, being raised, admit the strap edgewise between the same for adjustment between the slides. But the strap cannot be thus placed ready for operation without first turning it between the levers. In the Miller device we do not find these segmental levers. The levers are attached to the machine in such wise that its fingers can be raised and entirely removed from between the slides which hold the strap for trimming. The lever is operated by chains attached to the end thereof, the pressure varying with the position of the lever, and has not the segmental construction which is necessary to the operation thereof as described and claimed by Randall. If there is merit in a machine so adjusted that the strap can be directly placed between the slides, the advance upon the Randall mechanism is apparent, because the lever fingers are permitted to be entirely removed for admission of the strap. Whether this change constitutes patentable invention or not it is unnecessary to determine. It is enough for us to say that we find, in view of the state of the art, Randall's invention a mere improvement upon former devices, and in no sense a pioneer invention; also that, in describing the invention and stating his claim, he has limited the extent and scope of his patent to the device shown and described in the claim. Thus construed, we do not find all the elements of the combination in the alleged infringing machine. Entertaining these views, the decree of the court, so far as it adjudges the Miller machine to be an infringement of the Randall patent, is reversed, and the cause remanded, with directions to dismiss the bill.

THE LONGFELLOW.

(Circuit Court of Appeals, Sixth Circuit. October 2, 1900.)

No. 724.

1. SHIPPING—SINKING OF VESSEL—LIMITATION OF OWNER'S LIABILITY.

The Longfellow, a large river steamer, carrying passengers and freight between Cincinnati and New Orleans, on leaving Cincinnati at a time when the water was high and the current swift struck against the stone pier of a railroad bridge, and was broken in two and sunk, with the loss of her cargo and some of her passengers and crew. The owners had held her a day to await the clearing up of a fog; had provided her with competent officers, crew, and pilot, and with a powerful tug to aid her in passing the bridges at the city. *Held*, that faults in her navigation producing the collision could not be imputed to her owners, as having occurred through their "privity or knowledge," within Rev. St. § 4283, so as to prevent the limitation of their liability under said section to the value of the vessel and her pending freight.

2. SAME—EVIDENCE OF SEAWORTHINESS.

Where all the direct evidence was to the effect that a steamer was seaworthy when she entered on her voyage, it cannot be inferred from the fact that a short time before she had met with two accidents, in one of which she was slightly injured, that her seaworthiness was thereby im-

paired, in the absence of affirmative evidence that she was in fact injured thereby in her hull or machinery.

8. SAME—CARRIAGE OF PASSENGERS—DUTY OF INSPECTION.

Where a steamship had a portion of her guards torn away by a collision with a bridge pier, but an examination by competent men disclosed no injury to her hull or machinery, and only slight repairs were necessary, and she had been regularly inspected and pronounced staunch and seaworthy only three months before, the fact that no reinspection was applied for after the accident does not constitute a failure to comply with Rev. St. § 4417, regarding inspection, which will render her owners liable for injuries to passengers or their effects under section 4493, creating such liability, where they have failed to comply with any of the provisions of that title, when it is not shown that any injury in fact resulted which impaired the strength or safety of the vessel.

4. ADMIRALTY—SUIT FOR LIMITATION OF LIABILITY—COSTS.

Where the owners of a vessel, in proceedings instituted by them for a limitation of their liability on account of the sinking of the vessel, deny any negligence or any liability, as they are permitted to do by admiralty rule 56, and that issue is decided against them, they may properly be taxed with the costs arising on such issue.

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio.

In Admiralty. The steamboat Longfellow, while on a voyage from Cincinnati to New Orleans, came into collision with a stone pier of the Chesapeake & Ohio Railroad bridge which crosses the Ohio river at Cincinnati, and was instantly sunk. The boat and her cargo were almost a total loss, the appraised value of the wreck being only \$250. Several passengers, the chief clerk, and one or more of her crew lost their lives. The Longfellow was a first-class passenger steamboat plying on the Mississippi and Ohio rivers. She was constructed in 1875, and in 1893 was, to a large extent, reconstructed. She was then lengthened by the addition of a section of 30 feet about her middle. After this reconstruction and overhauling her length was 279 feet and her beam 42 feet. Her tonnage was 1,178. She was due to leave Cincinnati on the evening of March 7, 1895, but on account of fog did not leave port until about 6:40 a. m. March 8th, at which time the fog had disappeared. The river was high,—about 38 feet. To proceed down the river, she had to pass under three of the five railroad bridges crossing the Ohio at Cincinnati. At such a stage of water the current is very great, being from five to eight miles under these bridges. The evidence shows that the Chesapeake & Ohio bridge adds much to the perils of navigation, and that in high water there is a cross current which makes the most southerly of its piers an object much dreaded by navigators. In view of the stage of water, and the danger of passing the bridge, the managing officers of the corporation owning the Longfellow arranged that she should be assisted through the bridges by the Hercules Carrol, a towboat of much power, having a length of 172 feet. The Longfellow was directed not to go out until the fog cleared, and the Carrol was ordered to lie by her until she should start, and give such assistance as should be desired, both in turning and in going under the bridges. At 6:40 a. m., the fog having cleared, the Longfellow left port, and proceeded up the river, and towards the Kentucky side of the river, to secure ample room to turn in. There the Hercules Carrol came alongside, and was made fast on her starboard side, about midship. The turn was easily made, and the voyage down the river begun, the Carrol remaining alongside. The stage of the water was such as to compel the lowering of the smokestacks in order to pass under the bridges. To facilitate this, the stacks were hinged at about the height of the pilot house, so that they could be lowered out of the way of the bridges. This was done when the voyage down commenced. The pilot house was about 100 feet from the bow. The smokestacks were from 30 to 50 feet in front of the pilot house. The master was at his proper post, on the hurricane deck, about 75 feet in front of the pilot house. The suspension bridge was passed safely, though, while passing, the smoke from her stacks for a time obscured the outlook of the pilot from the pilot house. The rail-

road bridge was from 2,000 to 2,400 feet below the suspension bridge, and when the suspension bridge had been passed the pilot's vision became for a moment clear enough for him to see that he was headed for the middle of the channel span of the railroad bridge. Very shortly after this his view became again obscured, and almost simultaneously the boat took a sudden sheer to port. The pilot says he at once shouted to the captain, who was standing forward on the hurricane deck, "I cannot see a thing;" that he heard no answer, and repeated it, when the captain answered, "You are headed down to the left of the pier." He also says that somebody at the same time hollered, "Stop her!" "Back her!" The other evidence shows that this was said by the master. The first impulse of the pilot under the circumstances was to keep his speed and pass to the left of the pier, between it and the Kentucky shore. He therefore did not at once stop or reverse, but tried to make for the Kentucky shore, but in a moment he rang the bell to stop and then to reverse. He was too close. The bow passed the pier, but the boat struck the pier about midship of her starboard side. For a moment she seemed "to hang," as described by the witnesses, against the side of the pier, and then broke in two. The cabin and deck freight slid into the river, and with it several of the passengers and crew. The great majority, however, jumped over to the Carrol, which had cut loose but was close to the Longfellow's bow, and were saved. The smoke did not affect the view of the master at any time, as he was forward the stacks. Neither did he at any time notice its effect at the pilot house, or on the vision of the pilot. He says he did not hear the pilot shout that he could not see. The master also says that after passing the suspension bridge, and when within about 600 feet above the railroad bridge, the Longfellow took a sudden sheer, so as to head for the pier nearest the Kentucky shore; that he at once shouted to the pilot: "You are headed to the pier. Stop her and back her;" and that he later called to the Carrol to stop and to back. There is some conflict between the evidence of the different witnesses as to what was said by the pilot and the captain, and as to just when and who called to stop and back. This conflict need not now be regarded, as it will be referred to in dealing with another aspect of the case. In accordance with section 4283, Rev. St. U. S., and the practice thereunder as laid down in rules 54, 55, and 56 of the rules in admiralty, the owners of the steamer Longfellow filed a petition in the district court to obtain the limitation of liability conferred by the statute. For this purpose they averred that the loss and damage done or occasioned was without their "privity or knowledge." They also denied all legal liability, averring that the Longfellow was seaworthy, staunch, fully equipped, and having a full and experienced force of officers and men, and that the collision was not due to any negligence in navigation whatever. A motion issued. All persons interested or having claims were enjoined from suing, and required to set up their claims in the suit thus started. A large number of claims were presented by answers and cross libels. These cross libels were sustained to the extent of more than \$80,000, but the district court held that the owners were not liable beyond the value of the vessel and freight earned. No freight had been earned. The value of the wreck was appraised at \$250. The decree was that the owners pay this sum into court, and also enough to pay all costs, except the cost of depositions taken by cross libelants in support of their issues, and that the cost of such depositions be paid out of the fund, and the remainder distributed pro rata among those who had established losses.

R. B. Bowler, Joseph Wilby, and Oscar M. Gottschall, for appellants.

W. H. Jones, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The appellants are numerous. They may be divided into two classes: First, those who prefer claims for cargo lost; second, claims

preferred by passengers for loss of baggage, or by the representatives of passengers who lost their lives. The limitation of liability afforded by section 4283 applies to the claims of both classes of appellants, subject to the modifications in favor of passengers made by sections 4487 and 4493 of the Revised Statutes. *Butler v. Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017. The bearing and effect of these modifications will be considered hereafter.

1. Section 4283 of the Revised Statutes reads as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage, forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

The material question arising here is whether the loss of the Longfellow occurred "without the privity or knowledge" of her owners. Under the common as well as the civil law, a shipowner was personally liable to the full extent of any loss or damage resulting from the fault or wrongful conduct of the master or crew. In the interest of commerce, the maritime law of modern Europe limited his liability, if free from personal fault, to the extent of the value of his interest in the ship and her pending freight. The history of this limitation of liability is so fully and luminously stated by Justice Bradley in *Transportation Co. v. Wright*, 13 Wall. 104, 20 L. Ed. 585, and the subsequent case of *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134, as to make it only necessary to refer to those opinions. The section of the Revised Statutes set out is from an act passed by the congress in 1851, and its clear purpose was to place the shipping of the United States upon a footing similar to that of European competitors. To this end the act has been liberally construed in aid of the object and purposes of congress. Unless, therefore, the loss of the Longfellow was with the "privity or knowledge" of the owners, they are not to be held liable beyond the value of the vessel after the termination of the voyage and her pending freight. The petition of the corporate owner avers that the loss of the steamer arose through a peril of the river, without any negligence or fault, or that, if there was negligence or fault, it was that of the master or pilot, and was not such personal negligence or fault as to make the owners liable beyond the value of the vessel and her freight. They aver that due diligence was used to make the steamer seaworthy, and that in fact she was so. The answer and cross libels deny that the loss was by a peril of the river, or that it was without negligence, and aver that it was the result of the negligence of both the owners and of those in charge of her navigation. They deny that the Longfellow was seaworthy when her voyage began, and aver that she was badly loaded and overloaded, badly equipped, and improperly manned. A great amount of evidence was taken upon the issues thus made up, with the usual conflicts in respect to the occurrences immediately connected with the collision and loss of the boat, but no more than might be anticipated, considering the excitement, alarm, and interest of those who were spectators. The learned district judge reached the

conclusion that the steamer was seaworthy, that she was properly equipped and manned, and that she was neither overladen nor improperly laden. He further reached the conclusion that her loss was due to faults of navigation. These faults of navigation he found were without the knowledge or privity of the owners, who were therefore exonerated from liability beyond the value of the wreck and freight. The errors assigned by the appellants who were cross libellants do not open up the decree so far as it was found that there was faulty navigation, but are confined to that part of the decree which limited the liability of the owners. The only error assigned by the corporate owners of the steamer, the cross appellant, is as to the decree for costs. It follows that we must, for the purposes of this appeal, assume that there was faulty navigation, and confine our review to the question as to whether the loss and damage was without the "privity and knowledge" of the owners.

The faults which the trial judge found were clearly faults in the navigation of the Longfellow, and cannot be imputed to her owners, as having occurred through their "privity or knowledge." If we assume that there was no such positive prearrangement between the officers of the Longfellow and the Hercules Carrol as would secure the best co-operative results, it was the fault of those navigating those boats, and not of the owners of the Longfellow. The owners procured the Hercules Carrol to aid in passing under the bridges. She was directed to assist, and was there for that purpose. The navigation of the Longfellow was under the sole control and direction of her pilot, who was a licensed pilot of unquestioned reputation and skill. It was for him to direct how the Hercules Carrol should assist, and the latter was subject to his orders and direction so far as the actual navigation of the Longfellow was affected. Indeed, it is difficult to understand how the owners could do more than they did. They obtained the services of the towboat, but could not well foresee just how, in the exigencies of navigation, her movements could be directed in advance. The navigation of the towboat when lashed alongside of the Longfellow was necessarily to be governed by the navigation of the latter, and it was for the pilot to give such special orders as his judgment and the circumstances dictated. Neither was it the personal fault of the owners that the navigators of the Longfellow did not stop and back when smoke first obscured her pilot's view. If there was fault, it was a fault of those controlling her navigation, and was without the knowledge or privity of the owners. It is enough in respect to the lading of the steamer to say that there is no satisfactory evidence that she was overladen, or that there was any fault in stowing the character of freight shown to have been stowed upon her upper or hurricane deck. It has been argued that she was unseaworthy. True, she was a boat of some age. She was built in 1875, but she was reconstructed in 1893, and 30 feet added to her length. There is no tangible evidence that this addition rendered her structurally so weak as to be unseaworthy. The work was done by reputable constructors and shipbuilders, who testify that she was stanch and strong when thus overhauled and reconstructed. After that addition to her length, she made many voyages without de-

veloping any defects, and there is no material evidence which tends to contradict the positive evidence as to her general stanchness and seaworthiness. Appellants say that the fact that there was but little jar when she struck the bridge pier, and that she went to pieces so rapidly, is evidence of her rottenness, or of structural weakness amounting to unseaworthiness. That her important timbers were not rotten, but sound, is too clearly shown to be worthy of serious argument. Nor is the fact that no great jar was observable of great weight as evidence of unseaworthiness. When she struck she had not fully lost her headway and the current was carrying her down at from five to eight miles per hour. She struck amidship, and not bow first, and the object she struck was a solid stone pier, presenting an edge like the bow of a ship. The jar would doubtless have been greater had she hit bow on, or hit a yielding object like a boat or even a wooden dock. Striking on her starboard side about amidship, the first effect of the blow and the current seems to have been to "hang her" against the side of the pier. Her bow and stern, insufficiently supported, would tend strongly to produce a break in the middle of a steamer having her length. But it is said that a month prior to this she had collided with the same pier, and had not been thereafter officially inspected. The evidence shows that upon that occasion her starboard guard was struck and partly torn away. That collision occurred at night. The boat was landed, and the next morning an examination was made by Capt. Laidley, an experienced master, and president of the company owning the boat, and by the superintendent of repairs. No injury, except to the guard, was discovered, and the boat was ordered to continue her trip, the repairs being made en voyage. On her way back from New Orleans she grounded near Paducah, and was pulled off by aid of another boat. There is positively no evidence whatever showing that either this previous collision or this grounding had in fact affected the seaworthiness of this boat. It is strange that, if her hull was injured by either, some tangible evidence had not before appeared, or been shown in the proof. The grounding of a steamer navigating the Mississippi and Ohio is a matter of common occurrence, and the consequences to be apprehended are not at all like those following from a ship at sea striking a reef, or even going on a bar. Assuming that the general burden is upon the owners to show seaworthiness, where the evidence of the fact is such as to be peculiarly within their knowledge or control, we think that burden has been met. In view of the entire evidence touching the condition of this steamer when she left port, we do not think the court would be authorized to infer that the seaworthiness of this steamer was seriously impaired by the two accidents preceding her final voyage, in the absence of some affirmative evidence that her hull or machinery were in fact injured by reason thereof. We quite agree with the court below in the conclusion that this boat was seaworthy, in view of the voyage she was to make.

2. In behalf of those appellants whose claims arose out of the loss of life of passengers, it is argued that the master, after being admonished by the pilot that the further navigation of the vessel was unsafe, in consequence of the interference of smoke with his view, elected to

pursue the voyage, and thereby made the owners answerable for all damages which should occur to any passenger or his baggage. This contention is based on section 4487, Rev. St., which is in these words:

"On any steamer navigating rivers only, when, from darkness, fog, or other cause, the pilot or watch shall be of opinion that the navigation is unsafe, or, from accident to or derangement of the machinery of the boat, the chief engineer shall be of the opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor, or moored as soon as it can prudently be done; provided, that if the person in command shall, after being so admonished by either of such officers, elect to pursue such voyage, he may do the same; but in such case both he and the owners of such steamer shall be answerable for all damages which shall arise to the person of any passenger, or his baggage, from such causes in so pursuing the voyage, and no degree of care or diligence shall in such case be held to justify or excuse the person in command, or the owners."

Appellants rely upon the evidence of G. O. Woods and Mrs. Woods, his wife, and that of a Miss Dalrymple, who were passengers, who say that they were in the pilot house when the boat started, and remained there until just before she struck the pier. These witnesses say that while passing under the suspension bridge the smoke from the Longfellow obscured the pilot's outlook, and that he called to the captain, who was standing forward, on the hurricane deck: "Captain, I can't see anything for this smoke. Stop her;" and that the captain answered back: "Go ahead. You are all right." They also substantially agree in saying that when about halfway between the two bridges the pilot again called out, "Stop her, I say; I can't see anything for this smoke," and then rang the signal bell, and that the captain answered back: "Go ahead. You are all right. Go south of the pier." We premit the question as to whether the state of facts thus testified to would, under the circumstances which then existed, constitute the "admonition" referred to by the statute, or the "election" by the master to proceed with the voyage notwithstanding the admonition of the pilot. We are quite of opinion, from a careful consideration of the whole of the evidence, that the witnesses referred to have confused what was said by the pilot to the master with what was said by the master to him, and that the pilot never did call upon the master to stop or back the boat. The situation was one which admitted of no delay or discussion. If the danger was such as to be best avoided by stopping and backing, the means of doing so were wholly under the command of the pilot. The means of communicating with the engine room were in the pilot house, and the pilot was in control of the navigation of the steamer. To suppose that in such an emergency as existed, even when passing under the suspension bridge, the pilot would undertake to advise the master that the voyage could not be safely pursued, and that he must stop or back, savors of the absurd. It was an occasion for immediate action to meet a sudden and temporary emergency. That the pilot did shout that his view was obscured is true. He probably did so twice,—once when passing under the suspension bridge, and again when he was within 1,000 feet or less of the railroad bridge. But in neither instance did he call upon the master to stop the boat. He denies that he asked the master to stop, and in this he is substantially

supported by his partner, another pilot, who was in the pilot house with him, and by Capt. McKay, an old lake captain, who was a passenger, and also in the pilot house, as well as by all the circumstances of the case. The master says he did not hear the complaint about the smoke at all, but that when the boat suddenly sheered he shouted to the pilot that "he was headed for the pier, and to stop and back." This the pilot heard, but rightly decided that if he was so headed his best chance was to go ahead at full speed, and pass the pier on his starboard side. For an instant he held to this, then changed his mind, or saw he could not pass, rung the bell to stop and reverse, and also called on the Hercules Carrol to do likewise. This was too late. Indeed, on the evidence, we are disposed to think that, from the time he passed the suspension bridge, to stop and back was impracticable, and that the only chance the boat had was to keep her speed and steer for the middle of the span before the sheer, and after that to have steered for the Kentucky shore. Half the length of the boat passed the pier before striking. A few seconds more of time, and she would have cleared it. That time was probably lost in the vain effort to stop and back. It was, however, an emergency, and an error of judgment attributable to the emergency, for which no criticism is deserved. The witnesses upon whom appellants rely have doubtless confused the pilot's earlier call, "that he could not see for the smoke," with his later direction to the Hercules Carrol to stop and back. We do not think appellants have made any case under section 4487. There was no such admonition by the pilot, or election by the master to pursue the voyage, as is contemplated by the statute.

3. The next contention is that the owners are liable under section 4493, Rev. St. That section reads as follows:

"Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this title, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or willful misconduct of any master, mate, engineer, or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer, or pilot and recover damages for any such injury caused by any such master, mate, engineer, or pilot."

One of the provisions of the title in which this section is found is that contained in section 4417, which provides that "the local inspector shall, once in every year at least, upon the application in writing of the master or owner, carefully inspect the hull of each steam vessel within their respective districts," etc. The last inspection of the Longfellow was made November 27, 1894,—less than four months preceding her loss; and a license was then issued, which recited that she was sound and stanch and fully equipped. The contention is that another official inspection should have been applied for in consequence of the collision and grounding which occurred after November 27, 1894. There is no evidence whatever tending to show that the hull of this steamer sustained any injury whatever as a consequence of either accident, and none which in any degree tends

to show that the force of the collision with the pier on March 8, 1895, was not the sole proximate cause of her loss and destruction. We have been referred to the case of *The Anne Faxon*, 21 C. C. A. 366, 75 Fed. 312, where the failure to have a boiler reinspected after extensive replacements and repairs was held to be a failure to comply with the provisions of title 52. The case is not parallel. To make it so, it should appear that substantial repairs had been made to the hull or machinery of the *Longfellow* subsequent to her last inspection. This is not the case. There is no evidence of injury to hull or machinery, and none of repairs to either. We think there is no evidence of failure to comply with any provision of title 52.

4. This brings us to the cross appeal of the *Memphis & Cincinnati Packet Company*, owners of the *Longfellow*. This appeal is solely from the decree taxing costs. The *Packet Company* in their petition denied all negligence and all liability, and thus put the respondents and cross libelants to the proof of negligence to entitle them to any decree whatever. This issue was decided against the owner. All other issues were decided in favor of the owners. The inference from admiralty rule 55 is that costs and expenses of a strict limitation of liability suit should be paid out of the proceeds of the vessel and her freight. But by rule 56 the owners are at liberty in such suit to contest the liability of the vessel and of themselves for the loss or damage independently of the limitation of liability claimed under said act. If the owners elect to make such an issue, it would seem right that they should pay the costs arising upon the issue, and that rule 55 would not preclude such a taxation. This was the practice approved by the circuit court of appeals of the First circuit in *The H. F. Dimock*, 23 C. C. A. 123, 77 Fed. 226. The trial court doubtless had this distinction in mind when it taxed appellants with a part of the costs. We are not disposed to inquire deeply into the exact propriety of the division made by the district court; for, when the matter in controversy upon an appeal is merely the costs, the appeal will not be considered. *Fabric Co. v. Smith*, 100 U. S. 110, 25 L. Ed. 547; *Paper-Bag Cases*, 105 U. S. 766, 26 L. Ed. 959. The decree will in all respects be affirmed. The appellants, *Clayton* and others, will pay all costs except the costs of the cross appellant, the *packet company*. The costs of that appeal will be paid by that company.

GUARANTEE CO. OF NORTH DAKOTA v. HANWAY.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

No. 1,318.

1. FEDERAL COURTS—JURISDICTION—REMOVAL OF CAUSES.

An action by or against an agent of the shareholders of a national bank, chosen by them in pursuance of "An act authorizing the appointment of receivers of national banks and for other purposes," approved June 30, 1876, and its amendments (19 Stat. 63, c. 156; 27 Stat. 345, c. 360; 29 Stat. 600, c. 354), is a suit arising under the laws of the United States, of which a federal court has jurisdiction, under sections 1 and 2 of the Acts of 1887-88 (25 Stat. 434).

2. SAME—REMOVAL OF CAUSES.

Such an action is also a case for winding up the affairs of a national bank, and is by or against an officer thereof, and hence cognizable by a federal court, under the last clause of section 4 of the Acts of 1887-88 (25 Stat. 436).

3. SAME—REMOVAL OF CAUSES.

For the reasons above stated, an action by or against an agent of the shareholders of a national bank is removable from a state to a federal court.

4. REMOVAL OF CAUSES—TIME.

Where a case is not removable when the time for its removal prescribed in the acts of congress expires, but subsequently becomes removable by amendment or otherwise, the filing of a petition and bond for removal within a reasonable time thereafter entitles the petitioner to a transfer of the case to the federal court.

5. SAME—WAIVER.

One may waive objections to the time and manner of removal of a suit from a state to a federal court by silently proceeding to trial upon the merits, because matters of time and method are formal and modal, and not essential to the right of removal.

6. ACTION ARISING UNDER LAWS OF THE UNITED STATES—TEST.

The nature of the action, and not the character of the defense to it, constitutes the test to determine whether it arises under the laws of the United States. If the determination of the claim made in the action invokes a consideration of those laws, and the effect of the acts or omissions of parties to the suit under them, it arises under the laws of the United States, whether the defense to the suit is good or bad.

7. SUCCESSORY TRUSTEE—LIS PENDENS—ABATEMENT.

A successory trustee of a fund takes it in privity with his predecessor, and subject to suits pending against him which affect the administration of the trust. Such suits are not abated or defeated by a change of trustee.

Caldwell, Circuit Judge, dissenting.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of North Dakota.

This is an action at law for damages in the sum of \$4,000 for the wrongful sale of a pledge. It was commenced in August, 1897, in one of the courts of the state of North Dakota; and the original complaint counted upon a personal liability of, and prayed for a personal judgment against, Joshua A. Hanway, who was described in the title of the action as stockholders' agent of the National Bank of North Dakota, at Fargo, N. D. On April 16, 1898, the plaintiff, the Guarantee Company of North Dakota, a corporation, filed an amended complaint in which it alleged that the defendant, Joshua A. Hanway, held and wrongfully sold the pledge in his official capacity of shareholders' agent of the National Bank of North Dakota, and prayed for judg-

ment against him as such agent, and not against him personally. Thereupon, and upon May 13, 1898, the defendant filed a petition and bond for the removal of the case to the United States circuit court for the district of North Dakota. This petition alleged that the National Bank of North Dakota was a corporation organized under the laws of the United States; that the comptroller of the currency appointed a receiver of this bank in 1893, who served as such until August, 1895, when the petitioner was chosen shareholders' agent, and qualified and acted as such; that upon his final accounting as such agent on December 20, 1897, the United States circuit court adjudged him to be indebted to the trust estate in a sum exceeding \$10,000; that he then resigned his office as agent, and that court appointed one D. B. Holt as receiver, to wind up the affairs of the bank; that the action now before us was brought to obtain a judgment against Hanway in his official capacity, and to enforce the same as a claim against the proceeds of the assets of the bank; that it related to the winding up of the affairs of a national bank, and was ancillary to the administration of the trust; that he, as stockholders' agent of the bank, was an officer of the United States; that the original complaint stated no cause of action against him as such officer, but this cause of action first appeared in the amended complaint; and that the time to answer, demur, or otherwise plead to the amended complaint had not expired when he presented his petition. Upon this petition the case was removed to the United States circuit court. No motion was ever made to remand it, but an answer to the amended complaint was filed, a motion for judgment on the pleadings was made by the plaintiff and denied by the court, the case was tried without a jury, and judgment was rendered for the defendant. The writ of error challenges this judgment.

E. Ashley Mears (W. H. Standish, on the brief), for plaintiff in error.

John S. Watson (W. F. Ball and D. G. Maclay, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge (after stating the facts as above). The first objection to the judgment here is that this case was not removable to the federal court, and that the United States circuit court had no jurisdiction to hear or decide it. But the United States circuit courts have jurisdiction "of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States," and every suit of that character may be removed from a state to a federal court. Acts of March 3, 1887, and August 13, 1888 (25 Stat. 434, c. 433, §§ 1, 2). This is a suit arising under the laws of the United States. It is a suit against a shareholders' agent, chosen by the stockholders of a national bank in pursuance of "An act authorizing the appointment of receivers of national banks and for other purposes," approved June 30, 1876, and its amendments, to obtain a share of the trust funds he is administering. 19 Stat. 63, c. 156; 27 Stat. 345, c. 360; 29 Stat. 600, c. 354. An action by or against a receiver of a national bank, appointed under this act, is an action arising under the laws of the United States, because the act of congress creates his office, grants his rights and powers, and imposes his duties. In the absence of this act there would be no such receiver, and no suits against him could arise. Every action by or against him necessarily involves the exercise of some of his rights, or the proper discharge

of some of his duties and invokes a consideration of the proper construction and effect of the laws of the United States from which he derives them. For these reasons, in contemplation of law every action by or against him arises under the laws of the United States. *McDonald v. Nebraska* (C. C. A.) 101 Fed. 171, 172; *Auten v. Bank*, 174 U. S. 125, 19 Sup. Ct. 628, 43 L. Ed. 920; *In re Chetwood*, 165 U. S. 443, 458, 459, 17 Sup. Ct. 385, 41 L. Ed. 782; *Armstrong v. Trautman* (C. C.) 36 Fed. 275; *Grant v. Bank* (C. C.) 47 Fed. 673. The same reasons bring actions by or against a shareholders' agent under the same rule. He is chosen under the same act of congress. He is selected for the same purpose. At a certain point in the administration of the trust the act of congress empowers the shareholders of a national bank to determine by ballot "whether the receiver shall be continued and shall wind up the affairs of the association, or whether an agent shall be elected for that purpose." If they vote to continue the receiver, subsequent actions by or against him arise under the laws of the United States. If they vote to choose an agent for the same purpose under the same laws, it is difficult to perceive why actions by or against him do not also arise under the laws of the United States. Those laws empower the agent, when chosen, to hold, control, and dispose of the property of the banking association which he receives for the benefit of the shareholders, to sue and to be sued, and to do all lawful acts necessary to finally settle and distribute the assets in his hands. They authorize him, with the consent and approval of the circuit or district court of the United States for the proper district, to sell, compromise, or compound the debts due to the association, and require him to report to, and obtain a final settlement of his accounts in, one of those courts. They specifically prescribe the purposes to which the proceeds of all the property which comes to his hands as the agent of the shareholders shall be devoted, and the order in which they shall be applied to those purposes. As Mr. Chief Justice Fuller aptly said in delivering the opinion of the supreme court in *Re Chetwood*, 165 U. S. 459, 17 Sup. Ct. 391, 41 L. Ed. 787:

"The agent proceeds in the settlement with like authority to that conferred upon the receiver, although at the conclusion of his duty he is required to render to the circuit or district court of the United States for the district where the business of the bank is carried on 'a full account of all his proceedings, receipts and expenditures as such agent, which court shall, upon due notice, settle and adjust such accounts and discharge said agent and the sureties upon his bond.'"

The purpose of this suit was to control the official conduct of this shareholders' agent, and to compel him to pay to the plaintiff out of the trust fund in his hands \$4,000, which the agent claimed he was required under the laws of the United States, from which he derived his appointment, to distribute to the shareholders. Since his conduct as agent must be regulated and tried by these laws, this action and every action by or against a shareholders' agent chosen under this act of congress invoke the consideration of, and arise under, the laws of the United States.

Again, by section 4 of the Acts of 1887-88 (25 Stat. 436) it is provided that national banks shall be deemed citizens of the states in

which they are located, and that the federal courts shall not derive jurisdiction of suits by or against them from the mere fact that they are organized under the laws of the United States. But this provision is followed by an exception in these words:

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of an officer thereof, or cases for winding up the affairs of any such bank."

This is clearly a case for winding up the affairs of such a bank. It is a suit to take \$4,000 from the fund realized from the collection and sale of the assets of the National Bank of North Dakota in the process of winding up its affairs under the act of congress, and to pay it to the plaintiff, instead of permitting it to be distributed to the shareholders.

Moreover, it is now well settled that a receiver of a national bank is "the agent and officer of the United States," and that the federal courts have jurisdiction of actions by and against him as such an officer, under the provisions contained in section 4 of the Acts of 1887-88, which we have just quoted. In *re Chetwood*, 165 U. S. 443, 458, 17 Sup. Ct. 385, 41 L. Ed. 782; *Frelinghuysen v. Baldwin* (D. C.) 12 Fed. 395; *Price v. Abbott* (C. C.) 17 Fed. 506; *Armstrong v. Ettlesohn* (C. C.) 36 Fed. 209; *Armstrong v. Trautman* (C. C.) 36 Fed. 275. Now, a receiver is not an officer of the United States because the nation has any pecuniary or other interest in his acts or omissions, but simply because an act of congress authorizes his appointment, prescribes his duties, and designates the appointing power. By the same mark, a shareholders' agent is an agent and officer of the United States. The same act creates his office, authorizes his appointment, designates the appointing power, and imposes upon him the same duties. While at a certain stage in the proceedings for winding up the affairs of a national bank the power designated to appoint the agent may exercise its option to continue the receiver or to choose the agent, when that option has been exercised, and the agent has been appointed, he discharges the same duties as the receiver, and becomes the "agent and officer of the United States," in every sense in which the receiver is such an agent and officer. *McConville v. Gilmour* (C. C.) 36 Fed. 277, 1 L. R. A. 498; *Snohomish Co. v. Puget Sound Nat. Bank* (C. C.) 81 Fed. 518, 519; *Spekart v. Bank* (C. C.) 85 Fed. 12, 19; *Brown v. Smith* (C. C.) 88 Fed. 565, 566. The result is that the federal courts have jurisdiction of an action by or against the agent of the shareholders of a national bank chosen under "An act authorizing the appointment of receivers of national banks and for other purposes," and its amendments (19 Stat. 63, c. 156; 27 Stat. 345, c. 360; 29 Stat. 600, c. 354), in the absence of diversity of citizenship, and such a suit may be removed from a state to a federal court.

It is said, however, that the petition for removal avers that the defendant had settled his final account as agent, had resigned his position, and a receiver had been appointed in his stead, in December, 1897,—four months before the amended complaint, which first stated a cause of action against him as an officer, was filed,—and

that therefore he was not liable to suit as a stockholders' agent, and no case arose under the laws of the United States. A conclusive answer to this proposition is that it is the nature of the action, not the possibility of maintaining it, that determines whether or not a case arises under the laws of the United States. If the case presents a question, or may present a question, to be determined by those laws and the acts of the parties under them, it arises under the laws of the United States, whichever way that question ought to be determined. Conceding that it might have been a good defense to the action of the plaintiff against the defendant here that a court in another proceeding had found that this defendant had more than \$10,000 of the trust funds which the plaintiff was seeking to reach in his hands by this suit, and that the defendant, with this money in his possession, had resigned, yet the claim of the plaintiff was that the trust fund was liable to him for the misfeasance of the defendant before he resigned, and that he could reach that fund by a judgment in this suit against this defendant as the agent of the stockholders. Upon the questions presented by this claim he was entitled to a hearing and a decision, and that decision could not be reached without a consideration of the provisions of the act of congress under which the defendant was appointed, and the effect of his acts thereunder. The case therefore arose under the laws of the United States even if a proper decision of that question would have defeated the plaintiff.

Moreover, it does not seem to us that the resignation of this defendant after the commencement of the suit against him could relieve the trust fund, either in his hands or in those of his successor, of the liability to respond to this suit fixed upon him by the commencement of it before his resignation. The wrongful act charged in the original complaint was the same act upon which the amended complaint is based. It was committed on December 5, 1895, when the defendant was the agent of the shareholders. This action was commenced in August, 1897, while he was still the stockholders' agent, and before he had resigned. In April, 1898, four months after his resignation, this suit was transformed by amendment from an action against the defendant individually to a suit against the fund which he held in his official capacity as agent. There was no question of the statute of limitations here, and this amendment related back to the commencement of the action, so that the case stood the same as though the amended complaint had been filed when the suit was commenced. *Bowden v. Burnham*, 59 Fed. 752, 754, 8 C. C. A. 248, 251, 19 U. S. App. 448, 453. It was therefore, in law, an action against the fund in the hands of this trustee, commenced against him while he was acting as such trustee; and his subsequent resignation of the trust, and the substitution of another officer in his place, could not abate or destroy it. The statutes of the state of North Dakota provide: "No action shall abate by the death, marriage, or other disability of a party or by the transfer of any interest therein, if the cause of action survives or continues." Rev. Codes N. D. 1895, § 5234. The receiver subsequently appointed upon the resignation of Hanway was a mere suc-

cessory trustee in privity with the defendant, who necessarily took the fund which he was administering pendente lite, subject to the liability and charge which had been fastened upon it by the pending suit. *Henderson v. Wanamaker*, 79 Fed. 736, 738, 25 C. C. A. 181, 183, 49 U. S. App. 174, 177. The court below might undoubtedly, on the petition of the receiver, have substituted him for the defendant. But no succession of trustees or resignation of officers after the *lis pendens* had fastened the charge of this suit upon the fund could defeat this action, or relieve the fund of liability. *McNulta v. Lochridge*, 141 U. S. 327, 332, 12 Sup. Ct. 11, 35 L. Ed. 796; *State v. Port Royal & A. Ry. Co. (C. C.)* 84 Fed. 67, 68. This action arose under the laws of the United States, notwithstanding the statement in the petition for the removal that the defendant resigned as shareholders' agent after he was sued, and before the complaint against him was so amended as to charge him with liability as an officer.

Another objection to the jurisdiction of the court is that the case was not removed until after the time had passed within which the defendant was required by the laws of the state of North Dakota to answer or plead to the original complaint in the action. But the original complaint stated no cause of action against the defendant as the shareholders' agent. It was not until the amended complaint was filed that such a cause of action was stated, and it was then that a case first arose under the laws of the United States. The petition and bond for removal were presented within the time prescribed for answer or plea to the amended complaint. Where a case is not removable when the time for its removal prescribed in the act of congress expires, but subsequently becomes so by amendment or other action, the filing of a petition and bond for its removal within a reasonable time after it becomes removable entitles the petitioner to its removal. *Powers v. Railway Co.*, 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673; *Bailey v. Mosher (C. C.)* 95 Fed. 223; *Speckart v. Bank (C. C.)* 85 Fed. 12. None of the pleadings in this case were filed in the court until long after its removal from the state court, but the statutes and practice of the state of North Dakota did not require them to be filed, inasmuch as they were served upon the opposite party. Moreover, the time and the manner of the presentation of the pleadings and the petition relate to the form and method of the proceeding, and not to the essentials of the right of removal. No motion to remand this case was made, and, if there were any defects in the time or manner in which the proceedings were taken, they have been waived. *Edrington v. Jefferson*, 111 U. S. 770, 4 Sup. Ct. 683, 28 L. Ed. 594; *Railroad Co. v. Burns*, 124 U. S. 165, 8 Sup. Ct. 421, 31 L. Ed. 333; *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; *Martin v. Railroad Co.*, 151 U. S. 673, 686, 687, 14 Sup. Ct. 533, 38 L. Ed. 311.

Coming to the merits of the action, it is assigned as error that the court below denied the motion of the plaintiff for judgment on the pleadings. In its amended complaint the plaintiff alleged that about December 5, 1895, the defendant held a pledge of 40 shares of the capital stock of the Merchants' National Bank of Devil's Lake,

N. D., of the value of \$4,000, which belonged to the plaintiff, to secure the payment of its promissory notes held by the defendant; that, without demand of payment of the notes, he sold this stock at private sale to himself, without notice to the plaintiff, and afterwards conveyed it to a purchaser for value, who caused it to be transferred to himself on the stock journal of the Merchants' Bank. To this complaint the defendant answered that he denied each and every allegation contained therein which was not admitted, qualified, or explained or specially denied in the subsequent portions of the answer. For a second defense, he admitted that he held 30 shares, and no more, of the stock of the Merchants' National Bank as security for the plaintiff's promissory notes, and denied that said stock was of any value whatever. For a third defense, he alleged that he sold this stock, with the advice and consent of the plaintiff, for \$50 per share. For a fourth defense, he averred that the stock was worthless, but that he sold it for \$50 per share, and applied the proceeds thereof upon the indebtedness of the plaintiff to the National Bank of North Dakota. And, for a fifth defense, he pleaded that the plaintiff was indebted to the National Bank of North Dakota on December 5, 1895, in the sum of \$5,000; that it had deposited with the bank the 30 shares of stock to secure the payment of this debt; that, with the advice and consent of the plaintiff, he sold the stock to one John A. Percival for \$1,500, and applied this sum to the payment of the indebtedness of the plaintiff to the National Bank of North Dakota. It will be seen that the various separate defenses of the answer constitute in reality but one defense, and that is that the stock pledged was sold by the consent of the plaintiff at an agreed price to John A. Percival, and the proceeds thereof were applied to the payment of its indebtedness. This defense is so clearly pleaded, so plainly stated and reiterated, that he who runs may read. Argument and illustration cannot make the proposition that there was no ground for judgment against the defendant upon these pleadings more clear than the plain statement of their contents which we have made. Several pages of the brief of counsel for the plaintiff in error are devoted to the discussion of such technical objections as that a denial that the stock "was of the value of four thousand dollars (\$4,000), or of any value whatever," is an admission that it was worth \$3,999.99, and that the general denial of "each and every allegation in said complaint contained, not hereafter admitted, qualified, or explained or specially denied," is an admission of all the substantial allegations of the complaint, because in the subsequent defenses pleaded in the answer all those averments were either admitted or qualified or explained or specially denied. The arguments in support of propositions of this character are too refined and elusive for our appreciation. Even if there were no denial of the allegations of the complaint, the plain averments of the answer that the pledge was sold with the advice and consent of the plaintiff, and that its proceeds were applied to the payment of his debt, constitute a complete defense to the action. The motion for judgment on the pleadings was properly denied.

Another specification of error is based on the proposition that the

facts found do not sustain the judgment. The court tried the case without a jury, and made special findings of facts and conclusions of law. The facts found were that on December 5, 1895, the defendant, as shareholders' agent of the National Bank of North Dakota, held the obligations of the plaintiff which were then due and unpaid to the amount of about \$5,000, and held as collateral for the payment of this indebtedness 30 shares of the capital stock of the Merchants' National Bank of Devil's Lake; that this stock was worth \$300, and no more; that on that day, with the advice and consent of the plaintiff, the defendant sold this stock to John A. Percival for the agreed consideration of \$1,500, and thereupon, with plaintiff's consent, credited and indorsed this \$1,500 upon its indebtedness to the bank. These facts establish a complete defense to the action, and fully sustain the judgment which the court rendered. That judgment is accordingly affirmed.

CALDWELL, Circuit Judge (dissenting). The defendant, Hanway, was not sued individually. The action was brought against him in his official capacity as stockholders' agent of the National Bank of North Dakota. The amended complaint did not change the cause of action, or pray for any different relief from that sought by the original complaint. On the 20th day of December, 1897, Hanway resigned his office as stockholders' agent, and on the same day the United States circuit court appointed D. B. Holt receiver to wind up the affairs of the bank. More than three months after all this had been done, the defendant Hanway again appeared upon the scene, and filed a petition to remove the cause into the circuit court of the United States upon the ground that, as stockholders' agent, he was an officer of the United States. It is needless to say that he occupied no such relation at the time he filed this petition. He had resigned his office, if office it may be called, months before. His resignation had been accepted, the state of his accounts ascertained and declared, and his official or trust relation or agency in the business completely terminated, and the court had appointed Holt receiver to close up the affairs of the bank, to whom all of its assets had been turned over by Hanway. The appointment of Holt as receiver rests upon the general equity powers of the court, and not upon any special authority conferred by act of congress providing for winding up the affairs of insolvent national banks. Moreover, the application for removal was made too late. The time within which the action could be removed had long since passed. This is not a mere formal matter which the court and parties may disregard at pleasure. The requirements of the act of congress in this regard are jurisdictional and peremptory, and obligatory upon the parties as well as the court. The person making the application for the removal had long since passed out of the case, and had no further interest therein, either personal or official, and had no shadow of a right to appear in the case for any purpose whatever. He was as much a stranger to the case as if he had never been a party. As no other person sought to remove the case, it is unnecessary to inquire whether the receiver appointed by the circuit court could have

done so if he had applied within apt time. This is the first instance in which an entire stranger to a suit, not being a party thereto or having any interest therein, has been permitted to remove a cause from the state to a federal court.

WALTERS v. CHICAGO, B. & Q. R. CO.

McCARL v. SAME.

(Circuit Court, D. Nebraska. October 3, 1900.)

Nos. 8U, 9U.

REMOVAL OF CAUSES — CITIZENSHIP OF CORPORATION — INCORPORATION IN ANOTHER STATE.

A railroad corporation organized under the laws of another state, which subsequently also incorporates in Nebraska in compliance with the provisions of the constitution and statutes of that state, which require such incorporation to entitle a foreign railroad company to exercise the power of eminent domain or acquire real estate for right of way or other railroad purposes, by that act becomes a corporation of Nebraska so far as concerns its relations to the constitution and laws of that state, and subject to state regulation as a domestic corporation, as has been authoritatively determined by the supreme court of the state; but it does not thereby change its citizenship for the purposes of the jurisdiction of the federal courts, but remains for such purposes a citizen of the state in which it was originally incorporated, and is entitled to remove a suit commenced against it in a state court of Nebraska by a citizen of that state into the federal court on the ground of diversity of citizenship.

On Motions to Remand to State Court and Pleas to Jurisdiction.

Abbott, Selleck & Lane and Doyle & Stone, for plaintiff.

J. W. Deweese, F. E. Bishop, and J. R. Hanna, for defendant.

MUNGER, District Judge. In each of these cases motions to remand and pleas to the jurisdiction have been filed, and evidence in support thereof submitted to the court. From the record it appears that the defendant, the Chicago, Burlington & Quincy Railroad Company, was originally created and organized as a corporation under the laws of the state of Illinois. It subsequently consolidated with the Burlington & Missouri River Railroad Company, a corporation of Iowa. The manner of that consolidation does not appear. Whether by the creation of a new corporation out of the two, so that the new corporation was created by the laws of both states, is not shown, but for the purposes of this case that is immaterial. The Burlington & Missouri River Railroad Company in Nebraska was a corporation organized and created under and by virtue of the laws of the state of Nebraska, and as such became possessed of and operated a line of railroad in the state of Nebraska. In 1880 a consolidation of the Burlington & Missouri River Railroad Company in Nebraska with the defendant, the Chicago, Burlington & Quincy Railroad Company, was effected. The manner of consolidation was a sale of all of the property of the Nebraska corporation to the defendant company, and an issue of new stock of the defendant company to the

stockholders and owners of the Nebraska corporation. That a consolidation may be effected by a sale of the property and franchise of one corporation to another without the creation of a new corporation is well established by the authorities. The question involved in this case is the citizenship of the defendant corporation. Plaintiffs contend that it is a corporation of Nebraska, and, being such, it is, therefore, a citizen of Nebraska. Defendant contends that, while it is a corporation of Nebraska, its citizenship is that of Illinois. That plaintiff is a citizen of Nebraska is not controverted, and, if defendant is a citizen of Nebraska, then the case was not removable, and this court is without jurisdiction. The principles as announced in the cases of *Railroad Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. Ed. 802, and *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081, being the latest expressions of the supreme court, and subsequent to the cases of *Fitzgerald v. Railway Co.* (C. C.) 45 Fed. 814, and *Railway Co. v. Meeh*, 16 C. C. A. 510, 69 Fed. 753, 30 L. R. A. 250, must govern in the determination of these cases. The rule deducible from the decisions of the supreme court in the two cases referred to is that a corporation, as such, has no citizenship; that the citizenship of the incorporators determines the jurisdiction of the federal court; that the citizenship of the incorporators is conclusively presumed to be that of the state in which the corporation was first created; that while a corporation organized by the laws of one state may become a domestic corporation of another state, the laws of the two states permitting, yet the citizenship of the incorporators remains that of the state in which such corporation was first created. Where, however, a new corporation is created by the joint action or operations of the laws of two or more states, the citizenship of such corporation will be treated as that of each state. Section 8 of article 11 of the constitution of Nebraska provides that "no railroad organized under the laws of any other state or of the United States and doing business in this state, shall be entitled to exercise the right of eminent domain or have the power to acquire the right of way or real estate for depot or other purposes until it shall have become a body corporate pursuant to and in accordance with the laws of this state." This provision of the constitution is urged on the part of the plaintiffs as supporting the proposition that a foreign railroad corporation can have no existence in the state of Nebraska. It will be observed that this provision of the constitution deals solely with foreign railroad corporations. It does not absolutely prohibit such foreign railroad corporations from doing business, exercising the right of eminent domain, etc., within the state. Such prohibition is only imposed where such foreign railroad corporation does not comply with the laws of the state so as to become a domestic corporation. It clearly provides that a railroad corporation created and organized under the laws of another state may exercise all the powers of a railroad corporation organized under the laws of the state of Nebraska, whenever such foreign railroad corporation shall have become also a domestic corporation pursuant to the laws of Nebraska providing therefor. The statute of Nebraska provides the manner and method

by which a foreign railroad corporation may consolidate with one created and organized in this state, and provides, among other things, that upon the filing of the articles of incorporation and of consolidation such corporation shall become a corporation of this state, entitled to all the rights and privileges, and subject to all of the liabilities and restrictions imposed upon railroad companies originally organized under the laws of this state. The effect, then, of the proceedings of consolidation and of the filing of the articles of incorporation of the defendant company in the office of the secretary of state was to establish the status of the defendant company as a domestic corporation, or corporation under the laws of Nebraska, within the meaning of the constitutional provision referred to. Within the meaning of that provision, the defendant company is, in Nebraska, a domestic, as contradistinguished from a foreign, corporation; but that is not the question which this court has to determine on the pleas to the jurisdiction. It is the citizenship of the defendant that determines the jurisdiction of this court, and not the question as to whether it is a corporation of Nebraska.

The case of *State v. Chicago, B. & Q. R. Co.*, 25 Neb. 156, 41 N. W. 125, 2 L. R. A. 564, construed the effect of the constitutional provision in question and the statutes of the state with reference to the consolidation of foreign and domestic railroad companies. That decision, so far as it is a construction of the constitution and statute of the state, is binding upon this court. The question involved in that case was whether or not the defendant company was a foreign corporation, within the meaning of the constitutional provision referred to. The question of the citizenship of the corporation was not involved, and was not passed upon. True it is in the opinion of the court it was said that it did not have "the peculiar privileges which are granted to foreign persons or corporations in the way of removal of its suits from the state to the federal courts." That question, however, was not involved in the case, and the question of the rights of removal is not one governed by the constitution or statutes of the state. The right of removal is to be determined by the laws of the United States, and the decisions of the state court in respect thereto are not binding upon the federal court. All that the state court could do was to determine the status of the defendant corporation in the state of Nebraska,—whether it was a domestic or foreign corporation within the meaning of the state constitution. That determination by the supreme court of the state is binding upon this court. It is then for this court to apply to such status the statutes of the United States relative to removal of causes, and say whether the case is removable. In the cases of *Railroad Co. v. James and Louisville*, *N. A. & C. R. Co. v. Louisville Trust Co.*, before referred to, by the laws of Arkansas and of Kentucky, there considered, the defendant corporations became domestic corporations of the several states; yet it was expressly declared that a corporation organized in one state might become also a corporation of another state, the laws of such other state permitting. In other words, that one state might adopt or create as a corporation of that state a corporation of

another state, yet the citizenship of such corporation remained that of the state of its original creation.

In *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, it was said:

"It being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created."

As was said in *Railroad Co. v. James*:

"But, whatever may be the effect of such legislation in the way of subjecting foreign railroad companies to control and regulation by the local laws of Arkansas, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation in such a sense as to make it a citizen of Arkansas within the meaning of the federal constitution, so as to subject it as such to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that constitution as construed by the decisions of this court, it would be necessary to create it out of natural persons, whose citizenship of the state creating it could be imputed to the corporation itself."

So here the defendant, the Chicago, Burlington & Quincy Railroad Company, while created a corporation of Nebraska under and pursuant to the laws of Nebraska, was not created out of natural persons whose citizenship was that of the state of Nebraska, but was created out of an existing corporation whose citizenship was that of a foreign state. It follows from the foregoing that the motions to remand and pleas in abatement should be overruled. As the question, however, may be an important one to the parties, plaintiffs, if they desire, may elect and have judgment overruling the motion and plea in one case only, the motion and plea in the other case to remain undisposed of until this question in one case can be presented and disposed of in the proper appellate court.

SECURITY TRUST CO. v. DENT.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1900.)

No. 1,355.

1. JURISDICTION OF FEDERAL COURTS — ACTION AGAINST ESTATE OF DECEDENT — STATE STATUTE.

Gen. St. Minn. 1894, §§ 4509-4511, 4514, 4517, 4523, require all creditors of a decedent to present their claims to the probate court having charge of the administration of his estate within such time, not less than 6 nor more than 18 months from the granting of letters testamentary or of administration, as that court shall allow, and provide that any claim on contract not so presented shall be barred forever. *Held*, that such statute is ineffectual to deprive a federal court of jurisdiction of an action by a nonresident creditor against the executor or administrator of a decedent on a claim against his estate, and that the limitation therein cannot be applied to bar such an action in less than the full 18 months during which the probate court might, in its discretion, entertain a claim.

2. EXECUTORS AND ADMINISTRATORS—DISCHARGE—MINNESOTA STATUTES.

Under the statutes of Minnesota, the approval by a probate court of the final settlement of an administrator, and an order of distribution made thereon, do not operate to discharge the administrator; but he remains

subject to the orders of the court until the order of distribution has been executed to its approval, and a formal order of discharge entered.

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was brought by William H. Dent, as receiver of the First National Bank of Decorah, to recover from the Security Trust Company, as administrator of the estate of Sumner W. Matteson, deceased, the plaintiff in error, the amount which was alleged to be due to the receiver on five promissory notes executed by S. W. Matteson in his lifetime, which became the property of the First National Bank of Decorah, Iowa, before their maturity. Four of the notes were executed on April 15, 1895, and one of them on October 19, 1894. Two of the notes had matured prior to Matteson's death, which occurred on July 22, 1895. The remaining three notes matured prior to October 15, 1895, or within less than three months after Matteson's death. As a defense to all of the notes, Matteson's administrator pleaded, in substance, that it had fully administered upon Matteson's estate, and had been discharged as administrator; that during the course of the administration the notes sued upon had not been presented or allowed against the estate of the deceased; and that the action was barred by force of the statutes of the state of Minnesota, where the administration proceedings had taken place. The case was submitted to the trial court upon an agreed statement of facts, from which we cull the following, which are all that are deemed material: Sumner W. Matteson was a resident and citizen of the state of Minnesota from some time prior to January 1, 1894, until his death, and during that time resided at the city of St. Paul, in Ramsey county, Minn., where he died on July 22, 1895. The Security Trust Company was appointed administrator of Matteson's estate, and duly qualified and entered upon its duties as such administrator on September 3, 1895. On the same day the probate court of Ramsey county, Minn., by which the appointment was made, ordered that six months be allowed from and after the date of the order in which persons having claims against the deceased should file the same in the probate court for examination and allowance, or be forever barred; that the first Monday of April, 1896, at a general term of the court to be held at the court house in the city of St. Paul, be appointed as the time and place when and where the court would examine and adjust claims and demands against the estate of the decedent; and that notice of the hearing be given to all persons interested by publishing the order in question once each week for three successive weeks in a daily newspaper published at St. Paul, in the county of Ramsey, state of Minnesota. Said order was afterwards published in the manner prescribed by the order on September 10, 17, and 24, 1895, and proof of such publication was duly filed. As administrator the Security Trust Company took possession of the assets of the decedent's estate, and proceeded to administer upon them in the mode prescribed by law. On March 31, 1896, it filed an account of its administration, and its petition to have the same examined and allowed, and for the distribution of the residue of the estate to the persons entitled thereto. The court thereupon made an order for the hearing of the petition, and notice of the hearing was given as required by law, and proof of such notice was filed in due season. On April 27, 1896, the probate court examined the account, and upon such examination approved of the same, and ordered that the account be finally settled and allowed. It further ordered and adjudged, in substance, that all of the real and personal property of the estate which appeared by the account to be in the administrator's hands be assigned to and vested in the heirs at law, who were named in the order. On November 21, 1896, the probate court entertained a petition for an order amending and correcting its final decree by changing the description of some of the property referred to therein, and adding a description of some property that had been omitted, and, in accordance with the prayer of the petition, made an order making the desired alterations in the decree. No order was ever made by the probate court of Ramsey county discharging Matteson's administrator from its trust, other than the order heretofore mentioned, allowing its final account, and directing a distribution of the assets in its hands.

The Security Trust Company, as administrator, did not at any time make an assignment or transfer of the decedent's property to the distributees designated in the order of distribution, except in the manner following: Within a few days after said decree had been made, Charles D. Matteson, who was its secretary and treasurer, took all the securities and papers in the possession of the Security Trust Company as administrator, and placed them in a box or receptacle which he kept, and for a long time previous had kept, in the vaults of the said company. On December 23, 1896, it also executed an assignment of one certificate of stock in a land company, which belonged to the estate, to enable the distributees to obtain another certificate in lieu thereof. Other stocks and securities belonging to the estate, which the trust company held as collateral security for an indebtedness due to it by the deceased at the time of his death, it continued to retain in its possession, undistributed, and it still retained the same at the time of the trial below. As early as September 1, 1895, all of the officers and directors of the National Bank of Decorah had notice of the death of said Matteson, and that he died at St. Paul, in the state of Minnesota; and as early as November 1, 1895, the president of said bank (it being then a going concern) had knowledge that Matteson's estate was undergoing administration in the probate court of Ramsey county, state of Minnesota. The receiver of said bank, who was appointed on November 24, 1896, did not have knowledge of Matteson's death, and that his estate was undergoing administration, until about December 20, 1896. During the pendency of the administration proceedings neither the National Bank of Decorah, nor any one in its behalf, filed a claim against the estate in the probate court of Ramsey county, based upon the notes in controversy; and no action was brought thereon in any court until the present action was instituted in the circuit court of the United States for the district of Minnesota, which action was commenced by the receiver on January 22, 1897.

The General Statutes of the State of Minnesota for the Year 1894 contain the following provisions with respect to the administration of estates:

"Sec. 4509. At the time of granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order; said order shall fix the time or times and place in which the court will examine and adjust claims and demands of all persons against deceased. No claim or demand shall be received after expiration of the time so limited, unless for good cause shown the court may in its discretion, receive, hear and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given, as provided in the next section, and before final settlement, and the allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate. * * *

"Sec. 4510. The order prescribed in section [4509] shall be published according to law, and shall be notice to all creditors and persons interested.

"Sec. 4511. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought by the executor or administrator. All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim."

"Sec. 4514. No action at law for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court except as provided in this Code. No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent: provided,

that this provision shall not be construed as affecting any lien existing at the date of such death: provided, further, that said provision shall not be construed as affecting the right of a creditor to recover from the next of kin, legatee or devisee to the extent of assets received. This provision shall be applicable to the estate of persons who died prior as well as to those who may die after adoption of this Code."

"Sec. 4517. Upon the allowance or disallowance of any claim the court shall make its order allowing or disallowing the same. The order shall contain the date of allowance and the amount disallowed, and be attached to the claim with the offsets if any."

"Sec. 4523. The probate court at the time of granting letters testamentary or of administration, shall make an order allowing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate."

On the foregoing statement of facts the trial court rendered a judgment in favor of the receiver and against Matteson's administrator for the sum of \$13,535.06, including costs, to reverse which the present writ of error was brought.

Edmund S. Durment (Albert R. Moore, on the brief), for plaintiff in error.

Edward C. Stringer (McNeil V. Seymour, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

From the foregoing statement it will be observed that the present action against the administrator of S. W. Matteson to recover a judgment on the notes executed by him in his lifetime was not brought until after the expiration of the six months limited by the order of the probate court of Ramsey county, Minn., for the filing, examination, and allowance of claims against Matteson's estate, nor until after the examination and allowance of the administrator's final account. It is accordingly contended in behalf of the administrator that by virtue of sections 4509 and 4511 of the Minnesota Statutes, heretofore quoted, the right to a judgment on the notes in controversy was forever barred, although they were owned by a nonresident of the state, and a recovery was sought in the federal court. This contention raises the principal question that we are called upon to consider and determine.

By reference to the aforesaid sections of the Minnesota Statutes, it will be observed that the several probate courts of that state have been vested with the power to determine for what period of time the creditors of a deceased person whose estate is undergoing administration therein shall be given an opportunity to establish their demands against the estate; the only limitation upon that power being that the time granted shall not be less than 6 months, nor more than 18 months. In the first instance it seems that they cannot allow more than 1 year for the establishment of demands, but, for cause shown, which they deem adequate, they may audit and allow claims within 18 months from the date of the original order fixing the period for allowance, and before a final settlement. It is furthermore manifest that the local administration law was framed

with a view of requiring all demands against the estates of decedents to be established in the local probate courts, and not elsewhere, since section 4509 directs those courts to make an order fixing the time and place when they will examine and adjust claims and demands of all persons against the deceased, and section 4511 declares that all claims arising upon contracts "must be presented to the probate court within the time limited in said order," and that any claim not thus presented is barred forever. Moreover, section 4514 declares that "no action at law for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court, except as provided in this Code." In some states the administration laws provide, in substance, that the commencement of a suit in any court, state or federal, against an administrator or executor to establish a demand against a decedent, shall be deemed the lawful exhibition of the demand from the time process is served, and that, if such an action is instituted within a certain period after the administrator or executor gives notice of his appointment or files his bond, the judgment eventually recovered in such action shall be entitled to payment out of the assets of the estate in the administrator's hands. Gen. St. Mo. 1889, §§ 184-186, both inclusive; Sand. & H. Dig. Laws Ark. §§ 109-112, both inclusive; Gen. St. Kan. 1889, § 2890; Mills' Ann. St. Colo. § 4792. The administration law of the state of Minnesota contains no similar provisions, but plainly requires all creditors, whether domestic or nonresident, to file such demands as they may have against the estate of a decedent in the appropriate probate court within such period, not less than 6 nor more than 18 months, as it may see fit to grant, and to prosecute them to judgment in that court, or else be barred of the right of recovery. It is well settled by repeated adjudications that a foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the state relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the probate courts of the state. *President, etc., v. Vaiden*, 18 How. 503, 507, 15 L. Ed. 472; *Green's Adm'x v. Creighton*, 23 How. 90, 107, 108, 16 L. Ed. 419; *Suydam v. Broadnax*, 14 Pet. 67, 10 L. Ed. 357. This is but another form of saying that no state legislature can deprive the federal courts sitting therein of a jurisdiction which is vested in them by the constitution and laws of the United States. It follows, of course, that, in so far as the administration law of the state of Minnesota attempts to compel citizens of other states to establish demands against the estates of decedents by a proceeding in the probate court of the state, it is ineffectual to accomplish that object. It is said, however, that, although the statute in question may be ineffectual to compel nonresident creditors to submit their demands to the appropriate probate court for allowance, yet, as a statute of limitations, it should be given effect to prevent the establishment of a demand in the federal court of the state after such lapse of time that it cannot be established in the

probate court. The vice of this argument, as applied to the case in hand, consists in the fact that the legislature of the state of Minnesota has not undertaken to bar any claim against a decedent's estate, absolutely, until after the lapse of 18 months from the date of the order fixing the period of allowance, and in the case at bar that period had not expired when the action was commenced, to wit, on January 22, 1897. It is true that section 4509, when conferring the discretionary power to allow claims within 18 months, imposes the limitation that they shall be allowed "before final settlement"; and it is also true that the final account of Matteson's administrator had been submitted to and approved by the probate court before this action was commenced. But it must be borne in mind that the administration law (section 4523, *supra*) confers upon the probate court the power to determine when the final settlement of an estate shall be made, and to allow as much as 1 year and 6 months for that purpose. We think that the federal court must be conceded the same power, as respects the claim of a nonresident creditor, to allow it within 18 months, which is conferred upon the probate courts of the state; and we are furthermore of opinion that the right of a nonresident creditor to sue for the establishment of his demand in the federal court cannot be made to depend on the length of time that the probate court happens to allow for making a final settlement. If the federal court gives effect to laws limiting the period for establishing claims in the probate courts of the state which differ essentially from the general statute of limitations, it should only be required to apply the absolute bar arising from lapse of time which the legislature has erected. There is much reason, perhaps, for saying that citizens of other states ought not to be allowed to maintain an action in the federal court against a local administrator or executor after the expiration of a period when, by the express command of the legislature, no such action can be maintained in the local courts, provided the period fixed by the legislature is reasonable; but the right of a nonresident creditor to bring his action in the national courts ought not to be conditioned or made to depend upon the time that a local court chances to approve a final settlement, when the time of such approval rests in its discretion, and is largely a matter of convenience. For these reasons, we conclude that the case in hand—the same having been brought within less than 18 months after the order fixing the period for the allowance of claims was made—was lawfully entertained by the trial court.

Another claim which is interposed by the administrator as a defense to this action is that the approval of its final account and the order of distribution made thereon by the probate court on April 27, 1896, closed the administration, and operated, without more, as a discharge of the administrator, so that there was in point of fact no administrator when the suit at bar was instituted. This view evidently was not entertained by the probate court by which the administrator was appointed, since the record discloses that that court as late as November 21, 1896, entertained a petition on the part of the administrator, and at its instance made an order founded thereon by which the decree of April 27, 1896, was amended and cor-

rected in important respects. It is manifest that the probate court acted upon the theory that it had not lost jurisdiction over the administrator; that it was still subject to its orders as to all matters pertaining to the estate, and would remain so until it had fully executed its decree, and was formally discharged as administrator by an order made to that effect. And this assumption on which the probate court appears to have acted, in our opinion, was entirely correct. The order of distribution that was made on April 27, 1896, required certain acts to be done and performed by the trust company in its capacity as administrator; and until they had been done and performed, and the court had approved of the administrator's acts in that behalf, it was clearly subject to the orders of the probate court, and its functions as administrator had not ceased. The view contended for by the administrator is entirely untenable, since it would deny to the probate courts of the state the right to enforce such orders relative to the distribution of estates as they may see fit to make, leaving administrators, when final settlements are approved, in full possession of all the property then in their hands, and at liberty to deal with it as they please until they are called to account by some other tribunal than that from which they originally derived their authority. We are satisfied, therefore, that under the laws of the state of Minnesota the approval of a final settlement, and an order of distribution made thereon, does not operate forthwith to discharge the administrator, but that its effect is to give the distributees a right to the possession of the property that has been assigned to them, and a right to invoke the power of the probate court, as against the administrator, to compel obedience to its orders. Finding no error in the record, the judgment below is accordingly affirmed.

SANBORN, Circuit Judge. I concur in the judgment in this case for the reasons stated in the opinion of the court, and for the further reason that creditors, heirs, and legatees who are citizens of other states are not deprived of their right to maintain and try their suits in the federal courts against administrators, executors, and all other parties who are citizens of the state of the decedent, nor are they barred of their original rights to maintain and to try these suits in the federal courts, by their failure to present their claims to the state courts as provided by the administration statutes of the states. *Suydam v. Broadnax*, 14 Pet. 67, 74, 10 L. Ed. 357; *President, etc., v. Vaiden*, 18 How. 503, 507, 15 L. Ed. 472; *Borer v. Chapman*, 119 U. S. 587-589, 7 Sup. Ct. 342, 30 L. Ed. 532; *Lawrence v. Nelson*, 143 U. S. 215, 224, 12 Sup. Ct. 440, 36 L. Ed. 130; *Payne v. Hook*, 7 Wall. 425, 430, 19 L. Ed. 260; *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; *Johnson v. Waters*, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547; *Hayes v. Pratt*, 147 U. S. 557, 570, 13 Sup. Ct. 503, 37 L. Ed. 279; *Byers v. McAuley*, 149 U. S. 608, 621, 13 Sup. Ct. 906, 37 L. Ed. 867; *Hyde v. Stone*, 20 How. 170, 175, 15 L. Ed. 874; *Hess v. Reynolds*, 113 U. S. 73, 76, 5 Sup. Ct. 377, 28 L. Ed. 927.

PITT et al. v. RODGERS.

(Circuit Court of Appeals, Ninth Circuit. October 9, 1900.)

No. 572.

FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION—LIS PENDENS UNDER NEVADA STATUTE.

Under the statute of Nevada (Cutting's Comp. Laws, par. 3122) which requires the filing of a notice of lis pendens with the county recorder in order to charge subsequent purchasers with constructive notice of the pendency of an action affecting the title or possession of real property, a purchaser of land without knowledge or actual notice of a suit then pending in a state court between his grantor and others involving water rights in connection with such land, and in which no notice of lis pendens was filed, is not affected by such suit, and the institution by him of a suit in a federal court to determine his water rights, and the service of process and an injunction therein upon the defendants, who are also the adverse parties in the action in the state court, vests the federal court with priority of jurisdiction over the subject-matter and the parties, and it may properly protect such jurisdiction by an injunction restraining the defendants from further prosecuting the suit in the state court, to which, subsequent to the service of process upon them, they have made the complainant a party.

Appeal from the Circuit Court of the United States for the District of Nevada.

J. W. Dorsey and R. R. Bigelow, for appellants.

Charles W. Slack and A. E. Cheney, for appellee.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This is an appeal from an order of the circuit court of the United States for the district of Nevada (96 Fed. 668) restraining W. C. Pitt, J. T. Hauskins, and L. L. Downs from further proceeding against Arthur Rodgers, the complainant in this action, upon an amended and supplemental answer filed by them "in a certain action pending in the district court, Fifth judicial district of the state of Nevada, in and for the county of Humboldt, wherein J. R. Thies, P. N. Marker, and H. C. Marker are plaintiffs, and the said W. C. Pitt, J. T. Hauskins, and L. L. Downs are defendants." The appellants insist that the facts stated in the petition for injunction are not sufficient to justify the action of the circuit court in making the order appealed from, and this is the only question presented by the appeal. The allegations of the petition for injunction were very carefully stated by Judge Hawley, then presiding in the circuit court, in his opinion overruling the demurrer and exceptions to the petition, and from that opinion we quote as follows:

"The material facts presented in the petition may be briefly stated in their chronological order as follows: On November 30, 1892, there was filed in the state court a complaint in a suit wherein J. H. Thies, P. N. Marker, and H. C. Marker were plaintiffs, and W. C. Pitt, J. T. Hauskins, and L. L. Downs were defendants, praying for a decree adjudging to the plaintiffs therein the first and unrestricted right to the use of the flow of the waters of the Humboldt river, four hundred and four cubic feet per second, for the purpose of

irrigating the lands of the plaintiffs, the watering of their stock, and for their domestic purposes, etc. On March 7, 1893, the defendants Pitt and Hauskins filed their answer, denying many of the averments in said complaint, and, among other things, alleged that the plaintiffs were jointly entitled, as prior appropriators, to the use of only four hundred and thirty-five inches of water, as against the defendants. No injunction was ever issued in said suit. No trial of the case was ever had. No proceedings were ever taken after the filing of the answer until July, 1898, as hereinafter mentioned. On November 13, 1895, complainant Arthur Rodgers acquired the interests and became the owner of all the lands, water, and water rights theretofore belonging to and owned by the said P. N. Marker and H. C. Marker, mentioned and described in the suit commenced in the state court. On May 2, 1898, Arthur Rodgers filed in this court his bill of complaint against W. C. Pitt and the other defendants herein mentioned, wherein he prays that the claim of said defendants to have, divert, or use the water of the Humboldt river be adjudged and decreed to be invalid as against him, and that their rights thereto be adjudged and decreed subordinate and inferior to his rights to have and use the quantity of water mentioned in the bill, whenever the same is necessary for the irrigation of his land, and for watering his stock, and for domestic use. Upon proceedings regularly had therein, this court issued a temporary injunction restraining the defendants, and each of them, from diverting, or in any manner using, the waters of Humboldt river so as to prevent three thousand five hundred inches thereof, measured under a four-inch pressure, from flowing in the bed of the river to the head of the complainant's ditch during the irrigation season. 89 Fed. 420, 424. This cause is still pending, and the injunction is still in full force and effect. The defendants W. C. Pitt and J. T. Hauskins are the same persons as were the defendants in the suit in the state court. The lands, water, and water rights mentioned and described in the complaint in the state court are the same as described and mentioned in the bill of complaint filed in this court. The parties to the respective suits are not identical. On July 16, 1898, the defendants moved the state court for leave to file an amended answer in the suit therein pending, and were by the court allowed so to do. This is designated as an 'amended answer' and 'amended and supplemental answer.' In this answer defendants in the suit petitioned the court for affirmative relief therein against the complainant Rodgers and against J. H. Thies and L. M. Carpenter, who were co-tenants with complainant in a ditch which supplied him and them with water to irrigate their respective lands from Humboldt river, and this part of the pleadings is variously designated as a 'counterclaim' and 'cross complaint' and a 'cross bill.' Complainant was thereafter duly served with process from the state court, and divers preliminary motions and proceedings have been taken therein."

It is further alleged in the petition that a writ of subpoena was issued in the action in the United States circuit court, and duly served upon appellants, defendants therein, prior to June 27, 1898, and that the complainant did not have, at the date of his purchase of the water and water-rights described in the bill of complaint, nor at the date of the filing of the bill of complaint in the action in the United States circuit court on May 2, 1898, any knowledge or actual notice of the pendency of the prior action in the state court in which his grantors and J. H. Thies were plaintiffs and the appellants herein were defendants.

1. It will be noticed from the foregoing statement of facts that when the complainant Rodgers purchased the property which is now the subject of controversy between him and the appellants in the action in the United States circuit court the question of title to that property was in litigation between his grantors and these appellants in the action of Thies and others against Pitt and others, then and still pending in the district court, Fifth judicial dis-

strict, of the state of Nevada, and that court had acquired jurisdiction over the grantors of complainant and the appellants herein, and was thus vested with jurisdiction to determine, as between the grantors of the complainant and the appellants, all questions relating to the ownership of such property; and the court also had power to order other parties brought in, if deemed by it necessary to a complete determination of the controversy. In the exercise of this power by the state court, and upon application of the appellants herein, the complainant Rodgers was subsequently brought in as a party to the action in the state court; but before this was done he had commenced the action against the appellants in the United States circuit court for the district of Nevada, and that court had acquired jurisdiction over all the parties thereto by the service of its process. After the complainant had been made a party to the action in the state court, the United States circuit court made the order appealed from, restraining the appellants from further proceeding against the complainant in the action pending in the state court. It is the settled rule of law that, as between two courts having concurrent jurisdiction of the subject of an action, the court which first obtains jurisdiction of the controversy has the right to proceed to its final determination without interference from the other. *Taylor v. Taintor*, 16 Wall. 370, 21 L. Ed. 287; *Schuehle v. Reiman*, 86 N. Y. 270; *Stearns v. Stearns*, 16 Mass. 171; *Bell v. Trust Co.*, 1 Biss. 260, Fed. Cas. No. 1,260; *Union Mut. Life Ins. Co. v. University of Chicago* (C. C.) 6 Fed. 443; *Gamble v. City of San Diego* (C. C.) 79 Fed. 487. The question, then, which is presented by the record before us, is simply this: Did the United States circuit court or the state court first acquire jurisdiction to finally determine, as between the complainant and the appellants, the question of title to the water and water rights in litigation between them? In the consideration of this question we start with the proposition that the action in the state court was a personal action, and any judgment therein could only bind those actually or constructively parties thereto; that is, parties and those claiming under a party by purchase made after judgment, or during the progress of the litigation, with actual or constructive notice of the pendency of the action. The fact, therefore, that the state court had, at the date of complainant's purchase of the water and water rights in controversy, obtained jurisdiction to determine the title thereto as between the appellants and the grantors of complainant, did not of itself give to that court jurisdiction to proceed in the action pending therein and render a judgment which would bind the complainant, unless, at the time of such purchase, he had actual or constructive notice of the pendency of that action. Now, it is alleged in the petition for injunction that the complainant, when he purchased, and also when he subsequently filed his bill of complaint in the United States circuit court, "had no knowledge and no actual notice" of the prior action pending in the state court between his grantors and the appellants. This allegation, not having been denied, must be taken as true. Unless, therefore, the complainant had constructive notice of the pendency of the action in the state court

at the date of his purchase, and by reason thereof acquired only the rights of a purchaser pendente lite at common law, it must follow that the state court did not, prior to the time he was actually made a party to that action and served with its process, obtain any jurisdiction to render a judgment affecting his title to the property purchased by him. At common law a purchaser of real property involved in a pending action took the same subject to the result of the litigation to which his vendor was party, and was bound by whatever judgment the court might render in respect to his vendor's title. The mere pendency of the action after service of process was, under this law, deemed sufficient to charge the purchaser pendente lite with constructive notice of the litigation. But this rule has been modified by statute in the state of Nevada, and it is to that statute we must look for the purpose of ascertaining whether, at the date of the complainant's purchase, the steps already taken in the action in the state court were such as to charge him with constructive notice of the pendency of that action, and thus give to that court authority to render a judgment which would bind him upon the question of the title of his grantors to the property in controversy. The statute referred to is found in paragraph 3122 of Cutting's Compiled Laws of Nevada, and it is as follows:

"Sec. 27. In an action for the foreclosure of a mortgage upon real property, or affecting the title or possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file with the recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property, in that county affected thereby, and the defendant may also in such notice state the nature and extent of the relief claimed in the answer. From the time of filing, only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby."

Under this statute purchasers are not charged with constructive notice of the pendency of an action affecting the title to real estate, unless at the date of their purchase there is on file with the recorder of the county in which the property is situated a notice of the pendency of such action. The record does not disclose whether or not, at the date of complainant's purchase, there was on file with the recorder of the proper county a notice of the pendency of the action in the state court. There is certainly no presumption that such a notice was on file at that date. *Head v. Fordyce*, 17 Cal. 149. If such was the fact, the burden was upon the appellants to show it. Our conclusion is that it must be held, upon the record before us, that the complainant had neither actual nor constructive notice of the pendency of the action in the state court at the date of his purchase, and his rights were unaffected by such action. It follows from this view that, as the complainant, Rodgers, was a nonresident of the state of Nevada, he had the right, notwithstanding the pendency of the action in the state court, to invoke the jurisdiction of the United States circuit court for the purpose of obtaining a judicial determination of the validity of his title to the property purchased by him; and, the United States circuit court

having obtained in such action jurisdiction over the appellants before the complainant was made a party to the action in the state court, it had the right to proceed to a final determination of the controversy between the parties, and in the exercise of that jurisdiction properly enjoined the appellants from further proceeding against the complainant in the action pending in the state court. *French v. Hay*, 22 Wall. 250, 22 L. Ed. 857; *Insurance Co. v. Howell*, 24 N. J. Eq. 239. The order is affirmed.

HAGGE et al. v. KANSAS CITY S. RY. CO

(Circuit Court, W. D. Missouri, W. D. November 5, 1900.)

1. SURFACE WATER—OBSTRUCTION OF FLOW—LIABILITY FOR DAMAGES.

No action lies against a railroad company for damages on account of the obstruction of the flow of surface water by embankments made for its roadbed.

2. SAME—SLOUGH.

A slough which carries water only in time of freshet or excessive rainfall is not a water course, the obstruction of which by a railroad embankment without openings will render the company liable for damages.

3. WATER COURSES—NEGLIGENT OBSTRUCTION.

The leaving of piling, used while constructing a railroad bridge across a river, standing after its completion at such height as to collect débris and cause the river to overflow its banks, is negligence which renders the company liable for damages to adjacent property, caused by the overflow.

4. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY—JOINT SUIT IN EQUITY.

Landowners whose property is injured by the overflow of a stream, caused by its unlawful or negligent obstruction by defendant, may unite in a suit for injunctive relief in a federal court of equity, provided the injury to each of the several complainants amounts to \$2,000.¹

5. SAME—ALLEGATION OF DAMAGES.

A bill filed in a federal court by several landowners to enjoin the maintenance of an alleged nuisance by obstructing a stream and causing it to overflow upon the lands of the complainants, must clearly show that the amount of damage to each complainant is sufficient to give the court jurisdiction, and an allegation of the difference in the value of the land of a complainant with and without the overflow is not a good allegation of such damage.

6. EQUITY—JURISDICTION TO ABATE NUISANCE—ADEQUATE REMEDY AT LAW.

Ordinarily, where injury is done to land by an occasional overflow of a stream, caused by the erection and maintenance of a nuisance, and the wrongdoer is solvent, the injury may be adequately redressed by an action at law, and a court of equity will not entertain a suit to enjoin the nuisance, but there may be cases where the constant exposure of the lands to such overflow causes damages to the owners for which they cannot recover adequate compensation at law; and in such cases, where the right is clear, a court of equity will grant relief without waiting for a judgment at law establishing the fact of the nuisance and the complainants' legal rights.

In Equity. On demurrer to bill.

Allen & Allen, for complainants.

Lathrop, Morrow, Fox & Moore, for defendant.

¹ Jurisdiction of circuit courts as determined by amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75, and *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

PHILIPS, District Judge. This is a bill by several distinct land-owners in the state of Kansas in the nature of a mandatory injunction against the defendant railway company to compel it to remove certain obstructions consisting of an embankment built on its line of railway and certain pilings and débris under one of its bridges on the Marais de Cygnes river hereinafter designated as "the river," which are alleged to occasion the overflow of the complainants' land in times of high water. The defendant has demurred to the bill.

It is apparent on the face of the bill that much damage to the complainants' crops has resulted from the flow of what is known as surface water, for the obstruction of which, in building embankments and the like on the defendant's railroad, no cause of action exists against the defendant. *Abbott v. Railroad Co.*, 83 Mo. 272; *Benson v. Railroad Co.*, 78 Mo. 504; *Jones v. Railway Co.*, 84 Mo. 151; *Walker v. Railroad Co.*, 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837. It is also apparent from the bill that a part of the injury complained of results from the overflow, in times of unusual freshets, of the water from the natural banks of the river, for which no liability attaches to the defendant, unless it is made to appear that such overflow is occasioned by some unauthorized obstruction placed or maintained by the defendant in the natural channel. The allegations of the bill are not as distinct in this respect as they ought to be to present an exact issue for the taking of testimony thereon. The bill contains allegations respecting what is denominated a "slough," which in times of unusual water falls served as an outlet for waters overflowing from the river, and which it is alleged the defendant's predecessor obstructed by building embankments across it for its railroad bed. Sloughs are not recognized as water courses, which a railroad company, in the construction of its road-bed, may not fill up without openings for water which may seek an outlet in times of extraordinary rainfalls. *Jones v. Railway Co.*, 18 Mo. App. 251; *Railway Co. v. Schneider*, 30 Mo. App. 620. There is another allegation respecting the closing of the natural channel of Mine creek near its outlet into the river, and conducting the water thereat through an artificial channel, constructed by defendant's predecessor, into the river; the only effect of which, in so far as it may be gathered from the averments of the bill, is that at the point of confluence eddies are formed, and counter currents are created in the river. But what effect this has in causing overflows of the river is not made clear. It does, however, appear from the bill that where the bridge of the defendant spans the river the pilings used in the construction of the bridge, after its completion, were cut off and left at such height above low-water mark of the stream as to occasion the accumulation of débris to such an extent as to obstruct the natural current of the river, thereby causing the water to run over the natural bank onto some of the lands in question. If so, this constitutes negligence in so cutting off and leaving the pilings, with consequent damages. *Brink v. Railway Co.*, 17 Mo. App. 177. And if the defendant is maintaining such nuisance, and this occasions the overflow of the water, flooding the complainants' land and injuring the crops, it presents ground of action. This being so,

as the demurrer is general, going to the whole bill, it would be bad, unless the other grounds thereof are well taken. Because of the involved allegations of the bill, it is difficult for the court, until all the facts are before it, to determine where the nonliability of the defendant occurs, and where its liability arises.

In respect to the jurisdictional question raised by the demurrer, some embarrassment arises by reason of the frame of the bill. The general rule in equity is "that, if several persons be joined in a suit in equity, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of persons whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving jurisdiction, but each must stand or fall by itself alone." The authorities governing this question are principally *Shields v. Thomas*, 17 How. 3, 15 L. Ed. 93; *Market Co. v. Hoffman*, 101 U. S. 112, 25 L. Ed. 782; *The Connemara*, 103 U. S. 754, 26 L. Ed. 322; *The Mamie*, 105 U. S. 773, 26 L. Ed. 937; *Gibson v. Shufeldt*, 122 U. S. 29, 30, 7 Sup. Ct. 1066, 30 L. Ed. 1083; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044. As applied to the situation of the parties complainant here, the court is of opinion that all the separate landowners affected by the common nuisance, if any,—that is, all those whose injuries result from one and the same cause, or separate causes combining to produce the common injury,—may unite in one bill for injunctive relief, provided the extent of the injury to each separate landowner coming into the common suit amounts to \$2,000, exclusive of interest and costs. *Rich v. Bray* (C. C.) 37 Fed. 273, 2 L. R. A. 225; *Wheless v. City of St. Louis* (C. C.) 96 Fed. 865. The bill, as to any whose interest is less than that sum, would have to be dismissed. The requisite jurisdictional amount should, of course, affirmatively appear on the face of the bill. This requirement is not observed with sufficient specification as to some of the complainants, while as to others the requisite fact is stated rather inferentially than by specific averment. While it is averred that the market value of the land would be so much without the alleged overflow of water complained of, and so much less by reason thereof, there are palpable objections to this mode of pleading. First, it is argumentative; second, the difference in the market value of the lands would not necessarily be the proper criterion for ascertaining the amount of injury (*Benson v. Railroad Co.*, *supra*), but, rather, is it the amount of damage to each landowner, resulting directly from the occasioned overflow, which could naturally or reasonably be anticipated to occur; and, third, it is apparent from the allegations of the bill that much of the claimed damage results from mere surface water, on which no relief can be predicated, and how much results from the obstructions for which the defendant might be liable does not distinctly appear. As already stated, as the amount of value in controversy is essential to

the jurisdiction of this court, it should be distinctly averred, as arising from the wrongful act giving the cause of action. In this respect the bill is bad.

Further objection to the bill is made on the ground that a suit in equity to enjoin a nuisance is not maintainable until the complainants have established the existence of the nuisance in an action at law. In this jurisdiction this question is referred to the proper construction to be given to section 723, Rev. St. U. S., which provides that: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." The supreme court, in *Parker v. Woolen Co.*, 2 Black, 545, 17 L. Ed. 333, laid down the general rule under the restrictive provision of the statute touching a bill to enjoin a nuisance, from which the following propositions are deducible: A court of equity will not interpose where the redress in an action for damages at law is as plain, practical, and efficient "to the ends of justice and to its prompt administration as the remedy in equity." But equity will interpose where the injury may "be irreparable; as where the loss of health, the loss of trade, the destruction of maintenance or subsistence, or ruin of property must ensue." It will also interpose "to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction." This is supplemented by the further qualification that the party invoking this extraordinary remedy has not slept on his rights for any considerable length of time. He must be eager and prompt to appeal to the equity side of the court when the wrong is known to him. A delay of three years, or less, according to the circumstances of the particular case, may close to him the ear of the chancellor. His bill should, therefore, on its face, distinctly disclose the exigency and necessity for invoking the aid of a court of equity. Ordinarily, where the injury is done to land by the overflow of waters, produced by the erection and maintenance of a nuisance, which occurs only occasionally, in the absence of the insolvency of the wrongdoer, an action for damages would afford a complete remedy, where both the parties would be accorded the valuable right of trial by jury. It is conceivable, however, that the constant exposure of the lands to such overflows might render efforts at farming, using, and improving them so uncertain as to deter a conservative, reasonable man from plowing, planting, sowing, or otherwise improving his lands, because of the constantly impending apprehension that he might not gather the fruit of his labor. The landlord might not find a tenant, whose yearly crop was his sole dependence for daily support, who would take the risk of a lease, whereby the lands might lie idle. In such instances he would find no adequate compensation for his losses, because of the inherent difficulty of establishing them where he declined to plant, or where he failed to find a tenant who would take the risk of such uncertain cultivation. Such a condi-

tion, and the like, might well present a case "where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be prevented otherwise than by an injunction." This suggests a further rule of equity that the bill for such injunction must present "a strong prima facie case of right"; and even on a hearing where the evidence is conflicting as to the culpable wrong of the defendant the chancellor will remit the parties to a trial at law. This rule was recognized by the supreme court of this state in *Harrelson v. Railroad Co.*, 151 Mo. 483, 52 S. W. 368, which asserts that "in a clear case a court of equity will grant relief against a continuing nuisance without waiting for a judgment at law establishing the fact of the nuisance and the plaintiff's legal right; but it will not interfere in doubtful cases until there has been such a judgment at law." It appears from the allegations of this bill that since the construction of said bridge (perhaps in 1892) and the change of the channel of Mine creek (perhaps not later than 1894) there have been three overflows, and none later than 1898. And the court will take cognizance of the fact that these complainants, or at least a part of them, have pending before this court separate bills of intervention in the case of the receivership of the Kansas City, Pittsburg & Gulf Railroad Company, the predecessor of defendant, for the recovery of damages resulting from those overflows. As the question of nuisance or no nuisance, and the liability of the railroad company for its creation and maintenance, is directly involved in those cases, the court would be disposed, even if this bill were sufficient to invoke the equity jurisdiction, to defer the hearing thereof until the final adjudication of those cases. It is possible that with the foregoing suggestions the infirmities of the present bill may be cured by amendments. To the bill as it stands the demurrer is well taken, and is sustained.

AUTEN v. CITY ELECTRIC ST. RY. CO. et al.

(Circuit Court, E. D. Arkansas, W. D. October 25, 1900.)

1. MORTGAGES—DEED TO THIRD PERSON AS TRUSTEE—STATUTE OF FRAUDS.

Property was conveyed by an absolute deed to a grantee, who was designated in the deed as "trustee." The conveyance was in fact made as a mortgage to secure an indebtedness to a third party, and such fact was admitted by the grantee. *Held*, that the debtor could not invoke the statute of frauds to invalidate the deed or to defeat the trust thereby created, on the ground that the deed failed to disclose the object of the trust or the beneficiary, but that the true nature and purpose of the transaction could be shown by the creditor by parol, in the absence of any objection by the grantee, who held the legal title, and was alone entitled to plead the statute.

2. SAME—CORPORATIONS—EQUITABLE ESTOPPEL.

A street-railroad company from time to time purchased and paid for tracts of real estate, which it caused to be conveyed to individuals, the grantees being designated in the deeds as "trustee," but without stating for whom they were trustees or the nature of the trusts. Subsequently, at the request of a bank, to which the company was largely indebted, and

which had knowledge of all the facts, the persons holding the naked legal title to such property, one of whom was the manager and owner of practically all of the stock of the company, conveyed the same to a third person as security for the company's indebtedness to the bank, in reliance on which such indebtedness was extended, and further credit given the company. *Held*, that the fact that no formal action was taken by the directors of the company authorizing the conveyances would not defeat the equitable right of the bank to enforce the security, the company, which was the beneficial owner of the property, having received the entire benefit thereof.

8. DEEDS—CONVEYANCES BY HOLDER OF NAKED LEGAL TITLE—STATUTE OF USES.

The statute of uses does not apply so as to render a conveyance from the equitable owner of property necessary to pass the title, where the legal title is held by another as trustee, by a deed which does not disclose the equitable owner.

4. RECEIVERS—TITLE TO PROPERTY—CLAIMS OF THIRD PERSONS.

The rights of receivers for a corporation in respect of its property are no greater than those of the corporation, and they take such property subject to all claims or defenses which could have been asserted against the corporation.

In Equity. Suit by the receiver of a bank to foreclose deeds alleged to have been given as mortgages.

H. F. Auten, receiver of the First National Bank of Little Rock, Ark., filed two bills to foreclose deeds alleged to be mortgages executed to Nick Kupferle for the benefit of the bank. The Atlantic Trust Company intervened, and also filed cross bills, claiming a prior lien on the realty in controversy by virtue of a general mortgage executed to it by the street-railway company to secure an issue of \$300,000 of bonds. By consent, the two cases were consolidated, and at the hearing it was conceded that the trust company's mortgage did not include any of the lands sought to be foreclosed in this proceeding, and that its cross bill should be dismissed. For convenience the complainant will be referred to as the "Bank," and the defendant as the "Street-Railway Company."

The facts, as found by the court, are: "The street-railway company was a corporation existing under the laws of the state of Arkansas, operating electric street cars in the city of Little Rock. A large majority of its stock was owned by Horace G. Allis, who was its president and general manager. The board of directors consisted of his friends, selected by him, who gave but little, if any, attention to the management of the corporation, leaving that entirely to him. Afterwards Allis, having been elected as president of the First National Bank of Little Rock, resigned as president of the street-railway company, but continued to act as its manager, retaining absolute control of all its affairs. The directors attended no meetings, except when called together by Allis, and then only ratified such resolutions as were prepared by Allis and submitted to them by him. At times proceedings of meetings which were never held by the board were prepared by Allis, and sent to the secretary of the corporation, who entered them as proceedings of regular meetings. In short, Allis continued until 1893 to act as the corporation. The street-railway company at different times purchased the lands in controversy, taking the title as to some of them in the name of Allis as trustee, others in the name of H. P. Bradford as trustee, who succeeded Allis as president of the corporation, and the balance of them in the name of S. J. Johnson as trustee. While none of the deeds specified who the grantees were trustees for, nor the objects of the trusts, it is conceded by all parties that they were trustees for the street-railway company, who was the true owner, and who paid the purchase money therefor. In 1891, the street-railway company being indebted in large sums of money to the bank, principally evidenced by overdrafts on the bank's books, Mr. Kupferle, vice president of the bank, called on Mr. Allis, and insisted either on payment of these debts or security therefor. The street-railway company being unable to pay, Allis agreed to have these lands conveyed to the bank,

or Kupferle as trustee for the bank, to be held as security for the then existing indebtedness, or any money thereafter borrowed by the street-railway company from the bank. In pursuance of this agreement, Allis, on the 21st day of July, 1891, by proper deed, conveyed the lands held by him as trustee as aforesaid to Mr. Kupferle, describing him as trustee for the bank, but otherwise the deed was in usual form, without any limitations or description of the trust. The other parties, Bradford and Johnson, failing to execute promptly deeds to Mr. Kupferle for the lands held by them as trustees, Mr. Kupferle, as vice president of the bank, on the 15th day of April, 1892, wrote a letter to Mr. Bradford, as president of the street-railway company, which letter was written on the bank's paper, informing him that the board of directors of the bank had directed him to demand from the persons holding property of the street-railway company, as trustees, a conveyance thereof to the bank, as security for the debts due it from the street-railway company. In compliance with this request, Bradford and Johnson each executed deeds for the realty held by them, respectively, as trustees for the street-railway company, to Kupferle, describing him as trustee, but not mentioning the beneficiary nor the object of the trust. In consideration of these conveyances, payment of the debts due the bank from the street-railway company was extended, and new credits granted. There is now a large sum of money due the bank, which was by the comptroller placed in the hands of the receiver, and the complainant is the receiver of the bank, and the object of these bills is to have these lands subjected to the payment of the bank's debt, the deeds to Kupferle being treated as mortgages. Mr. Kupferle makes no claim to the lands, but, on the contrary, in his answer and deposition, which are signed by him, declares that he held the legal title to all of these lands as trustee for the bank, to secure any and all indebtedness due the bank from the street-railway company at the time the deeds were executed and delivered to him or thereafter contracted. Nor do the grantors of Kupferle make any claim to the property, it being agreed that they merely held them as trustees for the street-railway company. None of the parties pleaded the statute of frauds, but in the argument on the final hearing the defenses were that the deeds to Kupferle are absolutely void, for the following reasons: First, that none of the deeds disclose the object of the trust, nor is there any evidence in writing on that subject; second, that the deeds from Bradford and Johnson fail to show for whose benefit Kupferle was the trustee; third, that Allis, Bradford, and Johnson holding the legal title as trustees for the street-railway company, which fact was known to the bank, the deeds from the trustees are void, unless authorized by the beneficiary, the street-railway company, to execute them; fourth, that such authority must be in writing, and, the street-railway company being a corporation, it could only be granted by resolution of its board of directors, which was never obtained.

John McClure and Auten & Hill, for complainants.

Rose, Hemingway & Rose, for defendants.

TRIEBER, District Judge (after stating the facts). Without determining whether the statute of frauds can be considered on final hearing, if not pleaded, which is very doubtful (see Wood, St. Frauds, § 537), the claim that the failure of the deeds to Kupferle to show for whom he was trustee, or the object of the trust, vitiates the deeds for failure to comply with the statute of frauds, cannot be sustained.

The Arkansas statute of frauds, following that of England, provides:

"All declarations or creations of trust or confidences of any lands or tenements shall be manifested or proven by some writing signed by the party who is or shall be by law enabled to declare such trusts or by his last will in writing, or else they shall be void." Sand. & H. Dig. § 3480.

Counsel for defendants refer to *Grafton v. Cummins*, 99 U. S. 100, 25 L. Ed. 366; *Littell v. Jones*, 56 Ark. 146, 18 S. W. 497; *Freeport v. Bartol*, 3 Greenl. 345; *Robinson v. Robinson*, 45 Ark. 481; and other cases of that kind,—to sustain their contention; but a reference to those authorities shows that they were all cases wherein the party holding the legal title was sought to be held as a trustee against his wishes, or where, as in *Grafton v. Cummins*, it was sought to enforce an alleged purchase of real estate where the contract for the purchase was not made in writing, nor any sufficient memorandum thereof made in writing and signed by the party sought to be charged. In *Robinson v. Robinson*, the land was purchased by the plaintiff, and the deed therefor executed, at plaintiff's request, to the defendant, who was his son, and the court held that, as there was no evidence that the defendant, before or at the time the deed was executed or delivered, made any declaration, promise, or agreement in writing to hold the land in trust for his father, there could be no trust by reason of the statute of frauds, and the relationship of father and son existing between the parties raised the presumption that the purchase was intended as an advancement or gift to the son. In *Littell v. Jones*, the attempt was made to enforce a contract of purchase, evidenced by a receipt which did not comply with the requirements of the statute; hence the court declined to enforce it. Nor are the quotations from the text-books any more applicable, as they only refer to cases in which it is sought to establish an express trust, as against the holder of the legal title, by reason of verbal promises which he repudiated. If this were an action by the bank against *Kupferle*, who refused to recognize the rights of the bank, and he had pleaded the statute as a defense, the result might perhaps be different.

The general rule is that where in a deed the word "trustee" is added to the name of the grantee, but there is no declaration of trust, the word "trustee" may be regarded as *descriptio personæ*. *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 134 N. Y. 435, 21 N. E. 874; *Andrews v. Real-Estate Co.*, 92 Ga. 260, 18 S. E. 548.

In *Andrews v. Real-Estate Co.*, *supra*, this identical question was before the court. The Georgia Code (section 3159, subd. 4) provided:

"Where a trust is expressly created, but no uses are declared, or are insufficiently declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor or testator or his heirs."

The court, in passing upon the deed, which was exactly like those in this case, held:

"Here no trust is expressly created. The premises are not conveyed in trust expressly, but the vendees are only described by the word 'trustees.' * * * The result is that while we may conjecture, from the use of the word 'trustees,' and the phraseology, 'their successors and assigns,' that beneficiaries other than the vendees themselves may possibly have been in contemplation, for otherwise why the vendees were described as trustees is not easily accounted for without looking outside of the deed, yet this bare possibility furnishes no legal grounds for disregarding the use expressly declared

in the deed, and holding that the vendees were not the beneficiaries, and the sole beneficiaries, in whose behalf the conveyance was made. The better and safer construction is to hold that the word 'trustees,' wherever it occurs in the deed, is mere surplusage, and ought to be rejected in reading the conveyance and adjusting its legal effect." 92 Ga. 262, 18 S. E. 549.

Nor do the authorities cited by counsel sustain the contention "that the trust will not be executed if the precise nature of it, and the particular persons who are to take as cestuis que trustent, and the proportions in which they are to take, cannot be ascertained." None of these authorities (1 Perry, Trusts, § 83; Browne, St. Frauds, § 108; Hill, Trustees, p. 61; 2 Story, Eq. Jur. § 979a; Tilden v. Green, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33) have any application to the facts of this case. These authorities all refer to voluntary trusts created by will or gift, the rule in such case being that such a trust, without a certain beneficiary who can claim its enforcement, is void. In the Tilden Case, the court, in speaking of the trust sought to be created, said:

"If the Tilden trust is but one of the beneficiaries which the trustees may select as an object of the testator's bounty, then it is clear and conceded by the appellants that the power conferred by the will upon the executors is void for indefiniteness and uncertainty in objects and purposes. The range of selection is unlimited. It is not confined to charitable institutions of this state, or of the United States, but embraces the whole world. Nothing could be more indefinite and uncertain, a broader and more unlimited power could not be conferred, than to apply the estate to 'such charitable, educational, and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind.' 'A charitable use, which neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.' Perry, Trusts, § 637. 'Such a power is distinctly in contravention of the statute of wills. It substitutes for the will of the testator the will of the donees of the power, and makes the latter controlling in the disposition of the testator's property. That cannot well be said to be a disposition by the will of the testator with which the testator had nothing to do, except to create an authority in another to dispose of the property according to the will of the donees of the power.' Read v. Williams, 125 N. Y. 569, 26 N. E. 731."

In the case at bar it is not sought to establish such a trust as against the holder of the legal title, who is Kupferle; but the bank seeks to enforce an equitable mortgage, evidenced by a deed absolute on its face, to a grantee who confesses that he holds the legal title merely as trustee for the bank to secure the payment of debts due to the bank from the street-railway company, and he does not plead the statute of frauds. He waives it, and no one else can plead it. Wood, St. Frauds, p. 878.

If the conveyance to Kupferle was a valid conveyance, parol proof is admissible to show that, although the deed is on its face absolute, yet it was executed by the grantors and accepted by the grantee for the purpose of holding the lands conveyed as security for debts due from the grantors or their cestui que trust to the grantee or others for whom he was acting. Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Brick v. Brick, 98 U. S. 514, 25 L. Ed. 256. If any person has the right to plead the statute of frauds in this case, it would be Kupferle, and not the defendant.

As it is conceded that Allis, Bradford, and Johnson held the naked

legal title to the lands for the street-railway company, who paid the purchase money, was a conveyance from these trustees, without the written consent or authority of the beneficiary, valid? If the conveyances had been made by these parties for considerations paid to them individually, then there can be no doubt but that they would be void, as Kupferle, as well as the bank, had full notice that the true owner of the property was the street-railway company, and that his grantors only held the naked legal title for the use of the street-railway company. Had the deeds to Allis, Bradford, and Johnson shown on their face that they only held as trustees for the street-railway company, then under the statute of uses, which is in force in this state, the legal and equitable title would have been merged in favor of the usee, the street-railway company, but, as the usee was not named in the deeds, the statute of uses does not apply.

The conveyances to Kupferle now sought to be foreclosed as equitable mortgages were solely for the benefit of the street-railway company. The money due the bank was loaned to the street-railway company, the extensions were granted to it on the faith of these conveyances, and new loans made to the street-railway company in reliance upon the security supposed to be possessed by the bank by reason of these conveyances.

Notwithstanding the statute of frauds, a deposit of title deeds by the owner of an estate, either for the purpose of securing a debt already due, or a sum of money advanced at the time the deposit is made, operates as an equitable mortgage, and parol evidence to show the object of the deposit is admissible. Wood, St. Frauds, § 240; Browne, St. Frauds, § 62.

Without discussing the powers exercised by Allis with the full knowledge and consent of the board of directors of the street-railway company, a court of equity will not suffer a fraud to be perpetrated. The street-railway company received the entire consideration, and to permit it now to repudiate the acts of the person whom it held out to the world as clothed with full authority, without returning the money received by it, would be, to say the least, inequitable. This is not the object of the statute of frauds. In the language of Lord Hardwicke: "The statute of frauds should never be understood to protect fraud, and therefore, whenever a case is infected with fraud, the court will not suffer the statute to protect it." *Reech v. Kennegal*, 1 Ves. 125. Nor does it matter that the street-railway company is now in the hands of receivers, for they took the assets in trust for creditors, not for value and without notice, but subject to all the claims and defenses that might have been interposed against the corporation. Their rights in the property of the corporation which came into their possession are no greater than those which the insolvent corporation possessed. *Scott v. Armstrong*, 146 U. S. 499-507, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Bank v. Yardley*, 165 U. S. 634-653, 17 Sup. Ct. 439, 41 L. Ed. 855.

Complainant is entitled to a decree of foreclosure, and as the property has been sold in pursuance of an interlocutory decree entered by consent of parties, and the proceeds, less the amount due the receiver of the street-railway company for moneys advanced for taxes,

etc., deposited in the registry of the court, and as this sum is much less than the amount due complainant, and no personal judgment is asked in this proceeding, the decree may be that the sum in the registry of the court be paid over to complainant, if the parties will consent to such a decree, the consent to be without prejudice to the rights of the parties to appeal from any other part of the decree; but, if the parties will not agree to that, there will be a reference to the master to ascertain the amounts due the complainant from the street-railway company.

SMALL v. PETERS et al.

(Circuit Court, W. D. Michigan, S. D. October 22, 1900.)

EQUITY—EFFECT OF VOLUNTARY DISMISSAL—CROSS BILL FOR AFFIRMATIVE RELIEF.

Where a cross bill sets up new matter founded upon the same transaction, not by way of defense, but as ground for affirmative relief,—as where, in a suit for the specific enforcement of a contract, the defendant, by a cross bill, alleges facts which would entitle him to a rescission of the contract, and the retention and enforcement of a lien upon property in his hands, for which he prays,—a voluntary dismissal of the original bill does not carry with it the cross bill.

In Equity. On motion by complainant for leave to dismiss his bill.

J. F. Hilscher and John S. Cooper (George Clapperton, of counsel), for complainant.

Knappen & Kleinhans, for defendants.

SEVERENS, Circuit Judge. The bill in this case was filed for the purpose of obtaining the specific performance of a contract alleged to have been made between complainant and defendant Richard G. Peters, whereby in consideration of the transfer by complainant to that defendant of certain securities, amounting in par value to the sum of \$37,000, the said Peters agreed to convey to the complainant 37,000 acres of timbered lands in the state of Alabama, and also agreed to loan to the complainant the sum of \$10,000, for which a note was to be given, and of this sum said complainant was to draw such partial amounts at various times as he should require. A deed for the lands was to be executed by Peters, and deposited with a bank named in the agreement, to be retained by said bank until the money loan should be fully paid. The bill alleges further that the note was given, and the \$10,000 received upon the loan, in accordance with the contract, but that the title to several thousand acres of the land turned out to be not in Peters, and that, as to some thousand acres besides, his title was defective. It is charged that the defendant, therefore, was unable to make a good title to the part of the land contracted to be conveyed. Specific performance of the agreement was prayed for that part of the lands, the title to which was not defective; that complainant's note might be decreed to be delivered up and canceled, or that an account should be taken for the purpose of ascertaining to what part of the land Peters had not a merchantable title,

and that, as to so much thereof, Peters should be decreed to pay the complainant the value, estimated at \$1. per acre; and that the amount be deducted from the promissory note,—the balance thereof to be paid to complainant. To this bill Peters filed an answer admitting the contract, but denying that he had not a good, merchantable title to any part of the lands. The answer then proceeds to state that the contract was entered into on defendant's part in consequence of fraud and deceit of complainant in representing to Peters that the securities were of full face value, amounting to the sum of \$37,000, and that the obligors in these securities were solvent and responsible, and that the interest thereon had been kept paid, and divers other facts and circumstances in support of his general allegations of falsehood and deceit; that Peters relied upon the truth of these representations, which turned out to be wholly false; and that the securities were, with the exception of the smaller one, amounting to about \$5,000, wholly worthless. With this answer the defendant Peters filed a cross bill against complainant and certain other parties, citizens of other states than that of Peters, setting up substantially the affirmative matter stated in his answer. It should be further stated that in the answer and cross bill it was averred that the complainant had taken possession of the lands, or some parts thereof, and had sold off the timber standing thereon. Other matters are averred and alleged in the answer and cross bill, which need not, for the purposes of this motion, be detailed. The cross bill prayed that the contract might be decreed to be rescinded, and the defendants therein should be decreed to have no interest or claim in the lands; that the defendant in the cross bill, Small, should be decreed to pay the complainant the amount of the \$10,000 loan and certain other items; that complainant should be decreed to have a lien upon the securities in his hands to the amount of the loan; and that they might be sold for the purpose of satisfying such lien if the amount found due the complainant should not be paid.

Upon the filing of the answer and cross bill the complainant made this motion for leave to dismiss his bill upon payment of costs, and upon argument it has been contended that the effect of the entry of such an order as prayed would be to dismiss the cross bill also. It is therefore inferred that the object of the motion is to dispose of the suit altogether. It may be that the complainant is entitled to have such an order as he asks, but it is doubtful whether the complainant would ask for the order, except upon the understanding that the cross bill would also be dismissed, and that this would bring the whole of the litigation between the parties to an end. It is undoubtedly the general rule that the complainant may dismiss his bill, upon payment of costs, at any time before the defendant has obtained any right, by the decree or some order of the court, or otherwise, of which it would be inequitable to deprive him, and, in case the defendant has filed a cross bill which brings forward new matter merely defensive in its character, the complainant still has the right to an order dismissing his cross bill upon payment of the costs; the other circumstances being as above stated. But where the cross bill alleges new matter as a distinct ground for relief, and is founded upon the same transac-

tion, in respect of which he is entitled to affirmative relief, the rule is otherwise. In that state of the case the complainant in the cross bill, upon the filing thereof, may have the right in that suit to proceed and obtain the relief to which he may be entitled. The right of the original complainant to dismiss the suit altogether turns upon this distinction, which seems to be quite well settled by the authorities. *Lowenstein v. Glidewell*, 5 Dill. 325, Fed. Cas. No. 8,575, per Caldwell, J.; *Markell v. Kasson* (C. C.) 31 Fed. 104, per Brewer, J.; *Jesup v. Railroad Co.* (C. C.) 43 Fed. 483, per Harlan, J.; *City of Detroit v. Detroit City Ry. Co.* (C. C.) 55 Fed. 569, per Judges Taft and Swan. And it seems to be the logical sequence of the decision in *Holgate v. Eaton*, 116 U. S. 33, 6 Sup. Ct. 224, 29 L. Ed. 538. In *Dawson v. Amey*, 40 N. J. Eq. 494, 4 Atl. 442, it was held that the complainant might have leave to dismiss his bill, but that the cross bill would be retained; citing 2 Daniell, Ch. Pl. & Prac. (5th Ed.) p. 1553, note 3. See, also, *Worrell v. Wade's Heirs*, 17 Iowa, 96; *Story*, Eq. Pl. § 399, where it is said:

"Thus the dismissal of the original bill carries with it the cross bill when the latter seeks relief by way of defense; but it is otherwise, and relief may still be given upon the cross bill, where affirmative relief is sought thereby as to collateral matters properly presented in connection with the matters alleged in the bill."

In 5 Enc. Pl. & Prac. p. 663, after stating the general rule giving complainant the right to dismiss, it is said:

"But when the cross bill sets up additional facts relating to the subject-matter, not alleged in the original bill, and asks affirmative relief against complainant in a matter which is the subject of the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross bill, and the latter remains for disposition as if it had been filed as an original bill."

And a greater number of decisions are there cited in support of that proposition. Among them is the case of *Wickliffe v. Clay*, 1 Dana, 585, where it was held that:

"Where the complainant seeks for specific performance of a contract, and defendant by the cross bill asks a cancellation thereof, the voluntary dismissal of the original bill does not carry with it the cross bill."

The above-cited case of *City of Detroit v. Detroit City Ry. Co.* (C. C.) 55 Fed. 569, was a case decided in this circuit. A motion was there made for leave to dismiss the bill. The defendant company had filed a cross bill alleging facts wherein it claimed the right to affirmative relief. The motion to dismiss was denied, and Judge Taft, in delivering the opinion of the court, rested the decision not so much upon the distinction above stated, apparently, as upon the fact that under the circumstances of the case the defendant would be prejudiced if it could not proceed in that case for the relief prayed by its cross bill, in that the uncertainty of its position respecting certain franchises granted to it by the city put to hazard its operations thereunder. In the present case the nature of the property involved is such that there should be an early determination of the rights of the parties therein, and it is probably a fair matter for consideration that the dismissal of the cross bill would compel the complainant therein to go to a distinct jurisdiction for

the purpose of obtaining a judicial determination of his rights. The property upon which he seeks to fasten a lien is now in his hands. The complainant in the original bill is a citizen and resident of the state of Minnesota. The cross complainant has lawfully obtained the right to file his cross bill, and it is easy to see that he would be prejudiced if the right to prosecute it is denied. But I do not think it is necessary to rest the present decision of the court upon these peculiar considerations. It is sufficient to rest the decision upon the ground previously stated. The complainant places much reliance upon the language employed by Mr. Justice Wood in the case of *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081, where, in delivering the opinion of the court, at page 713, 109 U. S., page 601, 3 Sup. Ct., and page 1085, 27 L. Ed., he says:

"It may be conceded that, when an original bill is dismissed before final hearing, a cross bill filed by a defendant falls with it. It may also be conceded that as a general rule the complainant in an original bill has the right at any time, upon payment of costs, to dismiss his bill. But this latter rule is subject to a distinct and well-settled exception, viz. that after the decree, whether final or interlocutory, has been made by which the rights of a party defendant have been adjudicated, or such proceedings have been taken as entitle the defendant to a decree, the complainant will not be allowed to dismiss his bill without the consent of the defendant."

But it would seem that the concession there made was rather for the sake of the argument than as a positive determination, and at all events it is in no wise inconsistent with what was said that other exceptions than that stated would take the case out of the general rule. I do not, therefore, think that the present decision is at all in conflict with what was held in the case referred to. Assuming as I must that the complainant does not seek an order dismissing his bill, but leaving the cross bill standing, the motion will be denied.

NORTH AMERICAN EXPLORATION CO., Limited, et al. v. ADAMS et al.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,384.

1. WATER RIGHT—ABANDONMENT.

The abandonment of the right to divert and use the waters of a stream is not different in its character from the renunciation of any other right which is asserted and maintained by its use.

2. SAME—EXPRESS—IMPLIED.

Abandonment is either express or implied. It may be effected by a plain declaration of an intention to abandon. It may be inferred from acts or failures to act so inconsistent with an intention to retain and assert the right that the unprejudiced mind is convinced of the renunciation.

3. FINDING OF CHANCELLOR PREVAILS WHERE TESTIMONY IS EVENLY BALANCED.

Where the chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively correct, and will not be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence.

4. CONVEYANCE OF MILL SITE CARRIES APPURTENANT WATER RIGHT.

A deed of a mill site, without specific mention of a right to divert water from a stream and to use it to operate a mill which has been used thereon, conveys the water right as an appurtenance to the mill site, in the absence of any reservation of it, of any conveyance of it to another, or any other evidence that the grantor did not intend to part with it.

5. WATER RIGHT APPURTENANT TO SITE ON WHICH IT IS USED.

A water right used upon a mill site to treat ore extracted from a mining claim, and brought to the mill site for treatment, is not appurtenant to the mining claim, but to the mill site.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

Charles J. Hughes, Jr., for appellants.

H. M. Hogg, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This appeal challenges a decree of the circuit court which perpetually enjoins the North American Exploration Company, Limited, Ernest Thalman, and Hamilton F. Kean, the appellants, from diverting the waters of Bear creek so as to prevent the same from flowing freely to the extent necessary, not exceeding 180 miner's inches, for the lawful uses and purposes of the appellees, Alva Adams, Frank Adams, W. H. Trout, and George Holmes, co-partners doing business as the Chief Mining & Milling Company, in carrying on upon their mill site their concentrating plant and mill for the reduction of ores and for the operation of their mines. The appellants allege that this decree is erroneous for three reasons: (1) Because, while they concede that the grantors of the appellees first diverted and appropriated the water of this creek to a beneficial use in 1886, and thereby obtained the right to so divert and use it, yet they assert that this right had been abandoned and lost by these grantors and their successors in interest when, in 1898, the appellants diverted and used this water, and thereby acquired the superior right to it; (2) because the conveyances of the Silver Chief mill site, to which the water was diverted and on which it was used in 1886, to the appellees, did not, in terms, convey the right to divert and use the water as an appurtenant to the mill site; and (3) because neither the appellees nor their grantors ever used 180 miner's inches of water, or more than 15 miner's inches. These objections to the decree will be considered in the order in which they have been stated.

The abandonment of the right to divert and use the waters of a stream is not different in its nature or character from the renunciation of any other right which is asserted and maintained by its use. It may be express or implied. It may be effected by a plain declaration of an intention to abandon it, and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation. In the case in hand there was no express declaration of a surrender of the right which the grantors of the appellees acquired

in 1886, and the issue of abandonment resolved itself into a question of fact, to be determined by the course of action which the parties pursued and the circumstances surrounding them as they were developed in the evidence. The facts material to this question which the evidence established were these: The waters of Bear creek, at the place where this controversy arose, run in a northerly direction. On its easterly side lie the Silver Chief mining claim and the Silver Chief mill site, which are owned by the appellees, with the exception of one acre of the mill site, upon which the mill was not situated, and to which no water was ever diverted. This acre is owned by two of the appellants. On the west side of the creek are the Nellie mining claim and the Nellie mill site, which are owned by the appellants. In 1886 and 1887 all these claims and mill sites were in the possession of the same claimants who built a mill on the Silver Chief mill site, and used it to reduce ore which they took from the Nellie mining claim, and brought to the mill on a tramway. For the purpose of operating this mill, they diverted the waters from Bear creek by means of a ditch and a pipe line, conducted it to the Silver Chief mill site, and there used it in their mill for the purpose of milling ore and producing power. It was conceded at the hearing and upon this argument that these acts gave to the owners of this property an established right in 1886 and 1887 to perpetually divert and use the waters of this creek to the extent and for the purposes for which they were used in the years 1886 and 1887. The operation of the mill proved to be unprofitable, and it was not continued. After its operation ceased the owners loaned the wheel and sold the pipe which was used to conduct the water to the mill, and in the year 1897 a snow-slide swept the mill away. During these years from 1886 to 1897 the waters of the creek do not seem to have been claimed or used by others, and there was testimony that in the years 1896 and 1897 the owners of the Silver Chief mill site turned the waters of the creek into their ditch, although it does not appear that they used it for any beneficial purpose. In September, 1896, the appellees filed a notice of their claim to the right to divert and use the water of Bear Creek through the old ditch, under the statute. In May, 1898, the appellees commenced to construct a mill on the site of the old mill upon the Silver Chief mill site, to clear out their ditch, and to build a pipe line to conduct the water over its old course to their mill site, and in the year 1898 they had completed their mill, and commenced to use the water through this ditch and pipe line to operate it.

The appellants' claim to a superior right to this water rests upon these facts: On August 28, 1896, their grantor located a ditch and water right to divert 500 miner's inches of the waters of this creek at a point above the point of diversion of the appellees, and constructed a ditch 200 feet long, and led a portion of the water of the creek into this ditch, but did not apply it to any beneficial use. In April, 1898, the appellants commenced to dig a ditch from this point of diversion, to lay a pipe line to the Nellie mill site, and to construct a power house thereon to generate electricity to light

the Nellie mine. They constructed their power house, and first actually applied the waters of the creek to a beneficial use about three months after the appellees, in July, 1898, used it to operate their mill. The uncontradicted testimony of the witnesses was that the right to divert and use water upon a mill site was of very great value, while a mill site without the right to divert and use water upon it was practically valueless. The successive owners of the Silver Chief mill site testified that they never had any intention of abandoning the water right which they acquired in 1886.

There may be grave doubt whether or not the appellants could maintain a superior right to the diversion of the waters of this creek, even if it should be held that the appellees or their grantors had abandoned the right which they acquired in 1886. The ditch which the grantor of the appellants dug, and the diversion which he made of the waters of this creek in 1896, was on the east side of the stream, and he did not apply these waters to any useful purpose. Before the appellants commenced to construct the ditch and pipe line which they are now using, the appellees had filed a notice of their claim in September, 1896. Before the appellants had actually used any of the waters for any beneficial purpose, the appellees had constructed their new mill, had led the waters of the creek through the old ditch to their mill site, and had been using it for three months for the purpose of operating their mill. Upon this state of facts the equity of the appellants is not very persuasive. But before they can reach a consideration of these questions they must bear the burden of clearly establishing that the appellees or their grantors abandoned the right which they acquired in 1886 to divert the waters of this creek and use them upon their mill site. It may be conceded that the evidence in this case is so evenly balanced that a finding of abandonment would not be disturbed. The long period of 11 years during which the right to this water was not used, the loaning of the mill wheel, the sale of the pipe in the pipe line, the silence and inaction of the appellees and their grantors, might warrant such a conclusion. But this record is far from barren of competent and persuasive evidence which might well lead to an opposite finding. The facts that the Silver Chief mill site without the water right was valueless; that with it it was worth thousands of dollars; that during the time when this right was not exercised no one claimed to disturb or supersede it; that the old mill stood until swept away by the snow in 1897; that in the years 1896 and 1897 its owners turned the waters of the creek into the old ditch and permitted them to flow there; that they testify that they never intended to abandon their water right; and the very persuasive consideration that the voluntary renunciation of valuable rights of property is contrary to the ordinary course of human action,—furnish ample warrant for the conclusion that the right to divert and use this water acquired in 1886 never was abandoned, either by the appellees or by their predecessors in interest. This was the conclusion reached by the court below after a careful consideration of all this evidence. It is settled by the repeated decisions of the supreme court and of this court that where the chancellor has considered

conflicting evidence, and made his finding and decree thereon, they must be taken to be presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings should not be disturbed. *Mann v. Bank*, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Burt*, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; *Plow Co. v. Carson*, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; *Trust Co. v. McClure*, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46. The evidence of abandonment is not so clear and convincing in this case as to warrant a reversal of the conclusion of the circuit court that it was not established.

The appellants derive their title to the Nellie mining claim, the Nellie mill site, and one of the five acres which constitute the Silver Chief mill site by various mesne conveyances from the same parties from whom the appellees derive their title to the Silver Chief mining claim, and all of the Silver Chief mill site except the acre owned by two of the appellants. The old mill built, in 1886, was on that portion of the Silver Chief mill site owned by the appellees. The new mill which has been constructed, and which is now operated by the appellees, is upon the site of the old one. The water right acquired in 1886 was used in the old mill in 1886 and 1887 to furnish power and to mill ore which had been extracted from the Nellie mining claim. This water right is not specifically mentioned or described in any of the conveyances, and counsel for the appellants argue that it was appurtenant to the Nellie mining claim, and passed to the appellants by the conveyance of that claim, and that, if it did not pass to them, it remained vested in the former owners. It is difficult to perceive how the right to divert, conduct to, and use water in a mill which is used to reduce ore is any more an appurtenance of the mine from which the ore is extracted than the right to divert and use it in a mill which is used to grind corn is appurtenant to the field where the corn grew. The position that this water right was appurtenant to or passed with the Nellie mining claim, because it was used to reduce ore extracted from it and treated in a mill on other property, finds no support in reason or authority. Turning to the other contention of counsel for appellant, it is conceded that a water right may be reserved from a conveyance of the mill or site on which it was exercised, and that it may be conveyed without or with the mill site. Whether or not it passes by a conveyance of the mill or mill site on which it was used depends upon the intention of the parties to the conveyance. In this case the old mill was standing when many of the conveyances of the mill site under which the appellees hold were made. The old ditch was there. The mill and site without the water right were worthless, while with it they were of considerable value. The grantors in the various conveyances of the mill and its site did not reserve the water right which had been exercised upon them, nor have they ever conveyed

it to others, claimed it themselves, or otherwise evidenced their intention that it should not pass by their deeds. The inference is irresistible that they intended to and did convey it as an appurtenance of the mill site.

A deed of a mill site and mill upon which a right to divert water from a stream and to use it to operate a mill has been exercised conveys the water right as an appurtenance to the mill, in the absence of any reservation of it, of any conveyance of it to another, and of any other evidence that the grantor did not intend to convey it.

The third objection to the decree is that it is too broad; that it permits the appellees to use 180 miner's inches of water per second, when neither they nor their grantors ever have used more than 15 miner's inches. There are two reasons why this objection is untenable. In the first place, there is evidence that the owners of the Silver Chief mill site used, in 1886, all the water that would discharge itself through an aperture 8 inches in diameter under a head of 165 feet to drive their mill wheel, and all that would discharge from an opening 2 inches in diameter under a pressure of 20 feet fall to mill their ore, and this was much more than 15 miner's inches per second. In the second place, if, as appellants claim, the appellees have not used, and cannot beneficially use, in the operation of their mill and mines, more than 15 miner's inches, then the decree allows them to use no more; for the injunction against the appellants only enjoins them from preventing the flow of such an amount of water to the appellants' mill, not exceeding 180 miner's inches, as is necessary to operate their concentrating plant, mill, and mines. The real issue tendered by the pleadings in this case was the priority of right to the use of the water of this creek, and not the quantity which the appellants were entitled to use, and the testimony upon the latter question is not of that clear and convincing character which calls for a modification of the decree which the chancellor has rendered, and it is affirmed.

MORRIS & WHITEHEAD v. EAST SIDE RY. CO. et al

MAXWELL v. SAME.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 562.

1. PLEDGES—VALIDITY OF SALE—FRAUD AND COLLUSION.

A pledgee of the bonds of a street-railroad company, securing notes given by the owners of the stock of the company amounting to something more than half the face value of such bonds, sold the same at public sale, after due notice to all parties interested; the makers of the notes and the company having become insolvent and made default in the payment of interest. At the sale the bonds were purchased by a bank, which had acquired other claims against the company, for about \$5,000 less than the amount due on the notes secured. This sum the bank also paid, taking an assignment of the notes. By a previous arrangement, the bank, which was of good financial standing, borrowed from the

pledgee something over 90 per cent. of the amount it paid for the bonds, giving its own note therefor, secured by a pledge of the same bonds. The direct testimony of the parties showed without contradiction that the pledgee had no interest, direct or indirect, in the purchase of the bonds at the sale, and that its only purpose in assisting the purchaser by a loan was to obtain part payment of its debt, and the substitution of a solvent for an insolvent debtor for the remainder. Held that, in view of such evidence, the facts were not sufficient to impeach the good faith of the sale, and to warrant the court, in a suit to foreclose the mortgage securing the bonds, in disregarding it as fraudulent, and limiting the recovery to the amount of the original debt, to which such bonds were collateral.

2. SAME—CONDITIONS OF SALE.

The delivery by a corporation of its bonds to a third person for the express purpose of enabling him to pledge the same as security for a loan to be obtained for the benefit of the corporation carries with it implied authority to make the hypothecation on the terms usual in such cases as to the manner of selling the bonds in case of default in payment of the debt.

3. SAME—LAW GOVERNING.

Where bonds are pledged in another state from that in which the debtor resides to secure notes there payable, the law of such state governs as to the sale of the security.

4. SAME—MUTUAL MISTAKE.

A mutual mistake by which bonds separately pledged to secure two different notes to the same creditor are applied in each case to the wrong note is immaterial, and does not affect the validity of the pledges, where, on a sale of the bonds, those constituting the separate pledges do not in either case realize enough to pay the smaller note.

Appeal from the Circuit Court of the United States for the District of Oregon.

For former opinion, see 95 Fed. 13.

Ralph E. Moody, Cotton, Teal & Minor, and W. S. Goodfellow, for appellants.

Zera Snow and W. A. Cleland, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The defendant East Side Railway Company is a corporation organized by G. A. and James Steel for the purpose of building and operating certain lines of railway and street railway in and about Portland, Or. G. A. Steel became its president and James Steel its vice president, treasurer, and general manager. Each of them was a director of the corporation, the only other director being John B. Cleland, who was also its secretary, and who held but one share of the stock of the corporation, and that only to qualify him as director. Indeed, it appears that at all the times herein mentioned the two Steels were the real owners of all of the stock of the railway company, 100 shares of which, however, were hypothecated by them as security for an indebtedness to the Bank of British Columbia, and for that purpose stood in the name of George Good as trustee, whose proxy, however, James Steel held. It appears that the company built at least some of the lines of railway for which it was organized, and acquired various rights of way, rolling stock, power house, and other necessary and appurtenant property. Under

resolution of its board of directors, 250 bonds of the par value of \$1,000 each were authorized to be issued, secured by a mortgage on its property, executed to the Security Savings & Trust Company of Portland as trustee, for the benefit of the holders of the bonds. One hundred and twenty-five only of those bonds were issued, and they were issued and delivered to G. A. and James Steel, who pledged them to the German Savings & Loan Society of San Francisco, Cal., as security for money borrowed by them from that bank at different times, and aggregating about \$83,000. The case shows that this money was used by the Steels in and about the building up and operation of the lines of railway mentioned, and that, more money being needed for that purpose, the directors of the company adopted a resolution providing for the issuance of 300 bonds of the par value of \$1,000 each, to be secured by a mortgage upon all of the property of the company to the Security Savings & Trust Company of Portland as trustee, to be used in replacing the bonds of the first issue so far as necessary, and the remainder in securing additional money. In pursuance of that resolution, 300 bonds, numbered, respectively, from 1 to 300, both inclusive, were issued on March 1, 1893, secured by a mortgage on all of the property of the company to the Savings & Trust Company as trustee. These bonds were certified by the trustee, and delivered to the railway company. Of them, 125, numbered from 1 to 125, both inclusive, were delivered to James and G. A. Steel in lieu of the 125 bonds of the first issue thereupon surrendered and canceled, and bonds numbered from 131 to 153, both inclusive, were, also for value, delivered to James and G. A. Steel, and bonds numbered 126 to 130, both inclusive, were, for value, delivered to Eva P. Steel, who thereafter authorized James and G. A. Steel to pledge them to the German Savings & Loan Society of San Francisco, as hereinafter stated. The findings of the court below are to the effect that the remaining bonds of the last-mentioned issue, numbered from 154 to 300, both inclusive, "were by the East Side Railway Company delivered to James Steel and G. A. Steel, with authority and for the sole purpose of permitting the pledge of the same as security for the loan of \$80,000 made in their names for the benefit of the East Side Railway Company." By each of the 300 bonds the railway company promised to pay to the bearer, or, in case the bond should be registered, then to the registered owner thereof, the sum of \$1,000 in United States gold coin of the then standard weight and fineness, at the office of the trustee in the city of Portland on the 1st day of March, 1923, together with interest thereon at the rate of 6 per cent. per annum, payable semi-annually, in like gold coin, on the 1st days of March and September in each year, on the presentation and surrender of the respective interest coupons annexed to the bonds, and to pay the same at the office of the Security Savings & Trust Company in Portland. The mortgage securing the bonds was duly recorded in the office of the county recorder of the county in which the property was situated. In addition to the then existing indebtedness of \$83,000 due from the Steels to the German Savings & Loan Society, that banking institution agreed to, and did, on April 1, 1893, loan them \$80,000.

The old indebtedness was on that day evidenced by a new note executed by G. A. and James Steel for \$83,000, with interest thereon at the rate of 7 per cent. per annum, payable monthly; and for the additional loan of \$80,000, at like interest, they also executed their promissory note, bearing the same rate of interest. As security for the payment of these notes, both of which were made payable in San Francisco, Cal., the Steels, by instruments in writing, pledged all of the 300 bonds issued by the East Side Railway Company. The findings of the court below are to the effect that the intention of the parties was that the bonds numbered from 1 to 153, both inclusive, should be given and held as security for the \$83,000 note, and that the bonds numbered from 154 to 300, both inclusive, should be given and held as security for the \$80,000 note, but that by mutual mistake of the parties the reverse occurred. Each of the contracts of pledge appointed the Savings & Loan Society attorney in fact of the pledgor, with power of substitution, and the pledgee was thereby instructed, directed, and authorized to sell at any time, with or without notice, at its option, and without any demand upon the debtor for payment or increase of security, the whole or any part of the security, and to sell the same either at public or private sale, at its discretion, and to deliver the same to the purchaser or purchasers thereof; but the findings are to the effect that there was no express authority given by the East Side Railway Company to the Steels to insert those provisions in the contract of the pledge. In November, 1893, the railway company was indebted to the Northwest General Electric Company in the sum of \$37,639.95 for goods, wares, and machinery sold and delivered, for which, on the 9th day of that month, the railway company executed to the electric company its promissory note for the sum mentioned, with interest; and on the same day the railway company executed to the Commercial National Bank of Portland, Or., its promissory note for \$29,289.37, with interest, for money theretofore loaned by that bank to it. On the same day the railway company executed to the electric company a mortgage upon all of its property for the security of the two last-mentioned notes and for the purpose of securing payment to the electric company of "any and all sums of money which might thereafter become due to it from the said railway company, not exceeding \$25,000 in all, for apparatus, machinery, equipment, materials, and supplies" which the electric company might thereafter furnish to the railway company. The railway company was also indebted to various other persons and firms in various sums of money, upon some of which claims suits were thereafter brought, and the property of the railway company attached. Thereupon, and on the 8th day of December, 1893, the electric company commenced the present suit for the foreclosure of the second mortgage upon the property in question, namely, the mortgage executed November 9, 1893, making parties defendant thereto the East Side Railway Company and the unsecured creditors mentioned, but not making a party thereto the first mortgagee, namely, the Security Savings & Trust Company of Portland. Upon the commencement of the suit the court appointed a receiver of all of the property of the defendant

railway company, who qualified as such receiver, and took possession of the property, and continued to hold and operate it. Being without means to defray the expense of doing so, the receiver was, by an order of the court, authorized to issue receiver's certificates for the necessary money, which was done from time to time, and which were made a lien upon the property paramount to the lien of the mortgage. For some time the Steels paid the interest upon the eighty-three and the eighty thousand dollar notes, respectively, executed by them to the German Savings & Loan Society, and received a surrender of the appropriate interest coupons attached to the respective bonds. After a while they became unable to pay the interest, and the German Savings & Loan Society wanted the payment of both principal and interest. The Steels were making efforts in several directions to raise the money. Among others, they asked, in July, 1897, the banking corporation of Morris & Whitehead, of Portland, to purchase the bonds of the East Side Railway Company; and at the time they furnished them a detailed statement of the company's affairs, its earnings, expenses, and business plans. The company's property was still in the hands of the receiver appointed in the suit instituted by the electric company to foreclose the second mortgage upon it. One of the Steels suggested to Morris the purchase by his firm of the electric company's mortgage. Morris looked the property over, and talked favorably in respect to the proposition made to him by the Steels, but, without consummating any arrangement with them, Morris & Whitehead, on March 31, 1898, purchased of the electric company its mortgage, and were thereupon substituted as parties complainant in the suit. In the meantime the Steels, continuing to be unable to pay the principal or interest due on the eighty-three and eighty thousand dollar notes, respectively, entered into an agreement in writing on the 7th day of May, 1897, with the Savings & Loan Society, whereby the rate of interest upon those notes was raised to $8\frac{1}{2}$ per cent. per annum in consideration of the extension of the time of payment thereof. Time ran on, and the Steels were still unable to pay either principal or interest, and the Savings & Loan Society became desirous of collecting the amount of its loans. What it did was this: It assigned, on April 26, 1898, the two overdue notes and the bonds securing the same to one Albert Meyer. On the next day Meyer caused to be mailed to the Steels, the East Side Railway Company, and its various creditors a demand of payment of the notes, and notice of public sale of the bonds to take place at 11 o'clock a. m. of the 11th day of May, 1898, at the main entrance to the Merchants' Exchange Building on the south side of California street, between Montgomery and Leidesdorff streets, in the city and county of San Francisco, Cal., to the highest bidder for cash in United States gold coin. The notice of sale was also published in a San Francisco paper of general circulation 13 times consecutively, commencing April 27, and ending May 11, 1898, and was posted in three public places in the city of San Francisco, and was also personally served by the Portland agent of the Savings & Loan Society, B. Goldsmith, together with a demand for the payment of the principal and interest

due on the notes, on the Steels, the railway company, and its various creditors. No payment having been made, the bonds were sold at public auction, at the time and place stated in the notice, to Morris & Whitehead, who were the highest and only bidders therefor, for \$173,589. G. A. James, and Eva P. Steel were personally present at the sale. The purchasers thereupon gave Meyer their check for \$10,000 "to bind the bargain," and on the same or succeeding day paid him the balance of the purchase price, to wit, \$163,589, by check drawn by Wells, Fargo & Co. in favor of F. S. Morris, and by him indorsed to Meyer. Meyer paid the German Savings & Loan Society by his own check on the London & Paris American Bank, which was collected a day or two after the sale. The money represented by the Wells, Fargo & Co.'s check was obtained upon a short loan from Wells, Fargo & Co. to Morris & Whitehead, for which the bonds were pledged as security; and that loan was paid "a day or two after the sale," with money borrowed by Morris & Whitehead from the German Savings & Loan Society upon the security of the bonds, in pursuance of an arrangement made some days before the sale. Meyer, to whom the bonds and notes had been transferred by the German Savings & Loan Society, transferred them on the day of the sale to Morris & Whitehead, the purchasers thereof, and reassigned the notes to the Savings & Loan Society, which, on the following day, to wit, May 12th, assigned the notes to Morris & Whitehead in consideration of the payment of \$4,970.10, which sum was still due on the notes under the contract of May 7, 1897, providing for the increased rate of interest, after deducting the price for which the bonds were sold. In the meantime the German Savings & Loan Society and the Security Savings & Trust Company had been made defendants to the original bill filed herein for the foreclosure of the second mortgage upon the property in question, but neither of them had answered therein, and neither of them, nor the successor of the Security Savings & Trust Company, hereinafter mentioned, ever did answer or otherwise plead to the original bill. After the purchase of the bonds by Morris & Whitehead, they caused, under and by virtue of a provision in the mortgage securing those bonds, the removal of the Security Savings & Trust Company as trustee thereunder, and the appointment in its stead of A. L. Maxwell as such trustee, who was substituted as defendant to the original bill in place of the Security Savings & Trust Company, and who, as such trustee, made demand for the payment of the interest upon the bonds which was in default, and, payment thereof being refused, he elected to declare the principal of the bonds due, and gave due notice of such election, having been theretofore requested so to do by Morris & Whitehead and the German Bank, together with the request that he proceed to enforce payment thereof. Thereupon Maxwell filed in the suit a cross bill for the foreclosure of the first mortgage, making all of the former parties to the suit parties thereto, together with the various other parties. Neither G. A. nor James Steel was made a party to either bill, and they have not become parties to the suit in any way.

The principal question in the case relates to the validity of the sale of the bonds made in San Francisco. The court below held it invalid except to a limited extent, saying, in its opinion:

"The German Savings & Loan Society was not seeking to realize upon its securities, but to effect a transfer of the title of the bonds held by it to Morris & Whitehead. The sale, if it can be so called, was not a cash sale, as advertised, except as to the \$10,000, which, when the amount involved is considered, appears to be too small a sum to have operated as an inducement for what was done. The debt of the Steels, except as to \$4,970, was simply transferred to Morris & Whitehead. I am satisfied that the solvency of these bankers was not an inducement for the transfer. The security for the debt was the bonds. The German Savings & Loan Society was merely playing into the hands of Morris & Whitehead, and, if the former has no pecuniary share in the title derived from the sale, yet its conduct has all the consequences of such an interest to the debtors whose property was sold. But whether the pledgee may buy at his own sale is not considered. It is enough to defeat the sale that it was contrived between the seller and buyer in order to get the pledgor's title at a sacrifice of his interest, with that result. I am of the opinion that the purchasers of these bonds are duly entitled to a decree for the amount of the debts for which the bonds were pledged and interest and costs, and this conclusion is based upon the fact that the sale to Morris & Whitehead was prearranged between the parties, that it was contrived between them as a means of acquiring the property pledged, and that it is immaterial whether the German Savings & Loan Society have any interest in the sale or not. In reaching this conclusion I assume, from the earning capacity of the railway as shown by what appears in the case, that the bonds have a value greatly in excess of the price bid for them at the sale. If this is so, it is unconscionable that the mortgagors, or, what is the same thing, the other creditors, shall lose this excess by the expedient of this sale, while some \$5,000 of the original debt remains unsatisfied in the hands of the purchasers at the sale. If it shall turn out that the price bid is substantially all that the bonds are worth, then the considerations upon which this decree is based will fail. In that case the sale could not have prejudiced the mortgagors and other creditors, but in that case the purchasers at the sale will not be prejudiced by the decree. In any event, they will have their debt and interest, whether that is sufficient to absorb the property or not; and it is all they are equitably entitled to have."

We are unable to concur in these views of the court below. We find nothing in the record justifying the conclusion that Morris & Whitehead, in purchasing the bonds in question, were in any way acting for the German Savings & Loan Society, or that the savings and loan society had any interest whatever in that purchase. Those of the officers of that bank who testified in the cause testified explicitly that the bank had no such interest; and the circumstances of the case, so far from impeaching or tending to impeach that testimony, in our opinion strongly corroborate it. The bank had been trying for a long time to collect the loans. The borrowers had been unable to pay either principal or interest. Both of them, as well as the railway company, all of whose stock, as has been said, they really owned, were insolvent, and hard pressed for money. All of the property of the railway company was in the hands of a receiver appointed by the court, who, for lack of means to operate it, had been compelled to issue, under the orders of the court, receiver's certificates, which were made prior liens to the mortgage. Under such circumstances, what more natural than that the savings and loan society should be anxious to realize upon its loans, and to aid any one worthy of confidence found willing to buy the bonds? Mor-

ris & Whitehead, a Portland banking corporation, had examined the property of the railway company, and no doubt satisfied itself that by judicious management the property could be made to pay. It was a corporation of good financial standing, according to the evidence in the case, and one to which the bank of Wells, Fargo & Co. was willing to and did loan \$163,589, for the purpose of enabling it to buy the bonds in question. It may be, and probably is, true that the bank of Wells, Fargo & Co. was assured that its loan would be repaid within a few days by money loaned to Morris & Whitehead by the savings and loan society. But we see nothing illegal or wrong in that, if it be true. The savings and loan society had the legal and moral right to make such loan to Morris & Whitehead; and that it was to its interest to do so seems clear, for they paid on account of the purchase of the bonds \$10,000 out of their own funds, and, as the amount of that purchase was \$4,970.10 less than the amount due upon the Steel notes, they had to and did, in order to acquire the notes as well as the bonds, pay to the Savings & Loan Society the additional \$4,970.10. The result of the transaction, therefore, was that the Savings & Loan Society collected \$14,970.10 in money on the eighty-three and eighty thousand dollar notes of the Steels, and got for the balance the note of a responsible banking firm, secured by precisely the same bonds. In all of this we see nothing to indicate any contrivance between the savings and loan society and Morris & Whitehead to acquire the pledgor's title to the bonds at a sacrifice of their interest; nor, indeed, anything in any manner illegal or unconscionable. Although the contracts of hypothecation expressly authorized the savings and loan society to sell the bonds without demand of payment and without notice, and to make such sale either publicly or privately, personal demand of payment of the amount due upon the notes was made, and public and personal notice was given to all the parties interested of the sale of the bonds, and at that public sale the principal officers of the railway company and the real owners of all of its stock, as well as the makers of the notes and Eva P. Steel, were personally present to protect their interests. They could have done so by paying the amount due upon the notes, or by finding some one who would pay more for the bonds than they sold for. But nothing of the sort was done, and it is evident from the record that the Steels and the railway company were wholly unable to pay the money due to the savings and loan society. The contracts of hypothecation, as has been said, expressly authorized the sale of the bonds either at public or private sale. It is contended on the part of the appellees that, in so far as concerns the bonds numbered 154 to 300, both inclusive, claimed to have been the property of the railway company, such provision in the instrument of hypothecation was unauthorized; but the findings of the court below are to the effect that the railway company delivered to James and G. A. Steel those bonds for the very purpose of pledging them as security for a loan of \$80,000 to be made in their names for the benefit of the railway company. The general authority to make such pledge carried with it the power to do all things necessary or appropriate to the exercise of the power

expressly granted. There were no limitations imposed upon them, and in executing the contract of hypothecation in the form usual in such cases they were clearly within their implied powers. *Mechem*, Ag. §§ 311, 317; *Le Roy v. Beard*, 8 How. 451, 12 L. Ed. 1151; *Huntley v. Mathias*, 90 N. C. 101; *Craighead v. Peterson*, 72 N. Y. 279. But, apart from the authority conferred by the contracts of hypothecation, the law gave the pledgee the power to sell the bonds pledged as security, under the circumstances disclosed by the record in this case. The notes, as has been said, were made payable in California, and therefore the law of California in respect to the matter governs. *Andrews v. Pond*, 13 Pet. 78, 10 L. Ed. 61; *Dyert v. Trust Co.*, 37 C. C. A. 389, 94 Fed. 913; *Lee v. Selleck*, 33 N. Y. 615; *Tillotson v. Tillotson*, 34 Conn. 355, 367; *Civ. Code Cal.* §§ 2987, 3000-3002, 3010. Sections 3000-3002, 3005, and 3006 of the Civil Code of California are as follows:

"Sec. 3000. When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed.

"Sec. 3001. Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found.

"Sec. 3002. A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend."

"Sec. 3005. The sale by a pledgee, of property pledged, must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest obtainable price.

"Sec. 3006. A pledgee cannot sell any evidence of debt pledged to him, except the obligations of government, states, or corporations; but he may collect the same when due."

The record in the case shows that these provisions of the California Code were complied with on the part of the savings and loan society.

In respect to the mutual mistake stated in the findings to have been made by the parties in pledging bonds numbered 154 to 300, both inclusive, as security for the \$83,000 note, instead of the \$80,000 note, it is sufficient to say that all of the bonds were alike in all respects, and under the terms of the mortgage were entitled equally to its security, and were, therefore, of the same value, as was evidenced by the sale in question, at which, although each bond was offered for sale separately and altogether, there was no difference made between the bonds in the bidding. In such case the identity of the bonds becomes immaterial. *Atkins v. Gamble*, 42 Cal. 86; *Thompson v. Toland*, 48 Cal. 116; *Krouse v. Woodward*, 110 Cal. 643, 42 Pac. 1085. The pledge of bonds numbered 154 to 300, both inclusive, was certainly valid to the extent of \$80,000 and interest, as provided for; and as the sale disclosed no difference in the value of the bonds, and the whole of the 300 brought less by \$4,970.10 than the aggregate amount due upon the two notes, it is obvious that bonds 154 to 300, both inclusive, brought less at the sale than the amount for which they were properly pledged. We are of opinion that the record shows *Morris & Whitehead* to be the legal and

equitable owners of the whole of the 300 bonds in suit, and, as they were secured by a first mortgage upon all of the property of the defendant railway company, that they are entitled to a decree for the full amount of the face value of the bonds, together with the interest due thereon, and to a decree of foreclosure and sale of the mortgaged property as against all of the defendants to the cross bill, subject to such receiver's certificates as have proper precedence over the mortgage lien.

The judgment is reversed, and the cause remanded to the court below, with directions to enter a decree in accordance with the views here expressed

CENTRAL TRUST CO. OF NEW YORK v. PEORIA, D. & E. RY. CO. et al.

CHAMBERLIN v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Seventh Circuit. October 19, 1900.)

No. 667.

RAILROADS—SUITS TO FORECLOSURE MORTGAGES—INTERVENTION BY STOCK HOLDER.

Where it is admitted that the mortgage indebtedness of a railroad company is greater than the value of its property, a stockholder who was an active party defendant in suits to foreclose a second mortgage, in which receivers were appointed, and who made no objection to the administration of such receivers until three years after decrees of foreclosure had been rendered in such suits, has no such interest in the property as will justify the court after that time in entertaining a petition of intervention by him attacking the validity of the proceedings on the ground that the expenditures for betterments made by the receivers long previously were unnecessary, and were made through fraud and collusion between the receivers and first and second mortgage bondholders, for the purpose of causing a default in the payment of interest, which would bring about a foreclosure of the first mortgage.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Charles A. Boston, for appellant.

W. S. Opdyke and Bluford Wilson, for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

GROSSCUP, Circuit Judge, delivered the opinion of the court as follows:

This appeal is from an order of the Circuit Court (83 Fed. 910) denying the appellant leave to file an intervening petition. The petition, with its exhibits, is voluminous, but the essential facts lie within a very narrow compass.

The Peoria, Decatur and Evansville Railway Company, a consolidated railway company of Indiana and Illinois, was the mortgagor of divisional first mortgages executed in 1880, to secure an issue of bonds, one covering the part of the road from Evansville, Indiana, to Mattoon, Illinois; and the other covering the part of the road from Mattoon, Illinois, to Pekin, Illinois. There was, also, a

second mortgage to secure an issue of bonds, covering the entire property, including both divisions.

January, 1894, suits were brought by the railway company in the United States Courts in both Indiana and Illinois against the trustees named in the mortgage, to preserve the property, and secure its proper disposition among the creditors, and upon the same day receivers were appointed, one of them being still in possession of the property.

December '94 cross-bills were filed by the trustees under the second mortgage, praying for foreclosure, and to these cross-bills the existing receivership was extended. Certain stockholders of the company, including the appellant, were made parties to this cross-bill, and defended against it upon the theory that the court was without jurisdiction to foreclose the mortgage, and that the second mortgage and the bonds thereby secured were fraudulent.

March, 1897, a decree was entered in the Illinois suit, adjudging that the bonds and the second mortgage were valid, and foreclosing the same, and a few days later a similar decree was entered in the Indiana suit. No appeals from these decrees were prosecuted.

January 27th, 1900, nearly three years after the entry of the above decrees, the intervening petition of appellant under consideration was presented.

The petition, in substance, sets forth, that, pending foreclosure, a committee of first mortgage bondholders issued a plan of reorganization, under which the appellant deposited his stock. Prior to this the second mortgage bondholders had issued a plan of reorganization, the fairness of which is undisputed, but which, it seems, did not become operative. Subsequently to the issuance of the first mortgage bondholders plan, and in order to raise necessary cash, the second mortgage bondholders committee issued an amended plan, under the terms of which the second mortgage bondholders were given the following option: (a) To sell their certificates to the Colonial Trust Company, at fifteen per centum of the par value of the principal thereof, in cash; receiving back any cash paid to the committee under the original plan; or (b) to receive from the Trust Company, in exchange for such certificate, fifty per centum of the par value of the face thereof, in the new common stock to be issued upon reorganization, receiving back the cash paid under the original plan; or (c) to receive from the Trust Company fourteen per centum of the par value of such certificate in cash, and to receive back any cash paid to the committee under the original plan, the Trust Company, in that event, assuming the obligation of such certificate holder to the committee.

It is averred that this plan was in the interest of an undisclosed principal; that, by want of diversity of citizenship, the foreclosure suit on behalf of the second mortgage bondholders was seen to be futile, because no good title could thereunder be acquired; that, up to the year 1897 the earnings of the road were sufficient to meet the interest coupons on the first mortgage bonds; that, in that condition of affairs, no foreclosure could be had, at the suit of the first mortgage bonds; but that such influences were brought about, that the committee of first mortgage bondholders abandoned its plan of

reorganization, and agreed, in the interest of the second mortgage bondholders, to create such a state of affairs in the finances of the road, that there would be a default upon the interest coupons of the first mortgage bonds, whereby there might be a foreclosure at the suit of the first mortgage bondholders trustees.

Taking the averments of the intervening petition at their utmost meaning, it is charged that, in pursuance of this conspiracy, between the parties conducting the first mortgage bondholders suit, the second mortgage bondholders committee, and the receivers of the road, the receivers proceeded to make unnecessarily large expenditures out of their income for betterments; that there was much relaying of new rails; that the road was reballasted; that wooden bridges and long trestles were supplanted by iron bridges with stone abutments; and that these extraordinary improvements brought about the purposed deficit, leaving the interest due to the first mortgage bondholders unpaid. It is insisted that, upon these facts, this is a case of a mortgagee improving the mortgagor out of his premises.

While the court should never close its ear to a charge of fraud, brought in apt time by an injured party, upon a statement of premises that reasonably create suspicion, it is equally important that judicial proceedings should not be unfairly used to unsettle business doings, past and gone; or subject those, who participated in such doings to the menace of a judicial holdup.

The Circuit Court, in our judgment, properly refused to open up, at the instance of the appellant, an inquiry so intricate, uncertain, and burdensome as the intervening petition contemplates. The appellant was a party to the foreclosure proceedings, and as such, had access to the doings of the receiver; but, during the time the expenditures complained of were in progress, took no proper step to arrest them. He has remained uncomplaining for nearly three years since. He is a stockholder having no interest, except in the value of the equity of redemption, and it is not shown that there would, under a different administration by the receivers, have remained a more valuable equity of redemption. It is admitted, indeed, that the road, even as now improved, is worth much less than the aggregate amount of the first and second mortgage bonds. The appellant shows no interest that entitles him to initiate the proposed proceedings.

The decree of the Circuit Court must be affirmed.

CENTRAL TRUST CO. OF NEW YORK v. PEORIA, D. & E. RY. CO. et al.

BALDWIN v. CENTRAL TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Seventh Circuit. October 19, 1900.)

No. 668.

RAILROADS—SUITS TO FORECLOSE MORTGAGES—INTERVENTION BY BONDHOLDER.

A holder of second mortgage bonds of a railroad company, who was an active participant in litigation resulting in decrees foreclosing the mortgages on the property, and its sale thereunder, is not entitled to file a petition of intervention three years after such decrees were entered, at-

tacking the validity of the proceedings on account of an alleged fraudulent collusion between the receivers and other bondholders, by which the foreclosure of the first mortgages was brought about, where it does not appear that he has been deprived of any rights which were accorded to any other bondholder, or that he sustained any injury from such alleged fraud, if it existed.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Charles A. Boston, for appellant.

Wm. S. Opdyke and Bluford Wilson, for appellees.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The facts of this case are substantially identical with those of *Central Trust Co. of New York v. Peoria, D. & E. Ry. Co.*, 104 Fed. 418, in the matter of the intervening petition of Emerson Chamberlin, just decided, except in that case the proposing intervener was a stockholder, while in this case he is a holder of a second mortgage bond.

It appears that Baldwin, the appellant, has, at all times, been personally active in the litigation leading to the decrees; and has had personal knowledge of what was in progress. As a second mortgage bondholder, he had the alternative right, either to participate equally with others in the final plan of reorganization, or, standing out, to see to it that the road was sold for its full value. He does not show in his petition that he has been excluded from any opportunities afforded to other second mortgage bondholders in the reorganization plan; nor does he satisfactorily show that, had the conspiracy complained of never existed, the road would have remained unsold, or would have sold for a greater sum than was realized. Under these circumstances, the court rightly refused leave to file the intervening petition.

The decree will be affirmed.

TILLITT v. MANN.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,357.

1. CONSTRUCTION OF CONTRACTS—COURT MAY PUT ITSELF IN PLACE OF PARTIES.

The court may put itself in the place of contracting parties, and then, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, consider what they intended by the terms of their agreement.

2. SAME—INTENTION CONTROLS.

When the intention of contracting parties is manifest, it will control in the interpretation of their agreement, regardless of inapt expressions and technical rules of construction.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

James C. Starkweather, for appellant.

E. T. Wells, Thomas Macon, and R. T. McNeal, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree that a judgment against Ralston C. Bloomfield and Hiram R. Tillitt for \$30,591 damages, and \$1,448.71 costs, rendered on January 3, 1885, constitutes a just claim against the estate of Tillitt, who has since deceased, for \$19,718.56. This amount is one-half of the sum which was due on this judgment on September 13, 1892, together with the interest that has subsequently accrued on that moiety. On that day Bloomfield caused certain lands which were worth about \$1,700 to be conveyed to Mr. Thomas Macon, the attorney of the appellee, and the latter made this agreement with Bloomfield:

"In the Circuit Court of the United States for the District of Colorado.

"Jeremiah J. Mann, Plaintiff, vs. Ralston C. Bloomfield and Robert Tillitt, Defendants.

"Whereas, the above-named Jeremiah J. Mann on or about the third day of January, A. D. 1885, recovered in the said circuit court a judgment against the above-named defendants, Ralston C. Bloomfield and Robert Tillitt, for the sum of thirty thousand five hundred and ninety-one dollars or thereabouts for his damages, besides costs of suit; and whereas, the above-named defendant Ralston C. Bloomfield hath, at the instance and by the request of the above-named plaintiff of even date herewith, caused to be conveyed unto Thomas Macon, Esq., of Denver, Colorado, certain lands and premises, six hundred and forty acres, more or less, situated in township 1 south, of range 59 west, in the county of Arapahoe and state of Colorado, which said conveyance the said plaintiff hath accepted in satisfaction of one equal moiety of the said judgment, with all accumulations of interest on such moiety: Now, therefore, in consideration of the premises, the said Jeremiah J. Mann, plaintiff aforementioned, doth hereby, for himself, his heirs, executors, and administrators, and assigns, covenant and agree to and with the said Ralston C. Bloomfield, his heirs, executors, administrators, and every of them, that he the said Jeremiah J. Mann will not, and his heirs, executors, administrators, and assigns shall not, at any time, cause to be levied upon or taken, under any writ of execution or other process whatsoever, issued or which may be issued upon the said judgment, or cause to be attached, seized, or taken by virtue of any writ of attachment or other process which may be issued in any suit brought upon the said judgment as a ground of action, any of the lands, tenements, goods, chattels, or other estate or property of the said Ralston C. Bloomfield now owned by him, or which may be hereafter acquired by him, nor shall the said Jeremiah J. Mann in any way or manner seek to charge any of the lands, premises, goods, chattels, or estate, real or personal, of the said Ralston C. Bloomfield, now owned by him, or which may hereafter be acquired by him, with any share or part of the said judgment, costs, or interest. And the said Jeremiah J. Mann doth hereby release and discharge from the lien of the said judgment all estate, real and personal, whatsoever, which the said Ralston C. Bloomfield now hath or may hereafter in any manner acquire. And if any writ of execution issued, or which may be issued, upon the said judgment, or upon any judgment hereafter recovered thereupon, or any attachment or other process issued in any suit founded upon the said judgment, shall be levied upon any of the property of said Bloomfield now or hereafter acquired (otherwise than by fraudulent conveyance of the said Robert Tillitt), such levy shall and may, on motion of the said Ralston C. Bloomfield, be quashed, vacated, and set aside. And, whenever satisfaction of the residue of the said judgment shall be obtained of the said Robert Tillitt, the said Jeremiah J. Mann

will, in due form of law, enter satisfaction of the said judgment, and formally release and discharge the said Ralston C. Bloomfield and Robert Tillitt therefrom. Nevertheless, the said Jeremiah J. Mann expressly reserves to himself all right to pursue the said Robert Tillitt, and take execution upon the said judgment, and levy the same upon the estate and property of the said Robert Tillitt, and to pursue all remedies whatsoever which he, the said Jeremiah J. Mann, hath or can have in law for procuring satisfaction of or from the said Robert Tillitt as to all the residue of the said judgment. In witness whereof the said Jeremiah J. Mann hath set his hand and seal this 13th day of September, A. D. 1892.

J. J. Mann. [Seal.]”

When this contract was made the amount lawfully due on the judgment had been reduced by certain payments, which the appellee had received, to such an extent that it was less than one-half of the original amount of the judgment and interest from the date of its rendition. The contention of the appellant is that the appellee by this contract with Bloomfield agreed to receive, and did receive, the lands there mentioned in payment of one-half of the original amount of the judgment and accrued interest, and that, as the half of this amount was at the date of the agreement more than the entire amount that was then due on the judgment, he satisfied it in full and released Tillitt. The court below was unable to sustain this position, and held that the parties to the contract intended thereby to satisfy only one half of the amount due at the time the agreement was made. This left the other half still due from Tillitt and his estate, and this is the ruling which is assigned as error. In support of this assignment, counsel for appellant urges that the agreement recites that “the above-named Jeremiah J. Mann, on or about the third day of January, A. D. 1885, recovered in said circuit court a judgment against the above-named defendants, Ralston C. Bloomfield and Robert Tillitt, for the sum of thirty thousand five hundred and ninety-one dollars or thereabouts for his damages, besides costs of suit”; that Bloomfield has caused certain lands to be conveyed to Thomas Macon, “which said conveyance the said plaintiff hath accepted in satisfaction of one equal moiety of the said judgment, with all accumulations of interest on such moiety”; and that in a petition which the appellee filed in the court below on July 10, 1893, for the purpose of reviving the judgment, he alleged “that as to one equal moiety of the said judgment the same remains unsatisfied, and there is due and owing to your petitioner upon the said judgment the sum of \$15,295.50, with interest from the date of the rendition of the judgment aforesaid according to law, besides \$722.45, parcel of the costs heretofore taxed herein still remaining unpaid”; and prayed that the judgment might be revived for these amounts and interest. But neither the extracts from the contract and the petition which counsel quotes, nor the entire contract and petition taken together, disclose any substantial basis for this assignment. There is certainly nothing in the petition to indicate that the appellee conceded that the judgment had been satisfied. He claimed that one moiety of it was unpaid, and the only mistake he made was that he demanded a larger amount than was his due. This was by no means an admission that nothing was due. When we turn to the contract, there seems to be little doubt of the intention of the parties.

The primary rules for the construction of contracts are that the court may put itself in the place of the contracting parties, and then, in view of all the facts and circumstances surrounding them at the time of the execution of the instrument, consider what they intended by the terms of their agreement, and that when the intention is manifest it will control in the interpretation of the instrument, regardless of inapt expressions and technical rules of construction. When the agreement of September 13, 1892, was made, the judgment debtors, Bloomfield and Tillitt, owed the appellee \$16,680.83, with interest at 10 per cent. per annum from August 3, 1885. Bloomfield had no property subject to execution, and he caused 640 acres of land, worth \$1,700, to be conveyed to the attorney of the appellee, and obtained the agreement in issue. There was nothing in the situation or relation of the parties to lead one to suppose that Mann intended, in consideration of this property worth \$1,700, to satisfy the entire judgment and release both the debtors. The natural, customary, and rational course to pursue was to covenant not to pursue Bloomfield and to retain his rights against Tillitt. Nor is there anything in the agreement itself which tends to show that it was not made for this purpose or was not to have this effect. On the other hand, it expressly recites that the conveyance of the land is accepted, not in satisfaction of the entire judgment, but only "of one equal moiety" thereof. The appellee covenants, not that he will not collect the unsatisfied moiety of the judgment, but simply that he will not pursue any of the lands, tenements, goods, chattels, or other estate or property of the said Ralston C. Bloomfield for the purpose of collecting such judgment, and that, "whenever satisfaction of the residue of the said judgment shall be obtained of the said Robert Tillitt," he will satisfy the entire judgment. Finally, that there might be no mistake or misconstruction, he adds at the close of the agreement: "Nevertheless, the said Jeremiah J. Mann expressly reserves to himself all right to pursue the said Robert Tillitt, and take execution upon the said judgment, and levy the same upon the estate and property of the said Robert Tillitt, and to pursue all remedies whatsoever which he, the said Jeremiah J. Mann, hath or can have in law for procuring satisfaction of or from the said Robert Tillitt as to all the residue of the said judgment." The facts and circumstances surrounding the parties at the time this contract was made; the large amount due upon the judgment; the small value paid by Bloomfield for the contract; the plain declaration in the agreement that the conveyance which Bloomfield procured was accepted in satisfaction of only one-half of the judgment and interest; the express covenants not to pursue Bloomfield, and to satisfy the judgment only when the residue should be paid by Tillitt; and the express reservation of the right to pursue the latter, to take execution upon the judgment, and levy the same upon his estate,—conclusively show that it was not the intention of the appellee to release more than one-half of the amount due upon the judgment at the time he made the contract. The decree of the court below is affirmed, with costs.

NORTHERN PAC. RY. CO. v. SODERBERG.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 601

1. PUBLIC LANDS—MINERAL CHARACTER—BUILDING STONE.

Land chiefly valuable for granite which it contains, suitable for quarrying, and of good merchantable quality, is mineral land, within the meaning of the exception in the grant of July 2, 1864, to the Northern Pacific Railroad Company, and did not pass under said grant.

2. SAME—RAILROAD GRANT—EXCEPTION OF MINERAL LANDS.

The term "mineral lands," as used in excepting such lands from the grant of July 2, 1864, to the Northern Pacific Railroad Company, was subject to enlargement in its meaning at any time before the grant attached by the definite location of the road; and, conceding that, as used and understood by congress at the time of the grant, it did not include lands chiefly valuable for building stone they contained, subsequent acts of congress prior to 1879 fixed the status of such lands as mineral, and they were excluded from the grant along the portions of the road not definitely located until after that date.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Washington.

The Northern Pacific Railway Company appeals from a decree of the circuit court dismissing its bill in a suit brought to restrain J. A. Soderberg, the appellee, from removing granite from the N. E. $\frac{1}{4}$ of section 19, township 27 N., range 10 E. of the Willamette meridian, in the state of Washington. The bill alleges that the land in question is part of an odd-numbered section situated within the 40-mile or place limits of the grant to the Northern Pacific Railroad Company by act of congress approved July 2, 1864; that the title to said land passed to the railroad company upon the definite location of its line of road, which title the appellant has acquired by purchase; that there is situated upon said premises a ledge of granite of good quality, of the value of more than \$5,000, and that the defendant is engaged in quarrying and removing the same. The defendant answered, alleging that the premises were excepted from the grant to the Northern Pacific Railroad Company by reason of the fact that they contained granite valuable for building purposes, and alleged further that the defendant had made an entry of the premises under the mineral laws of the United States. The answer set forth an affirmative defense in the nature of a cross bill, alleging the facts of the defendant's entry of the premises under the mineral laws of the United States, and praying that he be decreed to be the owner of the premises covered by his entry. The case was heard upon an agreed statement of facts, in which it was shown that the line of the railroad was definitely located opposite the premises in controversy on March 26, 1884, and that it was a portion of the main line over the Cascade Mountains, authorized by act of congress of July 2, 1864, which, under the joint resolution of May 31, 1870, was designated the "Branch Line"; that at the date of the grant and at the date of the location of the road opposite the premises in controversy the land was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, unless the other facts stipulated and the acts of congress passed previous to March 26, 1884, constituted a reservation or appropriation; that the land in controversy is rough and mountainous land, and its principal value consists in the granite thereon, which is of good and merchantable quality, valuable for building stone, and of the value of more than \$5,000; that on April 14, 1897, the defendant entered certain portions of said quarter section of land under the placer mining laws of the United States, and on April 26, 1897, he caused a record of the location of his claims to be filed and entered upon the public records of the mining district in which the

land is situated. The stipulation sets forth further facts sufficient to show that the appellee acquired title to said mining claims under the mineral laws of the United States, provided that said lands were subject to entry under such mining laws.

James B. Kerr, for appellant.

R. A. Ballinger, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The question presented in this case is whether land which is chiefly valuable for granite of a good, merchantable quality is mineral land within the meaning of the exception from the grant of lands to the Northern Pacific Railroad Company. Section 3 of the act of July 2, 1864, grants to the railroad company certain odd-numbered sections not mineral, "and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office." There is a proviso that "all mineral lands" are excluded from the operations of the act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road may be selected. There is a further proviso "that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal." Section 2 of the act confers upon the railroad company power and authority to take from the public lands adjacent to the line of said road materials of earth, stone, timber, etc., for the construction thereof. It is contended by the appellant that in all the congressional legislation relating to minerals and mineral lands prior to and including the grant to the Northern Pacific Railroad Company the terms "mineral" and "mineral land" were used in their proper and ordinary sense, and were intended to embrace only such substances as were obtained from mines. Reference is made to the ordinance of May 20, 1785, for the disposal of lands in the Western territory, in which there was reserved "one-third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of, as congress shall hereafter direct," and to acts of congress in which lead mines and salines were reserved in the disposition of public lands, and especially to the act of September 4, 1841, the first general pre-emption law granting to settlers on public domain the right to purchase land to the extent of 160 acres each, in which it was provided in section 10 that no lands on which are situated any known salines or mines should be allowed entry under the provisions of the act. We do not, however, discover from the earlier statutes any definite light as to the meaning of the word "mineral" as the same is used in the grant to the Northern Pacific Railroad Company. In the pre-emption act of 1841 the reservation was of lands on which are situated any known "salines or mines." In the act of September 27, 1850, commonly known as the "Donation Act," the exception is of "mineral lands"

and lands reserved for salines. What is meant by the term "mineral lands" is not defined in the act, but the act contains provisions stating that portions of the public lands which seem unfit for cultivation purposes may be surveyed into townships only. Subsequently congress by statute repealed so much of the donation act as provided that none except township lines shall be surveyed where the lands are mineral, thus applying the term "mineral" to lands which seem unfit for cultivation. So the act of March 3, 1853, directing the survey of public lands in California, provided that "none other than township lines shall be surveyed where the lands are mineral." The act of July 1, 1864 (13 Stat. 343), enacted one day prior to the date of the grant to the Northern Pacific Railroad Company, has been regarded as a legislative interpretation of the words "mines" and "mineral lands" as they had been used by congress in prior legislation, and more especially in the pre-emption act of 1841. The act declared that "any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841, and which under past legislation are not liable to ordinary private entry," might be offered at public sale. This legislation expresses the meaning of congress in reserving "mines" in the pre-emption act. It declares that mines of coal, which is not a metallic substance, and had not been specified in the reservations of gold, silver, copper, lead, etc., had been included in the word "mines" in the reservation of the pre-emption act. *Mullan v. U. S.*, 118 U. S. 271, 6 Sup. Ct. 1041, 30 L. Ed. 170.

Contemporaneous construction of the word "mineral" by the executive officers whose duty it was to construe the land laws is, in a case of ambiguity, of persuasive force. *U. S. v. Moore*, 95 U. S. 760, 24 L. Ed. 588; *Brown v. U. S.*, 113 U. S. 568, 5 Sup. Ct. 648, 28 L. Ed. 1079; *Pennoyer v. McConnaughy*, 140 U. S. 23, 11 Sup. Ct. 699, 35 L. Ed. 363; *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992. In the case of *In re Hooper*, 1 Land Dec. Dep. Int. 560, the land department approved the rule which had been promulgated in a circular from the general land office that "whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of May 10, 1872." In *Maxwell v. Brierly*, 1 Brainard, Leg. Prec. 98, it was held that land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land. In the case of *In re Bennet*, 3 Land Dec. Dep. Int. 116, it was held that mountain land covered with granite cliffs and rocks, the value of which was in the quarry in the face of the cliff, was mineral land, and might be entered as a placer claim. This ruling was adhered to until 1891, when an apparent departure was made in the case of *Conlin v. Kelly*, 12 Land Dec. Dep. Int. 1, where it was held that stone useful only for general building purposes does not except land from pre-emption entry. In that case *Kelly*, the pre-emptioner, had made

final payment for the land seven years before Conlin filed his contest claiming that the land was valuable for mineral. Decision seems to have been controlled by that fact, together with the further fact, as found by the secretary, that the stone in the tract in controversy had no peculiar property or characteristic to give it special value otherwise than for general building purposes. But in *McGlenn v. Wienbroeer*, 15 Land Dec. Dep. Int. 370, it was held that land which contains a valuable deposit of stone useful for special purposes might be entered as a placer claim. The secretary distinguished the case of *Conlin v. Kelly*, and declared that the ruling in that case rested upon equitable as well as legal considerations, and that the department declined to cancel an entry which had existed for seven years upon the plea that it was fraudulently made, on the ground that common building rock, used for general purposes, is mineral. Shortly after the decision of the case of *Conlin v. Kelly*, and apparently for the purpose of disapproving the rule there announced, and of re-establishing the former ruling of the land department, congress enacted the law of August 4, 1892, permitting stone to be taken under the placer mining laws. In a case arising before the date of that law (*South Dakota v. Vermont Stone Co.*, 16 Land Dec. Dep. Int. 263) it was held, following *Conlin v. Kelly*, that lands chiefly valuable for ordinary building stone are not excepted as mineral lands from the grant to the state for school purposes. But in *Van Doren v. Plested*, Id. 508, it was held that land containing a deposit of sandstone of a superior quality for building and ornamental purposes, valuable only as a stone quarry, may be entered as a placer claim under the general mining laws. This also was held of an entry made prior to the act of 1892. In the case of *In re Gibson*, 21 Land Dec. Dep. Int. 329, it was held that land embraced within a placer entry of a tract chiefly valuable for ordinary building stone, made in 1889, is excepted from the subsequent operation of the grant of school lands to the state. In that case the secretary declined to approve the ruling in the case of *South Dakota v. Stone Co.* In *Pacific Coast Marble Co. v. Northern Pac. R. Co.*, 25 Land Dec. Dep. Int. 233, it was held that lands valuable only on account of the marble deposit contained therein did not pass to the Northern Pacific Railroad Company under its grant of July 2, 1864, but were subject to placer entry under the mining laws.

These rulings of the land department are, in the main, in harmony with the definition of the word "mineral" as the same is popularly and generally accepted. A mineral is defined by the *Century Dictionary* to be:

"Any constituent of the earth's crust; more specifically an inorganic body occurring in nature, homogeneous, and having a definite chemical composition which can be expressed by a chemical formula, and further having certain distinguishing physical characteristics."

Bainb. Mines (4th Ed.) p. 1, defining the term "mineral," says:

"The term may, however, in the most enlarged sense, be described as comprising all the substances which now form or which once formed a part of the solid body of the earth, both external and internal, and which are now destitute of or incapable of supporting animal or vegetable life. In this view

it would embrace as well the bare granites of the mountains as the deepest hidden diamonds and metallic ores."

There is authority in the earlier English decisions for holding that minerals signify that which is obtained from mines, from underground workings, as distinguished from that which is quarried. *Davvell v. Roper*, 24 Law J. Ch. 779; *Rex v. Sedgley*, 2 Barn. & Adol. 65; *Rex v. Brettell*, 3 Barn. & Adol. 424. But the weight of English authority includes under the term "mineral" that which is quarried as well as that which is obtained from mines. In *Railway Co. v. Checkley*, L. R. 4 Eq. 19, Lord Romilly, M. R., held that stone was a mineral under a reservation of mines and minerals. He said:

"Stone is, in my opinion, clearly a mineral; and in fact everything except the merest surface, which is used for agricultural purposes. Anything beyond that which is useful for any purpose whatever, whether it is gravel, marble, fire clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land."

In *Earl of Rosse v. Wainman*, 14 Mees. & W. 859, Parke, B., said:

"Beds of stone, which may be dug by winning or quarrying, are, therefore, properly minerals."

Similar views are expressed in *Midland Ry. Co. v. Haunchwood Brick & Tile Co.*, 20 Ch. Div. 552; *Micklethwait v. Winter*, 5 Eng. Law & Eq. 526; *Hext v. Gill*, 7 Ch. App. 699; *Jamieson v. Railway Co.*, 6 Scot. L. R. 188; and *Attorney General v. Granite Co.*, 35 Wkly. Rep. 617. In the case last cited it was held that the term "mineral" included granite.

In *Pennsylvania* the ruling in *Earl of Rosse v. Wainman* was followed in *Griffin v. Fellows*, *81 Pa. St. 114, where it was said:

"The term 'mineral' embraces everything not of the mere surface which is used for agricultural purposes. The granite of the mountain as well as metallic ores and fossils are comprehended within it."

In *Hartwell v. Cammon*, 10 N. J. Eq. 128, it was held that paint stone found in strata below the surface of the soil is included in the terms "mines" and "minerals." Under the authority of these decisions and definitions, we entertain no doubt that in the reservation of mineral lands from the grant to the Northern Pacific Railroad Company the granite quarry in controversy was included. But if, indeed, the reservation of mineral lands, as the term "mineral" was used and understood at the time of the grant to the Northern Pacific Railroad Company, was insufficient to exclude from the grant lands valuable principally for granite quarries, congress nevertheless retained the power to subsequently enlarge the reservation, and make it more comprehensive, at any time before rights were vested by the definite location of the road. The grant was a grant of lands that were not otherwise reserved or appropriated at the time of the definite location of the line of the road. *Menotti v. Dillon*, 167 U. S. 703, 17 Sup. Ct. 945, 42 L. Ed. 333; *Railroad Co. v. Sanders*, 1 C. C. A. 192, 202, 49 Fed. 129, 134. In the case last cited this court said:

"Although there was no statute providing for the sale or bestowal of mineral lands at the time of the grant to plaintiff, congress had the right to, and did afterwards, make such a law; and under it claims could be and were lawfully initiated prior to the definite fixing of the line of plaintiff's road. We think that the reservations in the plaintiff's grant were made in contemplation of future legislation as well as the then existing laws."

Soon after making the grant, congress enacted the first mining act. 14 Stat. 251. The first section provides:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States," etc.

On May 10, 1872, it was enacted (17 Stat. 91):

"That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," etc.

On June 3, 1878, congress enacted a law providing for the sale of lands valuable chiefly for timber or stone. 20 Stat. 89. These statutes define the status of the mineral lands included within the territorial limits of the railroad grant at the time when the grant took effect, the date of the definite location of the road. The land in controversy was land valuable chiefly for stone, and as such was offered for sale. The decree of the circuit court is affirmed.

KING v. McANDREWS et al.

(Circuit Court, D. South Dakota, S. D. November 3, 1900.)

1. PUBLIC LANDS—PATENTS AS EVIDENCE OF TITLE.

The issuing of a patent for public lands being a ministerial act, the validity of a patent depends on the legal authority of the department to issue it; and one issued under the homestead law, which shows upon its face, in connection with legislation of which the court is required to take judicial notice, that the land embraced therein had been previously appropriated and was not subject to entry under such law, is void, and is not admissible in evidence to establish title.

2. SAME—INCORPORATION INTO CITY—LANDS WITHIN INDIAN RESERVATION.

Act Dak. T. March 7, 1885, amending the previous act incorporating the city of Chamberlain by extending the corporate limits of the city, not having been disapproved by congress, was valid, notwithstanding the fact that a portion of the land so included in the city was at the time within the limits of the Great Sioux Indian reservation, since the land was within the jurisdiction of the territorial legislature, and the act in no manner affected the title, or the rights or property of the Indians therein; and on the extinguishment of the Indian title, if not before, such act, which was continued in force with the other laws of the territory after South Dakota was admitted as a state, became operative as to the lands previously within the reservation.

3. SAME—HOMESTEAD ENTRIES—LANDS WITHIN LIMITS OF CITY OR TOWN.

Act March 3, 1891, repealing the pre-emption law (26 Stat. 1095), did not have the effect of extending the right of homestead entry to lands included within the limits of an incorporated city or town, although it repealed Rev. St. U. S. § 2258, which expressly excepted such lands from those subject to pre-emption, and also by reference in the homestead law from homestead entry, since such lands are not "unappropriated," within the

meaning of Rev. St. U. S. § 2289, as amended by said act, which authorizes homestead entries only on "unappropriated public lands."

4. SAME.

Rev. St. U. S. § 2258, by expressly exempting from pre-emption entry lands included within the limits of a city or town, clearly authorized states and territories to incorporate public lands within the limits of a city or town; and the territorial legislature of Dakota, by Act of March 7, 1885, while said section was in force, incorporated within the limits of the city of Chamberlain certain lands then included in the Great Sioux Indian reservation, which act was continued in force by the state. Act Cong. March 2, 1889 (25 Stat. 888), extinguished the Indian title to a portion of the reservation, including such lands, and provided that on proclamation of the president it should be subject to disposition under the homestead law, and "under the law relating to town sites." *Held*, that the effect of the action of the territory was to appropriate the lands incorporated into the city to city or town-site purposes, and that on their restoration to the public domain they did not become subject to homestead entry as "unappropriated public lands."

On Motion for New Trial.

S. H. Wright, for plaintiff.

John D. Rivers, for defendants.

CARLAND, District Judge. This is an action of ejectment brought by plaintiff against defendants to recover possession of lots 3 and 4, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 10, all in township 104, range 71 W., Brule county, S. D. The case was tried at the present term of the court, and a verdict directed for defendants. On the trial the plaintiff, to establish his title to the demanded premises, offered in evidence a patent from the United States dated July 26, 1899, conveying lots Nos. 3 and 4, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 10, and lot No. 1 of section 15, in township 104 N., of range 71 W., Brule county, S. D., containing 112 acres and $\frac{30}{100}$ of an acre, to one Henry J. King, plaintiff's grantor. The offer of the patent in evidence was objected to by counsel for defendants for the reason that said patent was void on its face. The court sustained the objection, and excluded the patent from evidence. This ruling of the court is alleged to be erroneous, and because thereof a new trial is asked. It was not claimed by counsel for defendants at the trial that the patent, by reason of its recitals alone, was null and void, but that, taken in connection with matters concerning which the court would take judicial notice, it conclusively appeared that the land department had no power to issue the same. In *Burfenning v. Railroad Co.*, 163 U. S. 323, 16 Sup. Ct. 1018, 41 L. Ed. 175, the supreme court said:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the land department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the land department cannot override the expressed will of congress, or convey away public lands in disregard or defiance thereof."

Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; *Wright v. Roseberry*, 121 U. S. 488, 519, 7 Sup. Ct. 985, 30 L. Ed. 1039; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; *Davis' Adm'r v.*

Werbbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Knight v. Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; In re Moore, 27 Land Dec. Dep. Int. 488.

In *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639, the supreme court said:

"It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated are void. The executive officers have no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by defendant in an action at law."

The issuing of a patent for public lands is a ministerial act, which must be performed according to law, and, when issued upon appropriated lands, is without authority of law and void. *Deweese v. Reinhard*, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757; *U. S. v. Stone*, 2 Wall. 525, 17 L. Ed. 765; *Riley v. Welles*, 154 U. S. 578, 14 Sup. Ct. 1166, 19 L. Ed. 648; *U. S. v. Carpenter*, 111 U. S. 347, 4 Sup. Ct. 435, 28 L. Ed. 451; *Chotard v. Pope*, 12 Wheat. 586, 6 L. Ed. 737; *Railroad Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479; *Railway Co. v. Forsythe*, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. Ed. 71.

Section 1 of the act to incorporate the city of Chamberlain, in the county of Brule, S. D., passed by the legislative assembly of the territory of Dakota in 1883, is as follows:

"Section 1. That all that part of the county of Brule in the territory of Dakota described as follows, to wit: Beginning at a point where American creek empties into the Missouri river, thence easterly along the various courses of said American creek to the quarter section line in section 15, township 104, range 71, thence south on said line to the quarter corner between sections 15 and 22, thence in a westerly direction on said line between said sections 15 and 22, and also between sections 16 and 21, 64 chains and 78 links, thence south 20 chains, thence west to the Missouri river, and thence northeasterly along the various courses of said river to the place of beginning, is declared to be a city, and the inhabitants thereof are constituted a body corporate and politic with perpetual succession under the name of the city of Chamberlain, and by that name shall have power to sue and be sued, to make all contracts necessary to the exercise of its corporate power, to purchase, hold, lease, transfer and convey real and personal property for the use of said city, to have and use a corporate seal and change the same at pleasure, and to exercise all the rights and privileges pertaining to a municipal corporation."

Section 1 of "An act to amend an act entitled 'An act to incorporate the city of Chamberlain,'" passed by the legislative assembly of the territory of Dakota on March 7, 1885, is as follows:

"Section 1. That section 1 of said act be and the same is hereby amended as follows: That the corporate limits of said city of Chamberlain be and the same are hereby extended to embrace and include within the limits of said city of Chamberlain, all of section number 15, also the south half of section number 10, all in township 104 north of range 71."

The land in question is a portion of the land described in the patent to King, and is also included in the description of land contained in the act of March 7, 1885. Up to this point it appears that the land described in the patent is within the corporate limits of

the city of Chamberlain, and it is claimed by counsel for defendants that for this reason the land department had no authority to entertain a homestead entry which resulted in the patent, and no authority to issue the patent. The land department, proceeding on the theory that, if the land described in the patent was within the corporate limits of the city of Chamberlain, the entry which resulted in the patent should be canceled, decided that the act of the legislative assembly of the territory of Dakota dated March 7, 1885, was null and void, for the reason that the land described by the act was at the date of its passage within the exterior boundaries of the Great Sioux Indian reservation. *City of Chamberlain v. King*, 24 Land Dec. Dep. Int. 526. The patent, so far as its admission in evidence on the trial is concerned, must stand or fall upon the recitals contained therein, and those matters of which the court will take judicial notice. The court, from the act of congress of March 2, 1889 (25 Stat. 888), and the proclamations of the president of the United States dated February 10, 1890, and December 5, 1894, will take judicial notice that the land in controversy was on March 7, 1885, within the exterior boundaries of the Great Sioux Indian reservation. It also appears from the act of congress and the proclamations of the president of the United States hereinbefore mentioned that a large portion of the Great Sioux Indian reservation, including the lands in question, was on the 10th day of February, 1890, restored to the public domain, so far as the Indians were concerned. It also appears from the proclamation of the president of the United States dated December 5, 1894, that a particular tract of land, including the land in controversy, was not restored to the public domain until April 15, 1895, at which time it is conceded that King made homestead entry at the local land office at Chamberlain, S. D., for the land for which he received patent. It appears from the act of congress of March 2, 1889, and the proclamations hereinbefore mentioned, that the Chicago, Milwaukee & St. Paul Railway Company, by an agreement with the Sioux Indians, had the right to perfect title to a tract of country including the lands in question, after the Indian title had been extinguished by the proclamation of February 10, 1890, and that said railroad company having failed to perform the conditions upon which it should have title to the tract of land described in the proclamation of December 5, 1894, the same was by said proclamation restored to public domain. It thus appears that the proceedings which resulted in the patent to King for the land in question were initiated long after the act of March 7, 1885, amending the act incorporating the city of Chamberlain. Assuming for the present that, during the time between the entry at the local land office and the issuance of the patent to King for the land in question, lands within the limits of an incorporated town were not subject to entry, was the act of March 7, 1885, void and inoperative by reason of the fact that the land described therein was within the boundaries and a part of the Great Sioux Reservation? The land department held that the act was void. What authority the land department possesses to annul the act of the state or territorial legislature is not apparent. It has generally been supposed

that that power either rested in congress or the courts. Section 6 of the act to provide a temporary government for the territory of Dakota, approved March 2, 1861, provided "that the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act, but no law shall be passed interfering with the primary disposal of the soil." Neither this act, the treaty with the Sioux Indians concluded April 29, 1868 (15 Stat. 635), nor any law or treaty, contains any provision that lands within the limits of the Great Sioux Reservation shall be excluded from territorial or state jurisdiction. This being so, lands within the said reservation were a part of Dakota territory, and subject to the jurisdiction thereof. *Langford v. Monteith*, 102 U. S. 145, 26 L. Ed. 53. In the case of *Railway Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. 246, 29 L. Ed. 542, it appears that the railroad company had built and was operating in Idaho a railroad which, for a distance of 69 miles and a fraction of a mile, passed through a tract of land in the county of Oneida known as the "Ft. Hill Indian Reservation," which was on the 30th day of July, 1869, set apart by order of the president, for the Bannock tribe of Indians, pursuant to the provisions of a treaty between the United States and the Eastern band of Shoshones and the Bannock tribe, concluded July 3, 1868. The territory of Idaho levied taxes to the amount of \$4,478 upon the property of this road within the Indian reservation, and, the tax collector of the county having commenced proceedings to enforce the tax by sale of the property of the company, a suit was commenced to restrain him from so doing. The stipulations in the act of March 3, 1863, organizing the territory of Idaho, so far as Indians are concerned, are the same as those in the act creating the territory of Dakota, and the treaty setting apart the reservation contains similar provisions to those of the treaty of 1868 between the United States and the Sioux Indians. The supreme court, in disposing of the case, and holding that the territory of Idaho had jurisdiction over the Indian reservation, spoke as follows:

"It is contended by the plaintiff that these stipulations cannot be carried out if the laws of the territory are enforced on the reservation; and in support of the position special emphasis is placed upon the clause in regard to persons passing over, settling upon, or residing in the territory, and the clause touching wrongdoers among the Indians. As these treaty provisions have the force and effect of a law, it is insisted that the reservation is excluded from the general jurisdiction of the territory as effectually as if the exclusion was made in specific terms. To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the territory may rightfully extend to all matters not interfering with that protection. It has therefore been held that process of its courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance."

In the case of *Draper v. U. S.*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419, the supreme court held that, under and by virtue of the enabling act which admitted Montana and South Dakota to the

Union, there was no exclusion of jurisdiction from Indian reservations in favor of the United States, and that the state courts were vested with jurisdiction to try and punish all crimes other than those committed by Indians or against Indians. The title of the land which the act of March 7, 1885, brought within the limits of the city of Chamberlain, was in the United States, and the Indians only had the right of occupancy, and the inclusion of a few acres within the limits of the city of Chamberlain in no way interfered with the rights or property of the Indians; and it nowhere appears that the Indians or congress ever objected to the act of March 7, 1885.

Section 1844, Rev. St. U. S., which was a part of the organic act of Dakota territory, provided:

"The secretary [of the territory] shall record and preserve all the laws and proceedings of the legislative assembly, and all the acts and proceedings of the governor in the executive department. He shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session thereof, to the president."

And we must presume that this duty was performed, and that within 30 days after the end of the session at which the law of March 7, 1885, was passed the president of the United States was furnished with a copy of the same. Congress had the power to annul it, but did not do so. As to the power to include a portion of the Indian reservation within the corporate limits, see *State v. Doxtater*, 47 Wis. 278, 2 N. W. 439; also, *Schriber v. Town of Langlade*, 66 Wis. 616, 29 N. W. 547, 554.

The act of March 7, 1885, being clearly within the legislative power of the territory of Dakota, was a valid act; and, although it might not operate to the destruction of any treaty rights of the Indians, still, for the purpose of bringing the land in question within the corporate limits of the city of Chamberlain, it had full operation. Let us concede that from the time of its passage until the extinguishment of the Indian title on February 10, 1890, the act of March 7, 1885, was not operative. Certainly on the extinguishment of the Indian right of occupancy it became operative as to the land in question, as the legislature of the territory of Dakota had the right to incorporate within the limits of a city lands of the United States or of any private citizen. On November 2, 1889, the state of South Dakota was admitted to the Union, and by an act of the legislature of the state of South Dakota approved February 6, 1890 (*Sess. Laws 1890*, p. 254), it is provided:

"All laws in force in the territory of Dakota at the date of the admission of the state of South Dakota into the Union, not repugnant to or inconsistent with the constitution of said state, shall continue and be in full force and effect until altered, amended or repealed."

The law of March 7, 1885, by virtue of this state legislation, became a valid law of the state of South Dakota, as it was in no wise in conflict with or repugnant to the constitution of the state of South Dakota. On July 30, 1886, congress passed an act prohibiting the legislatures of the territories of the United States from passing special laws incorporating cities, towns, or villages, or

changing or amending the charter of any town, city, or village; but this act was passed subsequent to the act of March 7, 1885, and only spoke for the future, and in no wise invalidated acts of special legislation passed before that date. The constitution of the state of South Dakota also has a similar provision, but it only had relation to the future acts of the legislative assembly of the state of South Dakota, and to incorporate a city or to amend a charter incorporating a city is not in conflict with or repugnant to anything in the constitution; and the mere fact that the manner of passing the territorial act of March 7, 1885, would not be allowable under the constitution would not have the effect to repeal the law, especially when taken in connection with article 26 of the same constitution, section 1 of which provides:

"That no inconvenience may arise from the change of the territorial government to the permanent state government, it is hereby declared that all rights, actions, prosecutions, claims and rights of individuals and all bodies corporate, shall continue as if no change had taken place in this government."

At the time of the admission of the state of South Dakota there were many cities within its boundaries which had been incorporated by special acts, and it has never been contended for a moment that the admission of the state repealed the charters of all these towns and cities. Thus we have, at the time King initiated his proceedings which resulted in the patent offered in evidence, a valid law incorporating the land in question within the city limits of the city of Chamberlain. If there is any law withdrawing land within the limits of an incorporated town from homestead entry, it is difficult to see why this patent is not void on its face, when taken in connection with matters of which this court must take judicial notice.

While the land department, in issuing the patent to King, assumed that if the act of March 7, 1885, was valid, the entry ought to be canceled, counsel for plaintiff now insists that since the act of March 3, 1891 (26 Stat. 1095), there has been no law prohibiting homestead entries upon land included within the limits of an incorporated city or town. The argument in support of this position is as follows:

Section 2258, Rev. St. U. S., the same having been taken from the act of congress dated September 4, 1841 (5 Stat. 455), is as follows:

"The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit: First, lands included in any reservation by any treaty, law or proclamation of the president for any purpose; second, lands included within the limits of any incorporated town or selected as the site of a city or town; third, lands actually settled and occupied for purposes of trade and business and not for agriculture; fourth, lands on which are situated any known salines or mines."

Section 2289, Rev. St. U. S., previous to the act of March 3, 1891, above mentioned, read as follows:

"Every person who is the head of a family, or who has arrived at the age of 21 years and is a citizen of the United States, or who has filed his declaration to become such as required by the naturalization laws, shall be entitled to enter one quarter section or less quantity, of unappropriated public lands upon which such person may have filed a pre-emption claim, or which may at the time the application is made, be subject to pre-emption, at \$1.25 per acre."

By section 4 of the act of March 3, 1891, the sections of the Revised Statutes from 2257 to 2288, inclusive, were repealed; and by section 5 of the act of March 3, 1891, section 2289, above mentioned, is amended so as to read as follows:

"Every person who is the head of a family, or who has arrived at the age of 21 years and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity, of unappropriated public lands to be located in a body, in conformity to the legal subdivisions of the public lands, but no person who is the proprietor of more than 160 acres of land in any state or territory, shall acquire any right under the homestead law. And every person owning and residing on land, may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate 160 acres."

It will be noticed that the amendment to section 2289 eliminates from the same the following words:

"Upon which such person may have filed a pre-emption claim, or which may, at the time application is made, be subject to pre-emption."

Under section 2289 as it stood before the act of March 3, 1891, a homestead entry could not be made upon land that was not subject to pre-emption, and it thus happened that the provision of section 2258 of the pre-emption law determined what land was exempt from homestead as well as pre-emption filing. The act of March 3, 1891, was an act which repealed the pre-emption and timber culture laws. Congress having by this act repealed the pre-emption law, it was necessary to amend section 2289, for the reason that the reference to pre-emption in that section would be meaningless if there was no pre-emption law; but it does not necessarily follow that, because congress amended section 2289 as stated, all lands described in section 2258 are now subject to homestead entry. Section 2289, since its amendment, allows homestead entries to be made upon unappropriated public lands. The uniform interpretation of section 2289 by the land department since this amendment has been to the effect that homestead entries could not be made upon lands included within the corporate limits of a town. In *Barbour v. Wilson*, 23 Land Dec. Dep. Int. 466, decided December 3, 1896, the honorable secretary of the interior used the following language:

"I do not think it follows from said amendment, however, that lands within the limits of an incorporated town may now be entered under the homestead law. I cannot believe that such was the intention of congress. It might just as well be contended that lands on which are situated known salines or mines—certainly the former—are subject to homestead entry under the amended law, for the reason that such lands embraced one of the exceptions in the repealed pre-emption law, and no reference thereto is contained in the amended homestead law. The purpose of congress in making the amendment is apparent, and I do not think a broader scope should be given the amended law than that purpose warrants. Moreover, as the law now stands, it is only 'unappropriated lands' that are subject to homestead entry, and I do not think that lands included within the limits of an incorporated town can be justly held to come within that category. It would not be in accord with a sound public policy to allow the acquisition by homestead entry of lands so situated, and thereby likely largely enhanced in value. Moreover, the settlement and occupancy of such lands for purposes of trade and business, or their use for town-

site purposes, could and most likely would be seriously interfered with if such were the law."

This court will take judicial notice of the rules and regulations of the land department of the United States in regard to the disposal of the public lands. *Caha v. U. S.*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415. And it appears from said rules and regulations that before and continuously since the act of March 3, 1891, it is required of the homestead claimant and his witnesses, when he makes final proof at the local land office, that he answer under oath the following questions:

"Question. Is your present claim within the limits of an incorporated town or selected site of a city or town, or used in any way for trade and business? Question. Are there any indications of coal, salines, or minerals of any kind on the land?"

Why are answers to these questions required, if they are immaterial?

The interpretation given to laws regulating the disposal of the public lands by the land department, which is vested with the disposal of the same under said laws, is entitled to great respect. *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761. It is certainly the understanding of the land department, so far as matters of which judicial notice can be taken is concerned, that land included within the limits of an incorporated town is not subject to entry under the homestead laws. But, speaking of the particular case before the court, let us see if, at the time King made his entry upon the land in question, it was unappropriated public lands. Section 2258 was certainly in force until March 3, 1891. By its terms homestead and pre-emption claims could not be filed upon land within the incorporated limits of a town. This certainly was a permission by congress to the states and territories that public lands might be incorporated within the corporate limits of a city or town. While this law was in force the act of March 7, 1885, was passed, incorporating the land in question within the limits of the city of Chamberlain. That law, as has hereinbefore been stated, was valid. It was ratified and affirmed by the legislative power of the state of South Dakota, and the land in question had been absolutely appropriated by being brought within the limits of the city of Chamberlain. "To appropriate," in the sense that the word is used in the land laws of the United States, is to select the land for a particular purpose. By including the land in question within the corporate limits of the city of Chamberlain, the title to the land was in no wise interfered with; but the legislative power, in its discretion and judgment, thought it was proper that it be brought within the corporate limits. Courts have no authority to review the reasons for legislative action in this particular, and the act of the legislature had no other force or effect than to appropriate this land for town-site purposes, leaving the United States to dispose of it in any way that it should deem proper. The act of June 14, 1878, allowing timber culture entries on the public land, contained no express prohibition against entry of land included within the limits of a city or town; but the land department, in *Re Dayton*, 2 Land Dec. Dep.

Int. 634, held the act must be construed in the light of the general laws regulating the disposal of the public lands, and rejected Dayton's application for a timber culture entry within the limits of the city of Aberdeen, Brown county, Dak. T. By section 21 of the act of March 2, 1889 (25 Stat. 888), dividing the Great Sioux Reservation into separate reservations, it is provided that "all lands in the Great Sioux Reservation, outside of the separate reservations, shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, and under the law relating to town sites." This provision in no wise interferes with the provision of the general law that a homestead entry can only be made upon unappropriated public lands. By section 16 of the same act, congress recognized certain agreements which the Chicago, Milwaukee & St. Paul Railway Company and Dakota Central Railway Company had made with the Sioux Indians, and the railroads were given a certain time within which to comply with certain conditions, and in default thereof the lands should be forfeited. The description of these particular lands does not appear in the act of March 2, 1889, but in the proclamation of the president of the United States of December 5, 1894 (19 Land Dec. Dep. Int. 431), the description of these lands that were referred to in section 16 is given; and it appears from said description that the land in question in this suit is a portion of the land referred to in section 16, and section 16 contains this provision:

"And the said railway companies, and each of them, shall, within three years after this act takes effect, construct, complete, and put in operation their said lines of road; and in case the said lines of road are not definitely located and maps of location filed within the periods hereinbefore provided, or in case the said lines of road are not constructed, completed and put in operation within the time herein provided, then and in either case, the lands granted for right of way, station grounds, or other railway purposes, as in this act provided, shall without any further act or ceremony, be declared by proclamation of the president forfeited, and shall, without entry or further action on the part of the United States, revert to the United States and be subject to entry under the other provisions of this act."

This provision and the other provisions of section 16 account for the fact that the lands in question were not open to settlement until April 15, 1895; but there is nothing in the act of March 2, 1889, which would in any way interfere with the act of the legislative assembly of Dakota territory of March 7, 1885. At the time the act of March 2, 1889, was passed, section 2258, Rev. St. U. S., exempting lands within the incorporated limits of a city or town from homestead entry, was in force; and when congress said in the act of March 2, 1889, that lands open to settlement by that act should be disposed of by the United States to actual settlers under the provisions of the homestead law, it did not intend to repeal section 2258, which exempted land within the limits of a city or town from homestead entry. It merely provided that the lands should be disposed of under the homestead laws, leaving the homestead laws, as they then existed, to operate. The land in question is a portion of 188 acres on the east bank of the Missouri river, to the north of the city of Chamberlain, which is referred to in the proclamation of

the president of the United States dated December 5, 1894. The balance of the tract reserved to the railway company, and also open to settlement by said proclamation, consisted of 640 acres on the west bank of the Missouri river; and the fact that congress dealt with these lands in the act of March 2, 1889, and that the president issued his proclamation of December 5, 1894, concerning the same, without saying anything about this tract within the corporate limits of the city of Chamberlain, is no reason for saying that congress had intentionally, or even by implication, annulled the act of the territorial legislature incorporating this land within the limits of the city of Chamberlain. I cannot conclude otherwise than that the land in question, prior to the entry of King which resulted in the patent offered in evidence, was lawfully appropriated, within the meaning of the homestead laws, and that therefore no homestead entry could be made thereon; and this all appears to the court from documents of which the court is bound to take judicial notice. I therefore am of the opinion that the patent was rightly excluded, and that the motion for a new trial should be denied.

GREAT NORTHERN RY. CO. v. KASISCHKE.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1900.)

No. 1,345.

1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—QUESTIONS FOR JURY.

A railroad coal shed was equipped with boxes or chutes holding about five tons each, which, on being tripped, slid out over a tender, when the pulling of a pin permitted an apron to drop, and the coal was discharged into the tender. On one occasion one of the chutes failed to slide out on being tripped, and plaintiff, an employé, was directed by his foreman to stand on the tender and pull on it. It suddenly slid out, knocking plaintiff into the tender, and the apron fell, dumping the entire contents upon him, and causing his injury. There was evidence tending to show that 10 days after the accident only 1 of the 12 chutes in the shed would operate properly, and as they were designed to operate, and evidence was also introduced by defendant to the effect that they were inspected daily. *Held*, that such evidence warranted the submission to the jury of the questions whether the chute was in proper repair, and, if not, whether defendant knew or should have known its defective condition.

2. SAME—ASSUMED RISK.

In such case plaintiff must necessarily have known that from some cause the chute did not slide properly, and must be held to have assumed the risk therefrom; but that fact would not warrant the court in holding, as a matter of law, that he also assumed the risk from the defective fastening of the apron, by reason of which the coal was prematurely discharged upon him, or preclude a recovery for injuries caused thereby, and in the absence of evidence clearly showing that he had, or should have had, knowledge of such defect, that question was one for the jury.

3. RELEASE—VALIDITY—PROCURING BY DECEIT.

Plaintiff received quite severe injuries while in the employ of the defendant railroad company. A few days afterwards he signed a release of all claims for damages on account of such injury, for the stated consideration of "medical attention." He testified that he was sent for by the foreman and asked to sign the paper, and on his stating that he could not read or write English the foreman read the release to him, and

told him the company would pay his doctor bill and give him a light job; that he supposed that to be the purport of the paper, and did not understand it to be a release of his claim for damages, or he would not have signed it. *Held* that, under the circumstances, plaintiff had the right to rely upon the foreman for an explanation of the meaning and effect of the paper, and if he was misled as to its effect by the statements of the foreman, without negligence on his part,—which was a question for the jury,—it would not be binding upon him.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of North Dakota.

C. Wellington (W. E. Dodge, on the brief), for plaintiff in error.

G. W. Freerks (M. C. Freerks, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Carl Kasischke, the defendant in error, against the Great Northern Railway Company, the plaintiff in error, to recover damages for certain personal injuries which he sustained at Breckenridge, Minn., while he was in the employ of the defendant company, and was engaged in coaling one of its engines. It appears that, when an engine desired to take coal at the place where the accident occurred, it was run alongside of a building or shed containing coal, and that the coal was dumped into the tender by means of movable chutes or boxes in the side of the building, which were so arranged that they would slide out of their own weight, and discharge, respectively, about five tons of coal into the tender. These boxes were so arranged that they could be made to slide out of their sockets by pulling a rope, and when they had slid out a certain distance the coal which they contained could be dumped into the pit of the tender by drawing a bolt or pin, and permitting an apron or door at the front end of the box to open or fall. The plaintiff below alleged, in substance, that on the night of December 7, 1898, he was directed by his foreman to assist in coaling one of the defendant company's engines at its coaling station; that he was ordered by the foreman to stand on the locomotive tender and pull on one of the coal chutes, so as to make it slide out of its socket; that he obeyed this order, and that while in the act of pulling on the chute it suddenly slid out of its socket, thereby throwing him to the bottom of the tender, and precipitating upon him about five tons of coal. He further alleged, in substance, that the injuries which he sustained by reason of the accident were due in part to the negligence of the defendant company in failing to provide safe machinery for dumping coal, and to the faulty and defective construction of such machinery. There was a verdict and judgment in favor of the plaintiff below for a moderate sum, to wit, \$1,250, considering the nature and extent of the injuries which he is shown to have sustained. We are asked by the defendant company to reverse this judgment for various reasons.

It is claimed in the first place that no evidence was introduced which tended to show that the coal chute in question was defective in any respect, and that the verdict is without any substantial evi-

dence to support it, but a careful perusal of the record has served to convince us that this proposition is untenable. The testimony shows that the coal chutes or boxes, 12 in number, were made of sheet iron, and, if in a perfect state of repair, that they would slide out of their sockets of their own weight, by pulling a rope, or tripping them, and that they were designed to be operated in that manner, rather than by pushing or pulling them; also, that the doors or aprons of the boxes would remain closed and retain the coal until a bolt or pin was drawn, so as to release a latch which held the aprons. For some reason, however, one of the chutes (that which occasioned the injury) did not operate on the occasion of the accident as it was designed to operate. It did not slide out of its own weight when it was tripped, and, because it failed to operate as it should have done, the plaintiff was directed to stand on the tender and pull outwardly on the box with as much force as he could exert. Moreover, when the box slid from its socket it did not retain the coal, as it should have done, until the bolt was drawn and the latch released, but immediately discharged its contents into the pit of the tender, thereby covering the plaintiff's body with five tons of coal. We think that the fact that the chute, although handled properly, did not operate as it should have operated, warranted an inference by the jury that it was for some reason out of order and in need of repair. Besides, there was direct evidence on the part of one of the plaintiff's witnesses (a witness by the name of McCole), who had abundant opportunity to examine the chutes, that about 10 days after the accident none of them but one were in such a condition, owing to some defect in the pins or latches which controlled the aprons, that they would retain the coal and prevent it from dumping prematurely, while there was no testimony that during the intermediate period any unexpected event had occurred which had put them out of repair suddenly. We conclude, therefore, that a jury could properly find that the particular chute which was being operated at the time of the accident was then out of repair, and that the defect in question contributed directly to the plaintiff's injury.

It is furthermore urged that, although the chute where the accident happened may have been defective, yet the burden was on the plaintiff to show that the defendant company had knowledge of its condition prior to the accident, and that the plaintiff himself had no such knowledge. It is said that the record contains no evidence tending to show such knowledge on the part of the defendant company, while it does appear that the plaintiff himself was advised of the defect of which he now complains. We are willing to concede that it was incumbent on the plaintiff to satisfy the jury by competent evidence that the defendant knew or ought to have known before the accident that the chute was out of repair, provided it had been constructed properly in the first instance, and had become defective solely through use. We think, however, that there was some evidence which would justify a jury in concluding that the chute had been out of repair for some time prior to December 7, 1898, and that its condition ought to have been known to the defendant company, or to the person whose duty it was to inspect these chutes.

We have already referred to the fact that there was testimony to the effect that about 10 days after the accident all of the chutes but one were out of repair, and would not operate as they should have done, owing to some defect in the latches which were designed to hold the aprons in place. The defendant claimed, and offered evidence to that effect, that the chutes were inspected daily, and were in perfect order on the evening of the accident, and for a long time afterwards. The jury probably credited the statement of the plaintiff's witness McCollm that all of the 12 chutes, with possibly one exception, were in a defective condition very shortly after the accident; and, upon the assumption that they were convinced of this fact, it afforded a reasonable basis for an inference that the chutes, or some of them, were out of repair on the night of the injury and for some time previous, inasmuch as it did not appear that anything had happened in the meantime that would be liable to disarrange all of the chutes in that brief period. If, a week after the plaintiff was hurt, the chutes, with one exception, were out of order, and in need of repair to make them operate perfectly, or as they were designed to operate, it would be reasonable, we think, to conclude that some of them were in need of repairs previous to December 7, 1898, and that the defect should have been discovered by the defendant company, since the testimony which it produced tended to show that they were subjected to a daily examination. We think, therefore, that no error was committed by the trial court in allowing the jury to determine whether the chutes were in a defective condition on the night of the accident, and whether the defect therein was of such long standing that the defendant company, in the exercise of ordinary diligence, ought to have discovered their condition. In view of the conflict in the testimony respecting the condition of the pins and latches by which the aprons were held in place, it was the province of the jury to settle the controversy; and, if they found the chutes to be in a bad state of repair on the occasion of the accident, it was likewise their duty to determine for how long a period they had probably been in that condition, and whether reasonable care had been exercised by the defendant. It is a fact which admits of no controversy that when the plaintiff took his place on the tender, in obedience to the order of his foreman, for the purpose of pulling on the coal chutes or boxes, he was aware that for some reason the particular chute did not operate as it should have done when the rope was pulled, and that there was something which obstructed its outward movement. But it will not do to say that the testimony shows beyond peradventure that the plaintiff was aware that there was a defect in the pin or latch of the apron of the chute which he attempted to draw, which would cause it to dump prematurely. He testified, in substance, that he had only assisted in coaling engines at the coal chute in question for two nights prior to the accident, and that during that time he had learned that some of the aprons were open, but that the pins in most of them were so tight that they had to be knocked out with a pick. This statement did not warrant the trial court in assuming that the plaintiff knew that the apron of the chute which he attempted to draw was in such

a condition that it would open of its own accord, but it rather made it the duty of the court to permit the jury to determine whether he had such knowledge, or ought to have acquired it, prior to the accident. It was the province of the jury to decide what knowledge he had or ought to have had as respects the condition of the apron, and whether it was of such a nature as rendered him guilty of contributory negligence. It may have been, and probably was, a defect in the apron fastenings of the particular chute which he attempted to draw, occasioning an unexpected fall of a mass of coal upon the plaintiff's body as he lay in the pit of the tender, that caused his most serious hurt, namely, the rupture of which he now complains. In view of all the testimony, the trial court had no right to declare that the plaintiff had consciously assumed the risk of being crushed or bruised by the sudden fall of five tons of coal, even if it did appear that he had consciously assumed the risk of losing his balance on the edge of the tender by the sudden outward movement of the chute. Most men in his situation, and without knowledge that the apron of the chute was out of order and that it would discharge its load prematurely, would probably have obeyed the peremptory order of the foreman (which was given, as it seems, with some show of anger) to stand on the tender and pull on the chute, and would have done so without hesitation or thought of serious harm. We are not prepared to hold, therefore, and cannot assent to the proposition, that because he attempted to start the chute by pulling on it, knowing that it was obstructed by some obstacle, he thereby assumed the risk of an injury that was occasioned by an unknown defect in the apron, and is not entitled to recover for such injury. The evidence shows that there was another risk besides that of slipping into the pit of the tender, of which he may have been ignorant, that may have occasioned his chief hurt, and that this risk was incurred through the fault of the master. We are of opinion that the trial court very properly allowed the jury to determine, in the light of all the circumstances, whether the plaintiff was guilty of such contributory negligence in obeying the order of the foreman, and in taking such a position as he did on the tender, as should preclude him from recovering.

It is further urged by the defendant company that the plaintiff on December 12, 1898, for a valuable consideration, released it from all causes of action then existing, and that this action is barred by the release, which is in the following form:

"Form 2,704. Great Northern Railway Line. Great Northern Railway Company. Release of Damages.

"Know all men by these presents, that in consideration of the sum of medical attention —, to me in hand paid by the Great Northern Railway Company, the receipt whereof is hereby acknowledged, I have released, acquitted, and discharged, and by these presents do release, acquit, and forever discharge, the said railway company, its successors and assigns, of and from any and all cause or causes of action, costs, charges, claim, or demand, of whatever name or nature, in any manner arising or to grow out of personal injuries received by me at Breckenridge on Dec. 6th, 1898, while assisting in coaling engine No. 200. I slipped and fell into tank pit, and coal from pocket fell on me, whereby I was severely injured. The receipt of said sum of medi-

cal attention dollars being hereby acknowledged to be in full payment, satisfaction, and discharge of any and all such cause or causes of action, costs, charges, and demand arising or growing out of said personal injuries received as aforesaid.

"In witness whereof, I have hereunto set my hand and seal this 12th day of December, A. D. 1898.

Carl Kasischke. [Seal.]

"In presence of

"J. C. Nolan,

"E. Abig."

Along the margin of this release was written the following statement, but it was unsigned:

"This release read and explained to me before signature, and releases all claims for personal injury to date."

With respect to this document the plaintiff testified, in substance, that on December 12, 1898, five days after the accident, he was sent for to come to the roundhouse; that he was somewhat affected by dizziness at that time, as a result of the accident; that on reaching the office in the roundhouse he was shown a paper by the division master mechanic, J. C. Nolan, and was asked if he understood it; that he told Nolan at the time that he could neither read nor write English; that Nolan then read the paper to him, but that he did not understand it fully or accurately; that, in the course of the conversation which ensued about the paper, he told Nolan that his doctor had asked him that morning for a dollar, and that Nolan replied, "The company will pay your doctor bill and give you a light job." He further testified, in substance, that Nolan did not explain to him that the document was intended as a release of his claim for damages on account of the injury that he had sustained; that he did not understand it to be an agreement of that nature, but did suppose that it was an engagement on the company's part to pay his doctor and give him a light job, because Nolan said they would do so when he was asked to sign the document. He also testified that the interview with Nolan, when the paper was signed, lasted only five or ten minutes; that no money was paid to him at that time or afterwards; that nothing was said about paying him any money; that he ascertained the real purport of the writing after it was signed, through a conversation with some of his fellow workmen, and that he would not have signed the paper had he known it to be a release of all claims against the company for being injured. The evidence for the defendant with respect to this transaction was, as a matter of course, entirely different, and tended to establish that the release in question was not only read by Nolan, but that the object thereof was fully explained to the plaintiff before it was signed, and that he executed it with a full knowledge of the language employed, even if he did not comprehend its legal effect.

It was clearly the duty of the master mechanic, when he was informed that the plaintiff could not read or write English, and that he relied upon him for an explanation of the contents of the paper, to explain its purport and the object of asking him to sign it, and to do so fully, in language which the plaintiff could comprehend. Because Nolan represented the defendant company in the transaction, it was his duty to exercise special care in explaining its contents to

the plaintiff. It was likewise the plaintiff's duty to make reasonable efforts to obtain a correct understanding of the document before he signed it, and not to sign it until he had reasonable grounds for believing that he did understand it. *Railway Co. v. Belliwith*, 28 C. C. A. 358, 83 Fed. 437. We think, however, that the plaintiff had a right to rely upon Nolan for an explanation of the meaning and effect of the paper, inasmuch as he assumed the duty of interpreting and explaining it, and that the plaintiff was not bound to seek other advice on the subject. The result is that if Nolan, by his statements or conduct, misled the plaintiff in any manner as to the effect of the instrument and induced him to believe that it was merely a writing by which he was to have his doctor's bill paid and get a light job, and that it was not in fact a release of his cause of action, it ought not to stand or be accepted in the present action as a bar to a recovery. The contention of the defendant company is that there was no evidence whatsoever which tended in any way to impeach the validity of the release, and that the court should have so declared. But, in the light of what has been said, we are unable to assent to that proposition. In the first place, the consideration recited in the release as moving from the defendant company, to wit, "medical attention," was trifling in comparison with the permanent bodily injury which the plaintiff appears to have sustained; and this in itself raises a suspicion of unfairness, and gives color to the claim that the plaintiff was in some way deceived, and did not understand that he was releasing his right of action. Aside from this view are the positive statements of the plaintiff that he was not advised that the instrument was intended as a release of his claim for damages; that he would not have signed it had he understood such to be the object of asking his signature; that statements or representations were made by Nolan, which are not embodied in the document, that gave him a different understanding of its purpose; and the obvious facts that the plaintiff was to some extent subject to the influence of his superior officer, and had a very imperfect knowledge of the language in which the paper was written, and in which the negotiations leading to its signature were conducted. These considerations, in our opinion, warranted the trial court in permitting the jury to determine whether the plaintiff had consciously released his right of action, or whether his signature to the release had been obtained by conduct or representations on the part of the company's agent which amounted to deceit. While it is essential to the public welfare that the integrity of written contracts should be maintained, by requiring the parties thereto, before they sign the same, to exercise reasonable diligence in acquiring a correct knowledge of their meaning and effect, yet it is equally important that the rule of law in this respect should not be applied with such strictness as will enable persons who are so disposed to easily overreach those who are unlettered and unwary, and deprive them of valuable rights. In this instance we are satisfied that it was the function of the jury to decide whether the plaintiff was deceived as to the contents of the release, and also to determine whether he was guilty of any such negligence in execut-

ing it, under the circumstances disclosed by the proof, as should estop him from contesting its validity.

The foregoing comprehends all of the substantial grounds on which the right to a reversal is predicated, and, for the reasons stated, we think that none of them would warrant such action. The judgment below is accordingly affirmed.

SANBORN, Circuit Judge. I am unable to yield assent to the opinion and decision of the majority of the court in this case, because it seems to me that the undisputed evidence shows that the injury which the plaintiff sustained was the direct result of his own contributory negligence, and because, if he had any claim against the railroad company, he released it.

The uncontradicted evidence is that the theory of the construction and operation of the boxes containing the coal was that they should hold the coal after they were drawn out to the engine, until the pins were drawn and the aprons were released by the operator. The testimony is equally conclusive and uncontradicted, however, that these boxes never did in fact so operate, but that when they were in perfect condition the pins and aprons would not hold the coal after they were drawn forward to the engine, and they would frequently automatically dump it, so that it was always dangerous for an employé to be in front of them when they were drawn forth. There is a conflict in the evidence respecting their condition at the time of the accident. The testimony for the defendant is that they were in order. The plaintiff himself testified that some of them opened themselves before and at the time of the accident, but that it was necessary to open most of them with a pick; and one of his witnesses testified that ten days after the accident all but one of them were so out of repair that they would dump the coal automatically. The opinion of the majority assumes that the condition of the boxes at the time of the accident was that described by this last witness. If this was their condition at the time of, it had undoubtedly been their condition for at least four days before, the accident. The evidence is uncontradicted that the plaintiff assisted in coaling the engines only when the boxes would not slide out by the use of the rope, and that he had assisted in pulling these coal boxes out and in coaling the engines from them for the four nights immediately preceding the accident, and that he had done so 7 or 8 times each night, or from 28 to 32 times. He testified himself that during this time some of these boxes opened themselves, and that some of them they were compelled to loosen with a pick. Now, if, as the majority of the court assume, all the boxes but one dumped automatically at the time of the accident, because they were out of repair, the plaintiff must have known that fact, and he must have been aware of the risk and danger of placing himself in front of them. On the other hand, if they were in order, and if, as the uncontradicted testimony proves, they frequently dumped automatically when they were in perfect repair, so that there was always danger that they would do so, he must have known this fact. Whichever view of the testimony is taken, therefore, he was assisting to operate these boxes, and his opportunity to know and his

knowledge of their condition and operation, and of the risk and danger attending their operation, were necessarily better and more intimate than any that the defendant could acquire by a diligent inspection; and if, upon this testimony, the defendant could be guilty of negligence because it might have learned by inspection that the boxes were out of repair, much more was the plaintiff guilty of contributory negligence because he had the best opportunity to learn, and he himself testifies that he did know, that they dumped automatically, and knowing this he must have known the risk and danger of placing himself in front of one of them when he was pulling at its door with all his power. It was gross negligence for the plaintiff to permit himself, with this knowledge, to be found in front of the door of one of these boxes when it was about to be drawn forth to its dumping place. If he had not so placed himself, he would not have been injured. The result is that his accident was necessarily the direct result of his own negligence, for which the defendant was not liable, and the judgment against it should be reversed.

Nor am I willing to assent to the proposition that there was sufficient evidence of misrepresentation, fraud, or deceit in procuring the release which the plaintiff executed to warrant its avoidance. If the testimony of one of the parties to a written contract, who did not read it, or procure any friend or disinterested person to read or explain it to him, but to whom it was read and explained by the agent of the other party, that he did not know its purport or that he was deceived in its terms, is to be deemed sufficient to set it aside, when that testimony is contradicted by all the other witnesses to the transaction, written agreements will not only lose their sanctity, but their reason for being. It is a settled rule of law that written contracts may not be set aside or disregarded for fraud or deceit in their procurement unless the evidence of the fraud or mistake is clear, unequivocal, and convincing. In my opinion, the evidence in this case was not only not clear and convincing that there was fraud and deceit, but it was unequivocal and overwhelming that there was none. The story of the plaintiff is incredible in itself. It is that he did not know that the instrument he signed was a release of his claim, but that he supposed that it was a mere agreement on the part of the railroad company to give him a light job and pay him his doctor's bill. But the company needed to make no agreement to enable it to do these things, and the plaintiff must have known that his signature was not sought without purpose or reason. He does not claim that Nolan, who read the agreement to him, told him that the contract stipulated that he should have a light job. He admits that Nolan read the contract to him, and he simply claims that Nolan told him that he should have a light job, and the payment of his doctor's bill. If this testimony was true, his remedy was not an avoidance of his agreement, but an action for damages for the failure to give him the job, and to pay him his doctor's bill, if indeed there was such a failure. There does not seem to me to be sufficient proof of fraud or deceit in the testimony of the plaintiff, standing alone, to warrant an avoidance of his release. But it does not stand alone. Nolan, who read the agreement to him, testifies that he read it in full and clearly

explained it, that he told him that it was a release of his claim against the defendant, and that he made no misrepresentation to him of its contents. Abig, the witness to the contract, testifies that, when Nolan read it to the plaintiff in English, the latter said that he understood it, but that, for fear that he might not fully understand it, he explained it to him in German. He testified that he said to him in that language, "Charley, by signing this paper you release the company of any further claim on account of this damage," and that the plaintiff replied, "Yes, yes, yes, I understand," and thereafter executed the release. When the attention of the plaintiff was called to this conversation in his testimony in rebuttal, he did not deny it. He merely said he did not remember it. In this state of the record, there seems to me to be not only no evidence which would warrant a jury in finding that this release was procured by misrepresentation or deceit, but conclusive proof that it was not so obtained, and the court below should have so instructed the jury. The case falls fairly under the decision of this court in *Railway Co. v. Belliwith*, 83 Fed. 437, 28 C. C. A. 358, 55 U. S. App. 113, where my views of the law upon these questions and the importance of its enforcement are expressed more forcibly and more at length.

SHAPARD et al. v. HYNES et al.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1900.)

No. 1,367.

1. PARTNERSHIP—LIABILITY OF PARTNERS—TORTS OF CO-PARTNER.

A defendant cannot be held liable for the tortious act of another on the ground that they were partners, except upon proof that the partnership in fact existed at the time, and that the act was done in relation to the partnership business, with the knowledge and approval or ratification of such defendant, or that it was plainly for the benefit of the firm, and was committed in the usual and ordinary prosecution of the business which the partner committing it was accustomed to transact.

2. CHATTEL MORTGAGES—LIEN—REMOVAL OF PROPERTY TO ANOTHER STATE.

When a chattel mortgage has been executed and recorded in accordance with the laws of the state where the property is situated, so as to there create a valid lien, such lien will be recognized and given effect, through comity, in another state, to which the property is subsequently removed, in the absence of contrary legislation, although the mortgage is not recorded there, and will not be held subject to the requirements of the statutes of the second state as to the mode of execution and recording.

3. SAME—ATTACHING CREDITOR—CONVERSION.

A seizure of mortgaged property in the possession of one claiming to hold it under the mortgagee, upon an attachment against him or another than the mortgagee, and against his protest, amounts to a conversion, and entitles the mortgagee to recover its value.

In Error to the United States Court of Appeals in the Indian Territory.

This is a suit for the wrongful seizure and conversion of certain chattels under a writ of attachment. William M. Hynes, his wife, Philomana Hynes, and Clara Smith, as executrix of Samuel H. Smith, deceased, the defendants in error, were the plaintiffs in the lower court, while the plaintiffs in error, S.

S. Shapard, C. G. Moore, and F. W. Phelps (the latter being the officer by whom the attachment writ was levied), were the defendants. The writ of attachment under which the chattels were seized was issued at the instance of the Shapard Grocery Company, a firm said to have been composed at the time of S. S. Shapard and C. G. Moore, and it ran against J. E. Cottraux, from whose possession the property in controversy was taken. The plaintiffs below claimed to be the absolute owners of the chattels, under a bill of sale absolute on its face, that was executed at San Antonio, Tex., on January 4, 1894, by Philomana Cottraux and Joe Cottraux, her husband, who appear to have been, respectively, the mother and the father of J. E. Cottraux, who was in possession of the chattels at the time they were seized. J. E. Cottraux claimed to have the chattels in his possession at the time of the seizure as lessee of the plaintiffs. The property consisted of a marble soda fountain, marble-top tables, ice-cream freezers, show cases, and the general outfit of a confectionery establishment. It had been moved from Texas into the Indian Territory about 18 months before the seizure, and in the meantime had been in use by J. E. Cottraux, or by his father, Joe Cottraux, at South McAlester, in the Indian Territory, where the seizure took place. When the attachment writ was levied the property was loaded in a car for the purpose of transporting it to some point in Texas, and it was taken from the car, and a portion of it was subsequently sold. Shortly after the seizure, and prior to the sale, J. E. Cottraux served a written notice on S. S. Shapard, one of the attaching creditors, that the property belonged to the plaintiffs, and that they were entitled to its immediate possession. This notice, however, was disregarded, and a part of the property was sold to satisfy the claim of the attaching creditors. After the sale the attaching creditors offered to return to J. E. Cottraux, as agent of J. P. Cottraux (probably meaning his father, Joe Cottraux), such of the property as remained unsold. This offer was declined. The trial resulted in a verdict and judgment for the plaintiffs below in the sum of \$520. This judgment was affirmed by the court of appeals in the Indian Territory, and the case has been brought hither for review.

Samuel A. Wilkinson and Wallace Wilkinson, for plaintiffs in error.

Charles B. Stuart, Yancey Lewis, and J. H. Gordon, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

One of the issues that was raised on the trial below was whether the defendant C. G. Moore was a partner of S. S. Shapard at the time the latter directed the levy of the writ of attachment. The trial court disposed of this issue as a matter of law, instructing the jury, in substance, that Moore was a partner of Shapard at the date of the levy and sale, and that, being such, he was liable for the wrongful act of Shapard in directing the levy, if it was in fact wrongful, although he was not present, and neither directed the levy to be made, nor authorized the subsequent sale of the attached property. To this instruction an exception was taken, which presents one of the principal questions to be considered.

The testimony in the case concerning the existence of the alleged co-partnership was, in substance, as follows: Moore lived at Eu-
faula, in the Indian Territory, a considerable distance from South McAlester. About two years prior to January 1, 1897, he formed a co-partnership with Shapard for the purpose of carrying on the grocery business at South McAlester. By the terms of the agreement,

Shapard was to conduct the business in the name of the Shapard Grocery Company, and was to have full charge thereof, but Moore was to furnish the capital. Moore's name was not used in the business, and, as he testified, he was not generally known as being a member of the firm. On January 1, 1897, Shapard bought Moore's interest in the business, agreeing to pay him therefor \$1,800, at the rate of \$125 per month. This agreement, it seems, was oral. Four monthly payments were made in pursuance of the agreement, but no notice of a dissolution of the firm was published, and it was understood between the partners that Shapard should run the business, as before, in the name of the Shapard Grocery Company. Moore had no knowledge of the levy of the writ of attachment on the property of the plaintiffs, which was made, as it seems, in the month of April, 1897, and neither derived a benefit from the levy, nor took part in any of the proceedings which culminated in a sale of the attached property. His first knowledge that an attachment writ had been issued and levied was acquired from Shapard after the present action was instituted, when he was advised by Shapard that the suit would not trouble him in any way. In June, 1897, Shapard sold a half interest in the business of the Shapard Grocery Company to one Ambrose, doing so with Moore's consent. Ambrose, it seems, paid \$500 on account of his purchase, but failed to pay the residue of the purchase price. Later in the season, on or about September 1, 1897, Shapard having failed in business, and being unable to complete his monthly payments, Moore was compelled to take possession of the stock of goods then belonging to the Shapard Grocery Company, and he did so with Shapard's consent. At that time the grocery company was involved in debt, and Moore was compelled to pay, or at least did pay, \$2,000 to satisfy claims against the grocery company. Notwithstanding the testimony aforesaid, which seems to have an obvious tendency to show that Moore was not a partner of Shapard at the time of the alleged wrongful seizure and sale of the property in controversy, and that he was in no sense responsible for the willful trespass of Shapard, the learned judge of the trial court seems to have entertained the view that Moore must be held responsible for the wrongful acts of Shapard, by the operation of the doctrine of estoppel. In the instructions given, the attention of the jury was directed to evidence which showed that the parties had once been partners; that some people knew that Moore was a member of the firm; that the firm was afterwards secretly dissolved, without letting the public know the fact; that the business was thereafter conducted in the old firm name; and in view of these facts the jury were told that Moore must be regarded as a partner of Shapard, and liable for all of his tortious acts in conducting the firm business. Obviously, therefore, the trial court held Moore responsible for the conduct of Shapard, by the operation of the principle of estoppel, without any reference to their actual relations inter sese. We are of opinion that this view was erroneous, because the object of the suit was not to charge Moore with a contractual liability to some one with whom the firm had formerly dealt, but to make him respond for a willful tort said to have been committed by Shapard. In such an action it

was necessary for the plaintiffs to show that the relation of partners actually existed between them, and that the wrongful act was either done with the knowledge and approval of Moore, or that it was done for his benefit and in his behalf, and that he subsequently ratified it, or that it was plainly committed for the benefit of the firm, in the usual and ordinary prosecution of that part of the firm's business which Shapard was accustomed to transact. Add. Torts (6th Ed.) § 82; Lindl. Partn. (2d Am. Ed.) p. 150; Jag. Torts, pp. 271-293; Webb, Pol. Torts, p. 114, and cases cited. In view of the nature of the action, the trial court erred in forcing Moore into the position of a partner, by erecting an estoppel, and then holding him accountable for the acts of Shapard, as if the relation of partners actually existed. The jury should have been left to determine from the evidence, under appropriate instructions, if Moore and Shapard were partners in fact; and they should also have been instructed as to the circumstances which would render the former responsible for the willful torts of the latter, provided the jury found that a partnership actually existed.

A controversy arose at the trial as to whether the bill of sale under which the plaintiffs derived title, which was executed at San Antonio, Tex., on January 4, 1894, was a bill of sale, as it purported to be, or in reality a mortgage given to secure a loan for the sum of \$800, which was the consideration expressed in the bill of sale. There was some evidence to the latter effect contained in an affidavit for a continuance which the trial court permitted to be read. The plaintiffs contended that the instrument was what it purported to be, to wit, an absolute bill of sale. In view of this controversy the trial court instructed the jury, in substance, that, even if the plaintiffs did own the property by virtue of a mortgage recorded in Texas (and the bill of sale in question was there recorded), the plaintiffs might nevertheless recover, if the defendants had actual notice of the record of the mortgage when they levied upon and sold the property. The defendants below reserved an exception to this part of the charge, and they assign two reasons why it was erroneous. First, they say, in substance, that the attached chattels "were not recently brought from another state," but had been in the Indian Territory for about 18 months prior to the levy, and were liable to be attached for the debts of Cottraux; second, that the plaintiffs, if mortgagees, could not follow the property into another state, and sue a creditor of one who had the mortgaged property in his possession for attaching and selling it "without first showing that there was not sufficient property left to satisfy their debt."

There has been much discussion concerning the effect of the removal of mortgaged goods and chattels from the state where the mortgage was made and recorded, to another state. The general consensus of judicial opinion seems to be that when personal property, which at the time is situated in a given state, is there mortgaged by the owner, and the mortgage is duly executed and recorded in the mode required by the local law, so as to create a valid lien, the lien remains good and effectual, although the property is removed to another state, either with or without the consent of the

mortgagee, and although the mortgage is not re-recorded in the state to which the removal is made. The mortgage lien is given effect, however, in the state to which the property is removed, solely by virtue of the doctrine of comity. Hence a state may by appropriate legislation decline to observe the rule of comity, and may require all mortgages affecting personal property which is situated therein or brought therein to be there recorded, as a condition precedent to the recognition of their validity in that state. But the statutes of a state which prescribe how mortgages on personal property shall be executed and recorded are generally, if not universally, regarded as speaking with respect to mortgages made within the state upon property there situated, and as having no reference to personality brought within the state which is at the time incumbered with a valid lien created elsewhere. These propositions are fully sustained by the following authorities: *Hornthal v. Burwell*, 109 N. C. 10, 13 S. E. 721, 13 L. R. A. 740; *Smith v. McLean*, 24 Iowa, 322, 328, 329; *Handley v. Harris*, 48 Kan. 606, 29 Pac. 1145, 17 L. R. A. 703; *Bank v. Morris*, 114 Mo. 255, 21 S. W. 511, 19 L. R. A. 463; *Kanaga v. Taylor*, 7 Ohio St. 134; *Langworthy v. Little*, 12 Cush. 109; *Whitney v. Heywood*, 6 Cush. 82; *Iron Works v. Warren*, 76 Ind. 512; *Feurt v. Rowell*, 62 Mo. 524, 526; *Cool v. Roche*, 20 Neb. 550, 556, 31 N. W. 367; *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364; *Offutt v. Flag*, 10 N. H. 46; *Lathe v. Schoff*, 60 N. H. 34; *Barrows v. Turner*, 50 Me. 127; *Hall v. Pillow*, 31 Ark. 32; *Mumford v. Canty*, 50 Ill. 370; *Ballard v. Winter*, 12 Am. Law Reg. (N. S.) 759; *Jones, Chat. Mortg.* (4th Ed.) § 260. So far as our research has extended, Michigan is the only state which declines to recognize the validity of a mortgage lien upon personal property brought within its borders that was created elsewhere, and which maintains the superiority of an attachment lien acquired in a suit commenced in that state against the mortgagor, who has the property in his possession. *Corbett v. Littlefield*, 84 Mich. 30, 47 N. W. 581, 11 L. R. A. 95; *Boydson v. Goodrich*, 49 Mich. 66, 12 N. W. 913. The decision in *Green v. Van Buskirk*, 7 Wall. 139, 150, 19 L. Ed. 109, is not in conflict with the doctrines stated above, since the mortgaged property that was involved in that case was located in Illinois at the date of the mortgage, which was executed in New York, and the court was unable to give to the legal fiction that the domicile of the owner draws to it all of his personal property such force and effect as to remove the property in controversy from the operation of the laws of the state of Illinois, and subject it to the operation of the laws of New York. Sections 4742 and 4743 of Mansfield's Digest of the Laws of Arkansas (sections 3053, 3054, Ind. T. Ann. St. 1899), relative to the execution and recording of mortgages, which were in force in the Indian Territory until modified, as to the place where mortgages of personal property shall be recorded, by the act of congress approved February 3, 1897 (29 Stat. 510, c. 136), have reference only to mortgages made in that territory upon property there located (*Bank v. Lee*, 13 Pet. 107, 120, 10 L. Ed. 81); and, within the doctrine above stated, they cannot be given effect to destroy the lien of the instrument under which the plaintiffs claim

title to the property in controversy, that was executed and recorded in Texas, where the property was at the time located, and where both the mortgagors and the mortgagees at that time resided. Even if that instrument was intended as a mortgage, and not as an absolute bill of sale, the lien thereby created followed the property into the Indian Territory, and was rightly given effect by comity, and should have been given effect even if the attaching creditors did not have actual notice of the existence and record of the instrument at the date of the levy, since no effort was made in the trial court to impeach the instrument for fraud, or to question the consideration upon which it was founded.

As respects the second contention stated above,—that the defendants below, if the plaintiffs were merely mortgagees, were not guilty of a tortious act, or, in other words, of a conversion, in levying on the property in controversy, unless after the levy and sale there was not enough of the mortgaged property left to satisfy the mortgagees' debt,—this may be said: Some courts have held that a levy made upon mortgaged personal property in the possession of the mortgagor under a writ of attachment or execution against him does not amount to a conversion, because a sale, if made, under the writ, only conveys the mortgagor's right of possession and his equity of redemption, and does not destroy the mortgagee's interest. *Manning v. Monaghan*, 28 N. Y. 585. Other courts, however, maintain the contrary view, holding that a seizure of mortgaged personal property against the protest of the mortgagee amounts to a conversion. *McConeghy v. McCaw*, 31 Ala. 447; *Frisbee v. Langworthy*, 11 Wis. 375; *Tannahill v. Tuttle*, 3 Mich. 104. And this is said by Mr. Jones, in his treatise on Chattel Mortgages, to be the better rule, especially where the officer assumes to sell the entire interest when he has notice of the mortgage. Jones, *Chat. Mortg.* § 561, and note thereto. In the case in hand the evidence shows that the mortgaged property, when seized, was not in the custody of the mortgagors, but was in the actual possession of J. E. Cottraux, who claimed to hold it as a lessee of the plaintiffs. The present record does not show with certainty that the writ of attachment under which the property was seized ran against either of the mortgagors, but rather indicates that it ran against the son of the mortgagors, to wit, J. E. Cottraux. The plaintiffs also at the time of the levy would seem to have been entitled to the immediate possession of the property in controversy, even if they were merely mortgagees. Moreover, the attaching creditors were notified before the sale that the plaintiffs were the owners of the property, and they disregarded the notice altogether, by assuming to sell it, or so much thereof as was necessary to satisfy their claim, as the absolute property of their debtor, and thereafter appropriated the proceeds of the sale. After the sale the offer that they appear to have made to restore the residue of the property which remained unsold was an offer to restore it, not to the plaintiffs, but to J. E. Cottraux, as the agent of one of the mortgagors. Under these circumstances, we are of opinion that the acts of the attaching creditors amounted to a conversion of the property, and entitled the plaintiffs to recover the fair

market value of all the property that was described in the bill of sale, even if the jury believed that instrument to be merely a mortgage. The result is that we find no error in the instruction of the trial court last considered of which the defendants below are entitled to complain.

Some other questions are discussed in the briefs, which have been considered, but they do not require special notice. As the trial court erred in that part of its charge heretofore considered, which declared, as a matter of law, that Moore was a partner of Shapard, and was responsible for his acts if they were tortious, the judgment of the United States court of appeals in the Indian Territory and the judgment of the United States court for the Central district of the Indian Territory must be reversed, and the case remanded for a new trial. It is so ordered.

SANGER et al. v. HIBBARD et al.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1900.)

No. 1,393.

INFANTS—CONTRACTS—RIGHT TO DISAFFIRM.

The giving of a bond by a minor to dissolve an attachment of a stock of goods which he had purchased in part from the attachment plaintiffs did not operate as an affirmation of the contracts sued on, or as an estoppel, and afforded no ground for a judgment against him in the suit in which it was given, where he repudiated it, as well as the contracts sued on, upon reaching his majority, and pleaded such facts in his answer, together with the further fact that he had paid the entire proceeds of the goods thus released to another creditor.

In Error to the United States Court of Appeals in the Indian Territory.

S. S. Sanger, Jr., the plaintiff in error, did not attain his majority until the 19th day of August, 1895. During his infancy he engaged, as a retail dealer, in the mercantile business in the Indian Territory, and purchased goods on a credit from Hibbard Bros., the defendants in error, and other wholesale merchants. On the 9th of November, 1894, Hibbard Bros. sued out a writ of attachment against Sanger, which was levied upon the stock of goods in his possession, which he had purchased from them and other merchants. Other attachments were levied on the same stock of goods,—one in favor of W. W. Kendall Boot & Shoe Company, November 14, 1894, and one in favor of Wingate, Stone & Welles Mercantile Company, November 16, 1894. On December 10, 1894, the stock of goods so levied upon was sold by the marshal under an order of the court, and the proceeds of the sale, which were less than the amount of the several attachments, paid into the registry of the court. On the same day Sanger gave a bond to dissolve the attachment, under section 337 of Mansfield's Digest of the Laws of Arkansas, in force in the Indian Territory. This bond was procured and furnished by George M. Shelley, one of Sanger's creditors, upon an agreement that Shelley should receive the proceeds of the sale of the goods in the registry of the court in payment of his claim against Sanger, and the costs and expenses and attorney's fees in the case. The money was received by Shelley, and the whole thereof appropriated by him, according to his agreement with Sanger. To an answer filed by the guardian ad litem of Sanger during his infancy, as well as an answer filed by him after he attained his majority, setting up in due form the foregoing facts, the court sustained a demurrer. The defendant declining to plead

further, final judgment was rendered against Sanger and the sureties on his bond for dissolving the attachment for the amount of the plaintiff's claim, and on appeal to the United States court of appeals for the Indian Territory this judgment was affirmed, and thereupon the defendants removed the cause by writ of error into this court.

Sanford B. Ladd (John C. Gage and Charles E. Small, on the brief), for plaintiffs in error.

J. H. Gordon, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The argument in this case has taken somewhat of a wide range, but the case is in a narrow compass. The goods which Sanger purchased from the plaintiffs and others while still a minor were seized and sold on the attachment sued out against him, and the proceeds of that sale were received by Shelley, one of his creditors, so that while he was yet a minor all the goods he had purchased during his minority, and the proceeds thereof, had passed out of his possession and beyond his control. On this state of facts, properly pleaded, was it error to render judgment in an action at law against him for the goods purchased while a minor? This question must be answered in the affirmative. The rule is well settled that an infant has an absolute right to disaffirm and avoid his contract for the purchase of property with which to enter into trade. He can repudiate his contract to pay for property purchased for such a purpose, and the seller has no redress, unless the property purchased remains in the possession and control of the infant. In such case the infant's repudiation of his contract revests the title to the property sold in the vendor, who may recover it in a proper action for that purpose. But this suit is upon the contract for the purchase of the goods, and there is no claim that the property, or any part of it, or the proceeds thereof, are in the possession or control of the defendant. The attachment deprived him of the possession of the goods, and, under the agreement which resulted in the execution of a bond to dissolve the attachment, the proceeds of the sale of the goods went to one of his creditors while he was still a minor. It is not claimed that he ratified the contract or did any act to estop him from setting up this defense after he had attained his majority, and the claim that the execution of the bond to dissolve the attachment during his infancy operated either as an affirmation of the contract or as an estoppel is untenable. The bond was nothing but a contract, and no more binding upon him than the contract for the purchase of the goods in the first instance. The execution of this bond did not operate either to affirm the original contract, or to estop him from setting up the plea of infancy in bar of a recovery upon it, because he was still a minor when the bond was executed. A minor can neither make nor affirm a contract of this character during his infancy. The rule which precludes him from making a contract precludes him from ratifying it. He cannot effectually affirm a contract made during his infancy until he at-

tains his majority. "The question," says the supreme court, "is whether acts and declarations of an infant during infancy can estop him from asserting the invalidity of his deed after he has attained his majority. In regard to this there can be no doubt, founded either upon reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel in pais is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. *Brown v. McCune*, 5 Sandf. 224; *Keen v. Coleman*, 39 Pa. St. 299. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." *Sims v. Everhardt*, 102 U. S. 300, 313, 26 L. Ed. 87. The rules of law which we have stated, and which are the only ones applicable to the facts of this case, and decisive of it, are supported by all the authorities. *Corey v. Burton*, 32 Mich. 30; *Whart. Cont.* § 56; *Badger v. Phinney*, 15 Mass. 359; *Chandler v. Simmons*, 97 Mass. 508; *Carr v. Clough*, 26 N. H. 280; *Railway Co. v. Higgins*, 44 Ark. 296; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Mustard v. Wohlford's Heirs*, 15 Grat. 329; *Mortgage Co. v. Dykes*, 111 Ala. 178, 18 South. 292; *Brantley v. Wolf*, 60 Miss. 420; *Gibson v. Soper*, 6 Gray, 279; *Craig v. Van Bebber*, 100 Mo. 584, 13 S. W. 906. The judgment of the United States court of appeals for the Indian Territory, and the judgment of the United States court in the Indian Territory, Northern district (53 S. W. 330), are reversed, and the cause is remanded to the latter court, with instructions to grant a new trial, and to proceed therein not inconsistently with this opinion.

SALT LAKE CITY v. SMITH et al.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1365.

1. CONSTRUCTION OF CONTRACTS.

The great desideratum and the real end to be attained by the construction of a contract is to ascertain the terms upon which the minds of the parties met, and the sense in which they were used when the parties made the agreement.

2. SAME—SITUATION OF PARTIES—SUBJECT-MATTER—MATERIAL.

The situation of the parties when their contract was made, its subject-matter, and the purpose of its execution, are material, to determine the intention of the parties and the meaning of the terms they used; and, when these are ascertained, they must prevail over the dry words of the stipulations.

3. SAME—LIMITATION OF STIPULATION—EXTRA WORK—INTENT OF PARTIES.

The stipulation, common to corporation agreements for work and labor, that contractors may be required to perform extra work connected with that described in the contract, at the price named in the agreement or fixed by an engineer, is limited, by the subject-matter of the contract and the intention of the parties, to such proportionally small amounts of extra work as may become necessary to the completion of the undertaking con-

templated by the parties when the contract was made; and work which does not fall within this limitation is new and different work, not covered by the agreement, and for which contractors may recover upon a quantum meruit.

4. SAME—STIPULATION AS TO ALTERATIONS.

The provision in such a contract that the corporation or its engineer may make any necessary or desirable alterations in the work, and that the contractors shall receive the contract price, or a price fixed by the engineer, for work or material required by the alterations, is limited, by the subject-matter and the intention of the parties when it was made, to such modifications of the work contemplated at the time of the making of the contract as do not radically change the nature or cost of the work or materials required. For all other work and materials required by the alterations the contractors may recover the reasonable value, notwithstanding the agreement.

5. SAME—STIPULATION FOR ARBITRATION—EFFECT.

The stipulation in such contracts that any questions, differences, or controversies which may arise between the corporation and the contractor under or in reference to the agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to an arbiter, and that his decision thereof shall be final and conclusive upon both parties, gives the arbiter no jurisdiction to determine that work or materials which were not covered by the contract were furnished under it, and his decision to that effect is nugatory.

6. PLEADING—VARIANCE—MATERIALITY.

Where the ultimate facts which warrant a judgment for the plaintiff have been clearly alleged, and the issue thus tendered has been fairly tried, a variance between evidential facts pleaded and those proved, which has not misled or surprised the defendant, is not fatal to the judgment.

7. TESTIMONY AT FORMER TRIAL INADMISSIBLE.

The testimony which was given at a former trial by a witness who was presumptively within the jurisdiction of the court is hearsay and inadmissible under section 861 of the Revised Statutes and the general rules of evidence.

8. EXCEPTION TO EVIDENCE—WAIVER.

A single objection to a class of evidence when first offered, and an exception to an erroneous ruling admitting it, is sufficient, and neither the objection nor the exception is waived by a failure to constantly repeat them when subsequent offers of the same class of evidence are made.

9. EXCEPTION TO RULING—WAIVER.

One who objects and excepts to an erroneous ruling which permits his opponent to introduce improper evidence does not waive his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case.

10. RIGHT TO EXAMINE WITNESS—WAIVER.

The right to call and examine a witness upon material issues in a case is not waived or lost by reading his testimony at a former trial upon other questions in the case, in the absence of any order putting the party producing him to an election between his earlier testimony and his oral examination.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Utah.

E. L. Dubois and Joseph Williams made a contract with Salt Lake City on March 10, 1891, to furnish the materials and perform the necessary work, except that required to make the excavations, to construct a covered conduit for the purpose of leading the waters of Parley's creek from a point in Parley's cañon to Salt Lake City,—a distance of about six miles. After they had entered upon the performance of this undertaking, and before they completed it, they assigned their contract and their claim against the city to

Joseph H. Smith, G. G. Symes, H. A. W. Tabor, and J. W. Graham, who finished the work, and then sued the city for \$97,007.61, which they alleged to be the reasonable value of extra materials and labor which they and their assignors had furnished to the city in the construction of the conduit under the direction of the city engineer. The city denied liability, and averred that these alleged extras constituted a part of the work which the contractors and their assigns were required to perform, and that they had received payment therefor at the prices fixed in the contract. The case has been tried three times. The last trial was before a jury, and it resulted in a judgment of \$21,146.66 against the city, which now presents this writ of error for its reversal. Since the commencement of this action one of the original plaintiffs (G. G. Symes) has died, and Sophie S. Symes, his administratrix, has been substituted in his place. For the sake of brevity, those who have been and are seeking to enforce the claim against the city which has resulted in this judgment will be called the "plaintiffs," and Salt Lake City, the "defendant," in this statement and in the following opinion.

The plaintiffs alleged in their complaint: That the defendant advertised for bids for the construction of the conduit in accordance with maps and plans in the office of the city engineer. That Dubois & Williams examined these maps and plans, and the ground, upon the line laid out and staked by the city, which was such that it would require little or no stone masonry of any kind, no tunnels of any length, but an open trench, not to exceed six to eight feet in depth, over comparatively level ground throughout its entire length. That they made their bid with direct reference to constructing a conduit over the ground thus marked. That the instructions to bidders furnished by the city, and upon which the contractors relied, contained this provision and estimate: "For the purpose of arriving at the comparative value of the respective bids, the following quantities will be taken as approximating the actual quantities which the execution of the work will develop, and shall be used for no other purpose in connection with this contract. Approximate quantities: * * * Tunneling in earth, including timber, 10 cubic yards; tunneling in solid rock, 150 cubic yards; concrete masonry, 8,000 cubic yards; brick masonry, 2,500 cubic yards; cut-stone masonry, 10 cubic yards; rubble masonry, 10 cubic yards; rubble masonry laid dry, 10 cubic yards; riprap, 100 cubic yards; cement plaster, 40,000 square yards; lumber in the work per thousand feet, 10,000, board measure; cast-iron pipe, 36 inches, laid, 100 lineal feet; wrought-iron pipe, 36 inches, laid, 100 lineal feet; wooden pipe, 36 inches, laid, 100 lineal feet." That there was nothing in the maps, plans, or specifications that indicated that the bidders would be required to build any dam across Parley's creek, or to construct any wells or cisterns. That, in reliance upon these maps and plans, they prepared their bid and entered into their contract, and that in doing so they did not take into consideration the construction of any cut-stone culverts, or the lining of any tunnels with concrete masonry, or the laying of any pipes therein, or the building of any wells or cisterns or any dam across Parley's cañon, and that all this work was of a more expensive and of an entirely different kind, nature, and character from any work described in the specifications or instructions to bidders, or in the directions or instructions of the city engineer, and no such work would have been required if the conduit had been constructed over the ground where the line was staked out and surveyed. They averred that Dubois & Williams, in this state of the case, made the lowest bid, and entered into the contract to furnish the material and do all the work, except the excavation, for the construction of this conduit, and to accept and receive as compensation for the kinds of work they performed the following prices: Concrete masonry, per cubic yard, \$5.97; brick masonry, per cubic yard, \$8.85; cut-stone masonry, per cubic yard, \$12.40; rubble masonry, per cubic yard, \$7.50; rubble masonry, laid dry, per cubic yard, \$5; riprap, per cubic yard, \$3; cement plaster, per square yard, 34 cents; lumber used in the work, per 1,000 feet, board measure, \$35; cast-iron pipe, 36 inches, laid, per lineal foot, \$11.68; wrought-iron pipe, 36 inches, laid, per lineal foot, \$6.95; wooden pipe, 36 inches, laid, per lineal foot, \$3.45. They alleged that they commenced to construct the conduit at Salt Lake City, and

advanced with the work towards Parley's cañon; that, after they had constructed in the open trench over four miles thereof, the line or route of the conduit for the last mile was materially changed by the city engineer from comparatively level ground to a course over deep ravines and through hills, which required expensive tunnels, the lining of such tunnels at great expense with concrete masonry, the laying of heavy iron pipes therein, and the construction of large and expensive cut-stone culverts, which would not have been necessary if the line and plan of the work had not been changed; that they constructed the conduit in the place and manner directed by the engineer of the city; that, instead of furnishing 10 cubic yards of cut-stone masonry, they were required to and did build 865.44 cubic yards thereof; that, instead of 10 cubic yards of rubble masonry, they were required to and did build 134.63 cubic yards thereof; that the masonry so constructed was of an entirely different character, in a different location, and worth more than twice as much per cubic yard as the nominal quantity for which they bid, and which they agreed to construct; and that, because this work was of a different nature, character, and kind from that mentioned in the contract, it was not covered thereby, and they were entitled to recover the reasonable value thereof, which they alleged to be more than \$25,000. They asserted that, by reason of the changes in the line and route over which the conduit was constructed, they were required to construct a concrete conduit through the tunnels; that this work was of a nature entirely different from that of constructing a conduit in an open trench; and that they were entitled to recover the reasonable value of this work, which they claimed to be more than \$28,000. They averred that they were required to construct and did build an expensive concrete and cut-stone dam to gather the waters of Parley's creek, which was not contemplated or mentioned in the plans, specifications, bid, or contract, and that the work and material furnished upon this dam were worth more than \$26,000. For these and other similar items of materials and labor they asked to recover the \$97,007.61 for which the suit was brought. The answer of the defendant was that the line or route of the conduit for the mile for which the tunnels, cut-stone masonry, rubble masonry, and dam were required had not been located or surveyed when the bids and the contract were made; that Dubois & Williams made their bid and contract with knowledge of this fact; that most of the work and material for which they claimed to recover reasonable compensation in their complaint was of the same kind and character as that specified in the contract; that its price was fixed thereby; that the plaintiffs had been paid this price; that, wherever any extra material or work had been required, Dubois & Williams had, by their contract, empowered the engineer of the city to determine its price; that he had done so; and that they had been paid this price, so that there was no liability upon the city on account of any of the matters set forth in the complaint.

The testimony of the witnesses of the respective parties to this action generally supported the averments of their pleadings. Upon the questions whether or not a line for the masonry conduit had been surveyed and staked out over the last mile of the course before the bids were received and the contract was made, and whether or not the concrete masonry in the tunnels and the cut-stone and rubble masonry in the culverts and dam were of the same nature and character as those specified in the approximate estimate of the engineer and in the contract, and upon the question of the reasonable value of this work and material, the testimony of the parties is in hopeless conflict. Out of the mass of conflicting evidence, however, a few salient facts stand forth, established beyond peradventure. One of them is that the line where this conduit was subsequently actually constructed over the mile in dispute was neither staked nor marked upon the ground, nor shown upon any map or plan exhibited to the bidders, before the contract was made. This portion of the line had either never been surveyed and located at all, or it had been surveyed and located on another and different line, from which it was changed to the line of construction after the execution of the contract. Another fact is that while the city engineer's approximate estimate of the amount of cut-stone masonry to be furnished by the contractors when they made their bid was 10 cubic yards, the amount which they were actually

required to furnish was, according to his testimony, 535.7 cubic yards, and, according to the testimony of some of the witnesses of the plaintiffs, 865.44 cubic yards; that, while the amount of rubble masonry which he estimated would be required before the bids were made was 10 cubic yards, the amount which the plaintiffs were required to and did furnish was, according to his testimony, 308.7 cubic yards, and, according to the testimony of some of the witnesses for the plaintiffs, 154.07 cubic yards; and that, while the amount of iron pipe which he estimated would be required was 200 lineal feet, the amount which the plaintiffs were required to furnish and did furnish was more than 1,800 lineal feet. The contract price for the cut-stone masonry was \$12.40 per cubic yard. The testimony of the witnesses for the plaintiffs was that the cut-stone masonry constructed by the plaintiffs was reasonably worth from \$25 to \$50 a cubic yard. The contract price for the concrete masonry was \$5.97 per cubic yard. The testimony of some of the witnesses for the plaintiffs was that, while this was a fair price for concrete masonry placed in a trench 6 or 8 feet deep, it was not the reasonable value of masonry placed in tunnels, or of that placed in the dam, and that the reasonable value of this masonry, which amounted to about 2,000 cubic yards, was from \$12 to \$20 per cubic yard. All this testimony was contradicted by the testimony of the witnesses for the defendant, and the questions were submitted to the jury under the instructions of the court. But the main defense of the city was that most of this work was of the same character as that specified in the contract; that the contract price covered it; that under the contract the city engineer had authority to order extra work and materials, and to fix the price thereof; that he had the right to determine what portion of the work and materials required was governed by the contract, and what was not; that he had determined all these questions; and that the prices he had fixed had been paid. This defense was based on the following provisions of the specifications, the instructions to bidders, and the contract. The specifications provided: "All concrete masonry will be paid for by the cubic yard, at the price named in the contract, and will be measured after having been laid, only. * * * Brick masonry will be paid for by the cubic yard, at the price named in the contract. All stone masonry will be paid for by the cubic yard, at the price named in the contract." There were other similar provisions regarding all the other materials used in the work. The instructions to bidders contained the provision with reference to approximate quantities which has already been quoted, and these sections: "(2) The conduit will be constructed of masonry, and will be circular in form, built to a uniform grade line, and at such depth below the surface as will insure it against the effects of frosts. Manholes will be constructed at intervals of 1,000 feet along the conduit, to serve the purpose of repairs, and for ventilation." "(20) Any controversy or difference of opinion that shall arise regarding the true intent or meaning of any part of the specifications shall be referred to the city engineer, and his decision shall be final and binding on all parties." The contract contained the usual provision that the contractors would do the work, and that they would accept and receive as full compensation for the respective kinds of work named the prices already cited, and the following provisions: "(5) The work shall be done in strict conformity with the attached specifications, and with such lines, levels, stakes, maps, and drawings, and with such verbal instructions, as shall from time to time be given by the city engineer or any authorized inspector for the guidance and direction of the contractor." "(7) The contractor shall do such extra work in connection with the work herein contracted to be done as the city engineer and board of public works may direct, and, if it shall be of a nature for which no price is stated in this contract, then the price therefor shall be fixed by the city engineer. But no allowance for extra work of any kind will be made, unless ordered in writing, and signed by the city engineer and the board of public works." "(15) The city shall have the right to make any alterations that may hereafter be determined upon as necessary or desirable, either before or after the commencement of the work, by defining them in writing, and, in case such alterations increase the quantities, the contractor shall be paid for such excess at the contract rates herein specified; but, should such alterations diminish the quantity or extent of the work to be done, it shall not

under any circumstances be construed as constituting, and shall not constitute, a claim for damages, nor shall any claim be made on account of anticipated profits on the work that may be altered or dispensed with." "(22) Any questions, differences, or controversies which may arise between the city and the contractor under or in reference to this agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to the city engineer, and his decision shall be final and conclusive to both parties." The legal effect of these various written stipulations, and the sufficiency of the defense of the city based upon them, under the facts of this case, were presented to the court below; and its rulings upon them were challenged again and again by objections and exceptions to the introduction of evidence of the character and reasonable value of the extra materials and work, by requests for instructions to the jury, and by exceptions to the charge, and these and other questions which will be considered in the opinion are presented by the assignment of errors.

Charles S. Varian (Frank B. Stephens and Franklin S. Richards, on the brief), for plaintiff in error.

John W. Judd and Oscar Reuter, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The purpose of a written contract is to evidence the terms on which the minds of the parties to it met when they made it, and the ascertainment of those terms, and the sense in which the parties to the agreement used them when they agreed to them, is the great desideratum and the true end of all contractual interpretation. The express terms of an agreement may not be abrogated, nullified, or modified by parol testimony; but, when their construction or extent is in question, the meaning of the terms upon which the minds of the parties met when they settled them and their intention in using them must be ascertained, and when ascertained they must prevail in the interpretation of the agreement, however broad or narrow the words in which they are expressed. In the discovery of this meaning, the intention, the situation of the parties, the facts and circumstances which surrounded and necessarily influenced them when they made their contract, the reasonableness of the respective claims under it, and, above all, the subject-matter of the agreement and the purpose of its execution, are always conducive to and often as essential and controlling in the true interpretation of the contract as the mere words of its various stipulations. These are rules for the construction of contracts which commend themselves to the reason and are established by repeated decisions of the courts, and they must not be permitted to escape attention in the consideration of the contract which this case presents. *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 74, 12 O. C. A. 37, 41, 42, 27 U. S. App. 364, 372.

The great question in this case is whether the work and materials for which the plaintiffs have brought this action fall within or without their contract with the city, and that must receive its answer from an interpretation of the agreement itself. The court below (83 Fed. 784) held that, if the materials and labor in question were of the kind and of the value stated by the plaintiffs' witnesses, they were not contemplated by the parties when they made their

agreement, and were not within and governed by the contract, and that the defendant was bound to pay their reasonable value. The defendant complains of this ruling in various ways, by numerous specifications of error, which it is unnecessary to quote. Its counsel insist that the contract specifies a price, or authorizes the city engineer to fix a price, for every item of materials and of labor contained in the plaintiffs' claim, and that the price of every item thereof must therefore be determined and governed by the contract itself, and not by the measure of its reasonable value. They contend that the contractors agreed to construct cut-stone masonry for \$12.40 per cubic yard, and that although they did this in reliance upon the city engineer's approximate estimate that only 10 cubic yards, amounting in value to \$124, would be required, yet the engineer had the right to ask them to construct 865.44 cubic yards of this masonry, which was reasonably worth \$30 per cubic yard, or \$25,963.20, at the contract price of \$12.40 per yard, or for \$10,731.45. They argue that the parties gave the engineer this power under section 15 of this agreement, which authorizes him to make any necessary or desirable alterations in the work before or after its commencement, and to pay the contractors for increased quantities at the contract rates, and under sections 7 and 22 of the contract, which require the contractors to do such extra work connected with that covered by the contract as the city engineer and the board of public works shall direct, and authorize the former to fix the price which the contractors shall receive for all work and material of a different nature from that specified in the agreement. They say that under these provisions the city engineer was authorized to require the contractors to construct a dam to gather and hold the waters of Parley's creek, the concrete and cut-stone masonry in which cost more than twice the contract price per yard, and that the city was permitted to pay them in full therefor at such price as the engineer fixed, although no mention of this dam was made in the contract, or in the maps, plans, or specifications upon which the contractors made their bid; that the engineer had the right to demand that the contractors should place 2,000 cubic yards of concrete masonry in tunnels through hills and on embankments over ravines, upon a line that was never marked out before the agreement was made, for the contract price of \$5.97 per cubic yard, although that was the price bid for placing such masonry in an open trench on comparatively level ground shown on the map and by the specifications, and the cost and value of placing it in such tunnels and on such embankments was from \$12 to \$20 per cubic yard; and that this contract authorized the engineer to require the contractors to construct 154.07 cubic yards of rubble masonry and to lay 1,800 lineal feet of iron pipe at the prices named therein, although their bid and agreement were based on an approximate estimate of the engineer that only 10 cubic yards of such masonry and only 200 feet of such iron pipe would be required to construct the conduit. Nor are these contentions without support in the terms of the contract. If, blind to reason, to the object of the agreement, to the situation and intention of the parties,

and to the undertaking they contemplated, we read the dry words of the contract and the specifications, it must be conceded that they are broad and comprehensive enough to sustain these arguments of the counsel for the city. They require the work done and the materials furnished to be paid for at the price specified in the agreement; they require the work to be done on such lines and levels and in accordance with such verbal instructions as the city engineer shall present; they authorize the engineer to make any necessary or desirable alterations in the work; they require the contractors to perform any extra work in connection with that specified in the contract that the engineer shall require them to do; they provide that increased quantities of work and materials furnished under these provisions, of the same nature as those specified in the contract, shall be paid for at the agreed price, and that those of a different nature shall be paid for at a price fixed by the engineer; and they make him the interpreter of the specifications, and the arbiter of all controversies which arise in reference to the contract and the work done under it. The engineer admits in his testimony that under these provisions of the agreement he required these contractors to furnish more than 53 times the estimated quantity of the most expensive work and materials specified in the contract,—the cut-stone masonry; and the witnesses of the plaintiffs testify that he required more than 86 times the estimated amount, and that the masonry thus called for was of such a character that it cost and was reasonably worth more than twice as much per cubic yard as that described in the contract, or, in the aggregate, more than 182 times the cost and value of the amount which the engineer estimated would be necessary for the undertaking before the bid was made. If he could lawfully so multiply the quantity, change the character, and increase the cost of the most expensive work named in the contract, it is difficult to perceive why he might not, under the same authority, increase the cost and quantity of every other item named in the agreement to the same extent, and in this way require the construction of a conduit from 53 to 182 times as costly as that contemplated by the parties when the agreement was made. It is conceded that the literal terms of the contract, when divorced from reason, from the object contemplated by the parties, from their situation, and from their intention, are so general and unlimited as to permit this to be done. But it is as clear as the sun at noon in a cloudless sky that the minds of these parties never met upon such a proposition, and that they never contemplated or intended to make any such contract. When they settled upon the terms of this agreement, they were considering a conduit laid in an open trench 6 or 8 feet deep, "at such depth below the surface as will insure it against the effects of frost," as the instructions to bidders read, over a comparatively level surface, requiring materials and work of about the quantities estimated by the engineer, and of a character necessary for the construction of such a work. This was the conduit described in the plans and specifications upon which the bid of the contractors and the contract itself were based, and this was the contract which the parties con-

templated, and upon which their minds met when they made their agreement. This plain fact limits every stipulation of the agreement, and in its light and in the light of reason every provision of this contract must be interpreted.

The stipulation that the contractor shall do such extra work in connection with that described in the agreement as the city engineer and the board of public works may direct is as effectually limited by this fact to such extra work of proportionally small amounts as was necessary to the construction of the contemplated conduit as it would have been if this restriction had been written in the agreement in so many words. A concrete and cut-stone dam to gather and hold the waters of Parley's creek, and wells or cisterns along the course of the conduit, were no more contemplated or covered by this provision of the contract than pipes and hydrants to distribute the water in the city. The stipulation that "the city shall have the right to make any alterations that may hereafter be determined upon as necessary or desirable," and that the contractors shall be paid for increased quantities at the contract prices, is subject to a like limitation. That provision, not unusual in agreements with cities and other corporations, is limited in its meaning and effect, by reason, and by the object of the contract, to such modifications of the contemplated work as do not radically change its nature and its cost. Little if any testimony is required to convince the thoughtful mind that the cut-stone masonry required to construct a small culvert over a ditch or a creek on a level prairie may be of a character and cost radically different from that necessary to build a stone arch upon sloping banks over a mountain stream, or a stone bridge over a great river like the Mississippi, or a stone building of large dimensions and great height. There was ample testimony in this case to warrant the jury in finding that the masonry required for the dam and the culverts which the plaintiffs constructed was not of the same nature or value as that contemplated by the parties when they made the contract. Nor was the evidence much less persuasive, nor is it more incredible, that the 2,000 cubic yards of concrete masonry which was placed in tunnels of small diameter, into which it was borne on wheelbarrows, and where it was placed by artificial light, was of a very different nature and cost from that placed in open trenches, only deep enough to escape the frost, as contemplated in the bids and the agreement. The testimony of the plaintiffs' witnesses was that the value of this work was from \$12 to \$20 per cubic yard, while the contract price for that contemplated by the parties when they made the agreement was only \$5.97 per cubic yard. No such work as this was in the minds of the parties when they made this contract, nor could they have intended to authorize so radical an alteration of the nature of the work as to require it. Since they did not contemplate or intend to contract concerning it when they made their agreement, it was new and different work from that covered by their contract, and the plaintiffs were entitled to recover its reasonable value. Upon this question the court below held upon the trial, and finally charged the jury, in effect, that the city had

no right to require the contractors to perform large quantities of work, radically different in its character, nature, and cost from that originally contemplated by the parties when they made their contract, and that, if it had required such work, the plaintiffs were entitled to recover its reasonable value. This was the theory upon which the case was tried, and it was the true theory. It is just to the city, fair to the contractors, and it accords with reason and established law. The dry words and broad stipulations of contracts must be read and interpreted in the light of reason and of the subject contemplated by the parties. The stipulation common to many corporation contracts, that contractors may be required to perform extra work at the price named in the agreement or fixed by an engineer, is limited by the subject-matter of the contract to such proportionally small amounts of extra work as may become necessary to the completion of the undertaking contemplated by the parties when the contract was made; and work which does not fall within this limitation is new and different from that covered by the agreement, and the contractor may recover the reasonable value thereof notwithstanding the contract. The customary provisions in such contracts that the corporation or its engineer may make any necessary or desirable alterations in the work, and that the contractors shall receive the contract price or a price fixed by the engineer for the work or materials required by the alteration, is limited in the same way, by the intention of the parties when the contract was made, to such modifications of the work described in the contract as do not radically change its nature or its cost. Material quantities of work required by such alteration, that are substantially variant in character and cost from that contemplated by the parties when they made their agreement, constitute new and different work, not governed by the agreement, for which the contractors may recover its reasonable value. *Cook Co. v. Harms*, 108 Ill. 151, 158, 159; *Bridge Co. v. McGrath*, 134 U. S. 260, 10 Sup. Ct. 730, 33 L. Ed. 934; *City of Elgin v. Joslyn* (Ill. Sup.) 26 N. E. 1090, 1092; *Sexton v. City of Chicago*, 107 Ill. 323, 330; *Kirk v. Manufacturing Co.*, 118 Ill. 567, 8 N. E. 815; *Railway Co. v. Vosburgh*, 45 Ill. 311, 314; *Railroad Co. v. Smith*, 75 Ill. 496, 507. The stipulation in such contracts that all questions, differences, or controversies which may arise between the corporation and the contractor under or in reference to the agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to the engineer, and his decision thereof shall be final and conclusive upon both parties, does not give the engineer jurisdiction to determine that work which is not done under the contract or specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive upon the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it upon himself by erroneously deciding that he has it.

It is assigned as error that the court below refused to instruct the jury that, if there was no change of the line of the conduit

over the mile in controversy after the bid was made, there could be no recovery in this action. The argument in support of this specification is that the only cause of action pleaded in the complaint is based upon this change of line, and that, consequently, if there was no change of line established, there could be no recovery. It is true that the plaintiffs alleged in their complaint that the line which had been surveyed and staked by the city for this conduit before the contractors made their bid was changed by the city after they made their contract, and that, if this change had not been made, the work and the materials for which they sued it would never have been required. Nevertheless the gist of the cause of action pleaded in the complaint was not the change of the line, but the requiring and furnishing of the work and materials in suit. This is plain from the fact that if the line had been changed there could have been no recovery unless the work and materials furnished had been radically different from those covered by the contract, while the new and different work and materials would have warranted a recovery although there had been no change of the line. Nor will a careful analysis and consideration of all the averments of the complaint show any variance between the cause of action for the reasonable value of this new and different work and materials and the cause set forth in the pleadings. Those averments clearly state the character and value of this work and of these materials, that they were required of the contractors by the city, that they were radically different from any specified in the agreement, and that the contractors and their assignees supplied them. These allegations were ample to warrant a recovery here, whether there was a change from the line staked by this city for this conduit, as the plaintiffs allege, or there never was any line marked out for it until after the contract was made, as the city claimed. There was only one cause of action stated in the complaint. That was for the work and materials not covered by the agreement, and it was for that cause that the verdict and the judgment were rendered. There was no error in the refusal of the court to charge that there could be no recovery in this action unless the line had been changed. Where the ultimate facts which warrant a judgment for the plaintiff have been clearly alleged in the complaint, and the issue thus tendered has been fairly tried upon the merits, a variance between the evidential facts set forth in the pleading and those established by the proof, which has not misled or surprised the defendant, is not fatal to the verdict or judgment. *Burt v. Gotzian* (C. C. A.) 102 Fed. 937.

There are other assignments of error relative to the rulings and charge of the court concerning the line of the conduit over the mile in controversy, but it is unnecessary to consider them here, because, if there was any error in these rulings, it was probably immaterial, and it is not likely to creep into any subsequent trial. The crucial question in this case is not whether the line was staked before and changed after the contract was made, or was not located at all until after the execution of the agreement, although this issue may be of some importance in its bearing upon the main question to be deter-

mined. The real questions are: Was any of the work or material for which the plaintiffs have brought this suit radically different in its cost and character from that contemplated by the parties when they made their agreement? If so, how much, and what was its reasonable value? These are questions of fact to be determined by the jury, under proper instructions from the court, if the case is again tried before a jury, and by the court or a referee if it is tried without a jury. The facts relative to these questions as they were presented at the last trial, and the law applicable to them, have been considered for the purpose of facilitating, if possible, a fair trial and a speedy and conclusive determination of this issue. Our views have undoubtedly been sufficiently expressed to accomplish that purpose, and we turn to another phase of this record.

This case had been twice tried before it came to the trial under consideration, and the testimony of the witnesses in each of these earlier trials had been preserved and filed with the court. The order granting the third trial contained this provision: "All testimony heretofore taken and filed in this cause shall be available to the parties, respectively, on such trial, subject to objection." When the plaintiffs commenced to read from the transcript of the testimony given at one of the former trials the evidence of their first witness, the defendant objected to it on the ground that this was a trial at law, and the witnesses, being within the jurisdiction of the court, should be introduced and sworn, and should testify orally before the jury, as though their testimony had not before been taken. The court overruled this objection, and held that the former testimony of the witnesses could be read as a deposition, and the defendant excepted. After the plaintiffs had read the former testimony of their witnesses and had rested their case in chief, and after the defendant had read the former testimony of A. F. Doremus and that of some other witnesses, and had introduced and examined several witnesses orally, it introduced Mr. Doremus as a witness, asked that he be sworn, and offered to prove by him the quantity, quality, and reasonable value of the materials and work that entered into the construction of the conduit on that portion of the line in controversy. The court refused to permit this witness to be sworn or to be examined, because his former evidence had been read, notwithstanding the fact that his former testimony did not relate to the points on which the city sought to examine him orally. These rulings are challenged as error. The acts of congress dispose of one question which these specifications present. They provide in chapter 17, Rev. St.:

"Sec. 861. The mode of proof, in the trial of actions at common law, shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

"Sec. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court, by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient or infirm."

The remainder of this section and sections 864 and 865 are directory as to the officer before whom the deposition may be taken, the notice to the opposite party, and the manner of taking, testifying, and returning the deposition to the court.

"Sec. 866. In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuum rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States."

Section 867 authorizes the courts of the United States, in their discretion, and according to the practice in the state courts, to admit evidence so taken; and sections 868, 869, and 870 prescribe the manner of taking such depositions, and of the use of the subpoena *duces tecum*, and how it may be obtained.

These various sections of the acts of congress provide a complete system for the practice of the courts of the United States in the procurement and admission of the testimony of witnesses. In section 861 they establish a general rule, and in the subsequent sections to which reference has been made they specify every exception to it. Every case must, therefore, fall under the rule or under one of the exceptions. A glance at the sections which specify the exceptions discloses the fact that the testimony of a witness at a former trial is not among the exceptions, and this case therefore necessarily falls under the express declaration of congress that the mode of proof in actions at common law shall be by oral testimony, and examination of witnesses in open court. There was no proof or offer to prove that the plaintiffs' witnesses who testified at the former trial were dead, insane, without the jurisdiction of the court, or that for any reason their presence and oral examination were either impossible or impracticable. The legal presumption, therefore, was that their attendance could be obtained by the customary issue and service of a subpoena. It is not claimed that the acts of congress from which these provisions of the Revised Statutes are extracted were unconstitutional or ineffective. It is not within the province or the power of the judicial department of the government to repeal or to abrogate the provisions of these constitutional statutes, and it was error for the court below to admit in evidence the testimony of the witnesses for the plaintiffs taken at former trials. *Ex parte Fisk*, 113 U. S. 713, 722, 725, 5 Sup. Ct. 724, 28 L. Ed. 1117; *Whitford v. Clark Co.*, 119 U. S. 522, 525, 7 Sup. Ct. 306, 30 L. Ed. 500; *Beardsley v. Littell*, Fed. Cas. No. 1,185. Counsel for the plaintiffs attempt to escape from the effect of this proposition in numerous ways. They insist that the counsel for the defendant waived their objection to the former testimony of the witnesses because they did not urge it when the order granting the third trial was made, nor until the testimony was offered in evidence. But a party does not waive his right to a trial of his action according to the express provisions of the acts of congress and the settled rules of evidence by failing to object to an order for a trial in violation of them until his

opponent attempts to take advantage of that order. He has a right to presume that the latter will proceed in accordance with the statutes and the law, and not in pursuance of an order which it was beyond the power of the court to make or to enforce. The city did not waive its right to a fair and lawful trial of its case by its failure to object to hearsay evidence until it was offered.

Another contention is that counsel for the city waived their objection, because, after it was offered, and after they had taken their exception, they permitted the testimony of other witnesses to be read without objection, and because in the proof of their defense they availed themselves of the same class of testimony. But the single objection which they made, and the single exception which they took, presented the entire question of the introduction of this hearsay testimony, and elicited a ruling of the court upon it which was conclusive and controlling at that trial of this case. There was no reason or call for further objections to evidence of this character, and their only effect would have been to annoy the court and to delay the trial. When a question has once been fairly presented to the trial court, argued, and decided, and an exception to the ruling has been recorded, it is neither desirable nor seemly for counsel to continually repeat their objections to the same class of testimony, and their exceptions to the same ruling which the court has advisedly made as a guide for the conduct of the trial. Counsel for the city lost nothing by their failure to annoy the court by repeating an objection which it had carefully considered and overruled. Nor did they waive this objection and exception by introducing in defense of the suit evidence of the same character as that to which they had objected, and which they had insisted was incompetent. They had presented their view of this question. They had objected to hearsay testimony, and had excepted to the ruling which admitted it. They had not invited the error of that ruling, but had protested against it. This was all that they could do. The plaintiffs had induced the court to commit the error, and were thereby prohibited from availing themselves of it in any court of review. Under this error they established their case by hearsay. Were counsel for the city required to refrain from meeting this proof by evidence of like character, under a penalty of a loss of their objection and exception? By no means. They had presented to the court and argued what they deemed to be the law. The court had held that they were mistaken. However firm they were in their conviction of the soundness of their position, the presumption was that they were in error; and it was the part of prudence and their duty to their client and the court to produce all the evidence which they could furnish in support of their demands, under the rule which the court announced, firmly but respectfully preserving their right to reverse the judgment if they failed to win their suit under the erroneous rule which the court had established. If they succeeded and obtained a verdict, the plaintiffs could not complain of the error which they had themselves invited, and the defendant's case would be won. If they failed, they would in this way preserve, as they had a right to do, the right of their client to the trial of its case according to the stat-

ute and the established rules of evidence, of which the erroneous ruling had deprived them. One who objects and excepts to an erroneous ruling which permits his opponent to present improper evidence does not waive or lose his objection or exception, or his right to a new trial on account of it, by his subsequent introduction of the same class of evidence in support of his case. *Russ v. Railway Co.*, 112 Mo. 45, 50, 20 S. W. 472, 18 L. R. A. 823; *Gardner v. Railway Co.*, 135 Mo. 90, 98, 36 S. W. 214.

Finally, the defendant had the right, in the first instance, to produce the witness Doremus, to have him sworn, and to examine him orally in support of its defense. It is said that it is generally discretionary with the court to refuse to permit the recall of a witness who has once testified, and that the introduction of Doremus was in reality his recall, because his testimony at the former trial had been read. The truth is, however, that he had never been called at this trial. All that had been done was to read his incompetent testimony at the former trials under the erroneous ruling of the court. Even if it were conceded that the reading of this testimony might have made it discretionary with the trial court to refuse to hear his oral testimony on subjects concerning which he had testified at the former trials, it certainly could not have deprived the city of its right to his evidence on the material questions of the quantity, quality, and reasonable value of the work and materials for which the plaintiffs sued, and concerning which he had not testified at the earlier hearings. There was nothing in the order granting the third trial, nor in the prior rulings of the court, putting the city to its election between the former testimony of this witness and his oral examination, and the refusal to hear his testimony was a fatal error in the trial of this case. The judgment below is reversed, and the case is remanded to the court below, with directions to grant a new trial.

ATOKA COAL & MINING CO. et al. v. ADAMS et al.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,372.

INDIANS—ROYALTIES UNDER COAL LEASES—EFFECT OF CURTIS ACT.

The provision of the Curtis act (30 Stat. 495) § 16, making it unlawful for any person, after the passage of the act, to receive any royalty on oil, coal, or other mineral, or rents on any lands or property belonging to any one of the tribes or nations of the Indian Territory, with certain exceptions, and requiring such royalties and rents to be paid into the treasury of the United States to the credit of the tribe entitled thereto, is not retrospective in its operation, and does not affect royalties due to lessors under valid existing coal leases at the date of the passage of the act.

In Error to the United States Court of Appeals in the Indian Territory.

Ira D. Oglesby, for plaintiffs in error.

J. G. Ralls, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. It is conceded that, prior to the passage of what is known as the "Curtis Act,"—act of congress approved June 28, 1898, entitled "An act for the protection of the people of the Indian Territory, and for other purposes" (30 Stat. 495),—persons in the lawful possession and entitled to the usufruct of lands in the Choctaw Nation could grant valid leases to mine the coal in such lands for such royalties as might be agreed upon. On the 28th of January, 1888, James Davis and others entered into a contract whereby they granted to the Atoka Coal & Mining Company the right to mine coal on the lands therein described, for the royalties therein specified. The coal company entered into possession of the leased premises, and proceeded to mine and ship coal under this contract, and paid the stipulated royalties due the lessors and the Choctaw Nation for the coal mined down to May, 1898. The royalties which accrued under the lease from May, 1898, down to the passage of the Curtis act amounted to \$4,446.03. The coal company filed its petition of interpleader, admitting that it owed the sum of \$4,446.03 for royalties on the coal mined by it and not previously paid for, and prayed for leave to bring the money into court and to be discharged from all further liability therefor, and that certain persons named and the Choctaw Nation, who, it was alleged, set up a claim to the money adversely to the plaintiffs, be brought in and required to interplead for the same. The coal company having, by the leave and direction of the court, paid the money into the registry of the court, thereupon an order was entered that the defendant be "discharged from all liability herein," and due notice of the interpleader was served on the alleged claimants to the fund, including the Choctaw Nation. The Choctaw Nation entered no appearance, filed no pleadings in the cause, and set up no claim to the money. Waiving the question whether, upon this state of the record, the coal company and the Choctaw Nation, or either of them, can rightfully prosecute this writ of error, we proceed to the merits of the case. The single question on the merits of the case is, does the Curtis act operate to deprive the lessors of coal mines in the Choctaw Nation of the royalties due and owing to them for coal mined under valid leases prior to the passage of the act? The section of the act having any bearing upon the question reads as follows:

"Sec. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of any one else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the secretary of the interior, into the treasury of the United States to the credit of the tribe to which they belong: provided, that where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him: provided further, that nothing

herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment."

This section is not retrospective in its operation upon royalties due to lessors under valid leases at the date of its passage. It prohibits the making of such leases in the future, and probably prohibits the payment of royalties under existing leases which may accrue after the passage of the act, but it clearly does not, in terms or by implication, extend to or affect royalties already due under existing leases. The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its act will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If congress had intended to deprive lessors of the royalties due and owing to them at the date of the act, it would have used appropriate language to express that intention, and would necessarily have made some provision for the disposition of such royalties. But it is clear from the language of the act that it does not deal with royalties already paid, or already due and owing to lessors under leases for coal already mined. Something is said in the brief of counsel about the "Dawes agreement," but its provisions likewise operate prospectively, and not retrospectively on royalties accruing under leases in existence at its date. This view of the case renders it unnecessary to consider the extent of the power of congress to legislate for the Indian Territory and the nations or tribes of Indians inhabiting the same, or to inquire whether congress can in any case impair the obligation of contracts or divest vested rights. It is enough to say that congress, by the Curtis act, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act. The judgment of the United States court of appeals for the Indian territory (53 S. W. 539) and the judgment of the United States court for the Central district of the Indian Territory are affirmed.

CLAPP v. OTOE COUNTY, NEB.

(Circuit Court of Appeals, Eighth Circuit. October 9, 1900.)

No. 1,324.

1. STATE COURT—INJUNCTION INOPERATIVE ON SUIT IN FEDERAL COURT.

A state court may not, by injunction restraining the collection of taxes, prevent a federal court from proceeding to judgment in an action of which it has jurisdiction, nor from enforcing its judgment by mandamus to compel the levy and collection of taxes to pay it.

2. SAME—CONSTRUCTION OF STATE CONSTITUTION AND STATUTES—WHEN OBLIGATORY—RULE.

The national courts uniformly follow the construction of the constitution and statutes of a state given by its highest judicial tribunal in all

cases that involve no question of general or commercial law and no question of right under the constitution and laws of the nation.

8. SAME—QUESTION OF GENERAL JURISPRUDENCE.

The question whether or not the illegal action of a municipal or quasi municipal body, in the exercise of a power granted to it, constitutes a defense to bonds issued pursuant to such action, and held by a bona fide purchaser, is a question of general jurisprudence, which the national courts must determine for themselves.

4. SAME—EXCEPTION TO RULE—CONSTRUCTION BY STATE COURTS AFTER RIGHTS ACCRUE NOT CONTROLLING.

It is a well-settled exception to the general rule that decisions of state courts which affect the validity of contracts between citizens of different states, which were made, or under which rights were acquired, before such decisions were rendered, are not obligatory upon the courts of the United States in cases involving those rights.

5. PRECINCT IN NEBRASKA NOT A CORPORATION.

A precinct in Nebraska is not a municipal or quasi municipal corporation, and cannot contract, sue, or be sued.

6. PRECINCT BONDS IN NEBRASKA ARE THE BONDS OF THE COUNTY WHICH ISSUES THEM.

Bonds issued by a board of county commissioners of a county in Nebraska upon a favorable vote of the electors of a precinct, under sections 3518, 3519, and 3520 of the Compiled Statutes of Nebraska of 1899, are the bonds of the county whose board issues them.

7. MUNICIPAL BONDS—RECITALS—ESTOPPEL.

The recitals of the officers of a municipal or quasi municipal corporation, who are invested with the power to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, to the effect that they have found that all the requirements of law necessary to authorize the issue of the bonds have been fully complied with, preclude inquiry, in an action on the bonds by an innocent purchaser, as to whether or not the precedent condition was actually performed before the bonds were issued.¹

8. SAME.

A board of county commissioners which had power to divide its county into precincts, and to subdivide the precincts and change the lines thereof (Comp. St. Neb. 1899, § 2141), which in the exercise of this power defines the boundaries of a precinct, and fails to make them correspond with the wards of a city of the second class, which is located upon a portion thereof (section 1520), and upon a favorable vote of the electors of that precinct issues bonds, and certifies therein that it has found that all the requirements of law necessary to authorize the issue of the bonds have been fully complied with, is estopped, as against an innocent purchaser, from denying that the precedent condition requiring the establishment of a legal precinct was fulfilled.

9. SAME—RECITALS—ESTOPPEL.

A recital in municipal bonds, authorized to be issued under a statute, that they are issued for the purpose stated in the law, and that all the requirements of the law have been complied with, estops the corporation from defending an action on them by an innocent purchaser on the ground that the proposition submitted to the electors upon which the bonds were issued stated that they were to be issued for an unlawful purpose, and did not correspond with the conditions of the bond. Such a recital relieves the innocent purchaser of all inquiry, notice, or knowledge of the proposition submitted to, and the vote of, the electors, and estops the county from denying that a legal proposition was submitted, and a favorable vote had.

¹ Bona fide purchasers of municipal bonds, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 41 C. C. A. 6.

10. SAME--USE OF PROCEEDS.

A recital in municipal bonds authorized under a statute, that they were issued for the purpose therein stated, and that all the requirements of the statute have been complied with, estops the corporation from defending an action upon them by an innocent purchaser, on the ground that their proceeds were applied to an unlawful purpose.

11. POLITICAL SUBDIVISION AND OFFICERS DE FACTO.

When a quasi municipal corporation and its officers have created, with ample statutory power (Comp. St. Neb. 1899, § 2141), but not in the way prescribed by the statute (section 1520), a political subdivision of the quasi municipality recognized by the organic law, and that subdivision and its inhabitants have assumed to act as such, and the quasi municipal body and its officers have assumed to act on behalf of such subdivision, and the existence of the subdivision and the acts of these officers have been recognized by the officers and departments of a state and by private citizens, without objection, for a considerable period of time, until the rights of private citizens have become vested and fixed in reliance upon the existence of the subdivision and the validity of the acts of the quasi municipality and its officers, the district comprised in the subdivision becomes a political subdivision de facto, and its acts, and the acts of the officers de facto, who represented it, have all the force and validity of acts of a subdivision and of officers de jure. The quasi municipal corporation and its officers, the political subdivision and its citizens, are alike estopped to question, in litigation over the rights of private parties, the existence of the subdivision or the validity of the acts of its officers de facto.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

Francis A. Brogan (C. Heydrick, on the brief), for plaintiff in error.
W. D. McHugh, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action upon county bonds of the county of Otoe, in the state of Nebraska, issued upon a favorable vote of the electors of Nebraska City precinct, in that county, under the provisions of sections 3518-3521, Comp. St. Neb. 1899. The defenses to these bonds which are urged upon the consideration of this court are (1) that the national courts are bound to declare these bonds void because, in a suit to which none of the holders of the bonds were parties, the supreme court of the state of Nebraska so decided, more than 10 years after the bonds here in question had been issued, and had been bought by John Martin Clapp, the plaintiff in error, who was a bona fide purchaser thereof for value (*Morton v. Carlin*, 51 Neb. 202, 70 N. W. 966); (2) because the board of county commissioners of the county of Otoe, in which Nebraska City precinct was located, did not draw its boundary lines where the statutes of Nebraska directed that board to locate them; and (3) because the proposition to issue the bonds, which received the favorable vote of the electors of the precinct, prescribed that the bonds when issued should be delivered to three individuals named therein "as trustees for the persons who shall have paid for the right of way and depot grounds aforesaid," and the bonds were so delivered and their proceeds were applied to pay private parties for expenses which they

had incurred or paid to procure this right of way and these grounds for a railway company. The court below sustained the first defense, and dismissed this action, and the plaintiff in error questions that judgment.

It is not claimed that the decree of the supreme court of Nebraska in *Morton v. Carlin*, 51 Neb. 202, 70 N. W. 966, which enjoins the county commissioners and county clerk of Otoe county from levying taxes to pay these bonds, renders the questions in this action res adjudicata, since neither the plaintiff in error nor any one in privity with him was a party to that suit. That was a taxpayers' suit to enjoin the county commissioners and county clerk of Otoe county from levying taxes to pay these bonds, and the injunction of a state court is futile against an action in the national courts brought against the debtor by the holders of the bonds, or against a mandamus to enforce a judgment rendered in such an action. A state court may not by injunction prevent a federal court from proceeding to judgment in an action of which it has jurisdiction, or from enforcing its judgment by a mandamus to compel the levy and collection of taxes to pay it. *Holt Co. v. National Life Ins. Co.*, 80 Fed. 686, 691, 25 C. C. A. 469, 474, 49 U. S. App. 376, 385; *Riggs v. Johnson Co.*, 6 Wall. 166, 18 L. Ed. 768; *Supervisors v. Durant*, 9 Wall. 415, 19 L. Ed. 732; *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. 846, 27 L. Ed. 820. Nor was there any attempt by the supreme court of Nebraska to give any such effect to its decree. On the other hand, it expressly stated in its opinion that the fact that the bonds were held by innocent purchasers was neither pleaded nor made to appear in that case, and that it was not directly considering the rights of such persons, if they existed. *Morton v. Carlin*, 51 Neb. 209, 70 N. W. 966.

Notwithstanding all this, it is earnestly contended by counsel for the defendant in error that inasmuch as the supreme court of Nebraska decided, in *Morton v. Carlin*, that Nebraska City precinct was never legally constituted, and that, therefore, all the bonds here in controversy were void, and inasmuch as it reached that conclusion by construing the statutes of that state, its decision is binding upon the federal courts, under the rule so often announced and applied in this court, that "the national courts uniformly follow the construction of the constitution and statutes of a state given by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the constitution and laws of the nation." *Madden v. Lancaster Co.*, 65 Fed. 188, 192, 12 C. C. A. 566, 570, 27 U. S. App. 528, 536. There are, however, two exceptions to this rule as vital and as clearly established as the rule itself. The first is that decisions of state courts which affect the validity of contracts between citizens of different states, which were made, or under which rights were acquired, before there was a judicial construction of the constitution or statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States. *Speer v. Board*, 88 Fed. 749, 760, 32 C. C. A. 101, 113, 60 U. S. App. 38, 57; *Burgess v. Seligman*, 107 U. S. 20, 27, 2 Sup. Ct. 10, 27 L. Ed. 359; *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67-72, 11 Sup. Ct. 215, 34 L. Ed. 864; *Louisville Trust Co. v. City of Cincin-*

nati, 47 U. S. App. 36-47, 22 C. C. A. 334, 339, 76 Fed. 296, 301; Jones v. Hotel Co., 30 C. C. A. 108, 86 Fed. 370, 373. The other exception is that conceding that the action of a municipal or quasi municipal body was illegal, as held by a state court, still the question whether or not the illegal action of such a body, in the exercise of a power granted to it, constitutes any defense to bonds issued or contracts made pursuant to such action, and held by a bona fide purchaser, is a question of general jurisprudence, which it would be a dereliction of duty for a federal court to decline to consider and determine for itself. Speer v. Board, 88 Fed. 749, 762, 32 C. C. A. 100, 114, 49 U. S. App. 38, 39; Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 203, 17 C. C. A. 62, 65, 36 U. S. App. 152, 156.

The plaintiff in this case was a citizen of the state of New York. The bonds of this county were issued in 1886, and he purchased and paid for them in good faith in 1887, without notice of any defect in their execution or in the preliminary proceedings which led to their emission. By this purchase he entered into a contract relation with this county, a citizen of the state of Nebraska, before any construction had been given by any court to any statute of that state, or to any action of the board of county commissioners of that county, which cast a shadow of suspicion upon the bonds he bought. By his purchase he acquired the right, under the constitution and laws of the United States, to have his contracts interpreted, and his rights enforced, in a court of the United States, and a fortiori to the independent judgment of that court upon the legal questions his case presents. No decision of a state court rendered after his rights under these contracts had vested could forestall the judgment of a national court upon these questions, or deprive him of the right to invoke, or relieve a federal court of the duty to accord, its independent consideration and decision of his case. Much less could the decision of a state court, which studiously ignored the rights of innocent purchasers of these bonds, and which was not rendered until 10 years after they were bought, deprive the purchaser of the right to the independent opinion of the federal court to which he presents them. This question is not new in this court. It was considered more at length in Speer v. Board, 32 C. C. A. 100, 88 Fed. 760, and reference is made to the opinion in that case for a more extended discussion of it, and for a review of some of the authorities which sustain the proposition which we have announced. In that case a township in the state of Kansas had been organized and had incurred obligations on account of which warrants were subsequently issued by the county in which the township was located. After the plaintiff in that case, who was a citizen of Illinois, had bought his warrants, the supreme court of Kansas held, in an action against the county by a third party upon a warrant of the same class as those held by the plaintiff in the federal court, that these warrants were void because the law under which Kearney township was organized was unconstitutional, and therefore neither the township nor its officers ever had any existence, either de facto or de jure. Atchison, T. & S. F. R. Co. v. Board of Com'rs of Kearney Co., 48 Pac. 583. But this court held, after a full consideration of the question, and a review of the authorities, that

this decision of the state court was not controlling, and upon an independent investigation reached the opposite conclusion, and held that the warrants were valid. The decision in that case rules the question presented by the first defense urged upon our consideration in this case, and we adhere to the views which we there expressed. The decision of the supreme court of Nebraska in *Morton v. Carlin*, 51 Neb. 202, 70 N. W. 966, was not rendered until 10 years after the rights of the plaintiff under his bonds had vested, and it is not controlling authority in any federal court upon the questions which involve those rights.

The second defense for our consideration is that the bonds are void because the board of county commissioners of Otoe county did not locate the lines of Nebraska City precinct so that they corresponded with the lines of the wards of Nebraska City, which was located upon a part of the precinct, as that board was required to do by the statutes of the state of Nebraska. The section of the statutes which is invoked to sustain this defense reads:

"Precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward lines in such city, and such precinct shall correspond in number with the wards of the city and be coextensive with the same." Comp. St. Neb. 1899, § 1520.

The fact upon which this defense rests is that in 1886, when the bonds were voted and issued, the lines of Nebraska City precinct did not correspond with the ward lines of Nebraska City, which was a city of the second class, and was located upon a portion of the precinct which was not under township organization, but those lines were so drawn as to include several wards of the city and property without the city. It is insisted by counsel for plaintiff in error that the statute upon which this defense is founded is unconstitutional and void, because there was a material defect in its title as it was published, and another defect in its title as it passed the legislature of the state, which has been held by the supreme court of the state to make it invalid. *Webster v. City of Hastings*, 81 N. W. 510. A large portion of the briefs of counsel is devoted to a discussion of this question. In our view of this case, it is unnecessary to consider that question. Conceding, but not deciding, that the section of the statute which we have quoted was the law of the state of Nebraska when the bonds were voted and issued, is the fact that the board of county commissioners of this county had neglected to comply with the provisions of this statute fatal to the bonds which the county issued, on the theory that it had made a legal precinct, and which have been bought by an innocent purchaser, upon the faith of the certificate of the county that it had complied with this statute?

A precinct, under the statutes of Nebraska, is a mere political subdivision of a county. It is not a municipal or quasi municipal corporation or entity. It does not govern itself. It does not choose its governing officers, and it can neither act nor contract for itself, sue nor be sued. It is the mere creation of the board of county commissioners of the county in which it is situated, and that board is vested with plenary power to bring it into existence, to act and con-

tract for it while it is in being, and to enlarge, to diminish, and to destroy it. The statutes of Nebraska provide that "each board of county commissioners shall divide the county into convenient precincts; and as occasion may require, erect new ones, subdivide precincts already established, and alter precinct lines" (Comp. St. 1899, § 2141); that any precinct organized according to law is authorized to issue bonds in aid of works of internal improvements upon a favorable vote of its electors; that a petition of not less than 50 freeholders of the precinct shall be presented to "the county commissioners * * * or the board authorized to conduct the business in such precinct," and the board of county commissioners alone has that authority; that the petitioners shall give bond, "to be approved by the county commissioners," for the payment of the expenses of the election, if the proposition is defeated (Comp. St. 1899, § 3518); that, if two-thirds of the votes cast shall be in favor of the proposition, "the county commissioners" shall issue the bonds, and the chairman of the board of county commissioners shall sign them, and the county clerk shall attest them (Comp. St. 1899, § 3519); and that the county commissioners shall each year levy upon the taxpayers' property in the precinct a tax sufficient to pay the interest and 5 per cent. of the principal sum (Comp. St. 1899, § 3520). Now, there can be no obligation without an obligor; no contract without a contractor. A precinct cannot contract and cannot be an obligor because it is not a corporate entity. The favorable vote of its electors authorizes the precinct to do nothing. It can neither act nor contract, sue nor be sued. But, when its electors vote favorably upon a proposition to issue bonds, the statutes of Nebraska authorize the board of county commissioners of the county in which the precinct is situated to issue these bonds, to levy the necessary taxes upon the property in the precinct to raise money to pay them, and to apply this money to that purpose. Who, then, becomes the obligor in these bonds? Who makes the contracts? Who agrees to pay them? There can be but one answer to these questions, and that is that the county which issues them, and which, under the statute, has the power to levy the taxes to raise the money to discharge them, agrees to pay them. The conclusion is irresistible that bonds issued by the county commissioners of a county in Nebraska, upon the favorable vote of the electors of a precinct therein, are the obligations of the county. In legal effect, they are the contracts of the county that it will pay the bonds, and the only difference between such bonds and the ordinary bonds of a county is not in the obligation of the county to pay them, but in the method by which the county may raise the money to discharge its own obligations. In the former case, it may levy the taxes upon the property in the precinct which voted for their issue; in the latter case, upon all the property in the county. But the obligation of the county to pay them is as sacred and effective in the one case as in the other. *Davenport v. Dodge Co.*, 105 U. S. 237, 241, 26 L. Ed. 1018; *Nemaha Co. v. Frank*, 120 U. S. 41, 7 Sup. Ct. 395, 30 L. Ed. 584; *Blair v. Cuming Co.*, 111 U. S. 363, 4 Sup. Ct. 449, 28 L. Ed. 457; *State v. Dodge Co.*, 10 Neb. 20, 4 N. W. 370. In *Davenport v.*

Dodge Co., 105 U. S. 241, 26 L. Ed. 1020, speaking to this question, the supreme court said:

"Precincts in Nebraska are but political subdivisions of a county. They have no corporate existence, and cannot contract or be contracted with. They have no corporate officers, and can neither sue nor be sued. Certain officers are elected by the voters of precincts for political, administrative, and judicial purposes, but they are in no sense the representatives of the people of the territory as a municipality. *State v. Dodge Co.*, 10 Neb. 20, 4 N. W. 370. Precincts are governed by the county commissioners, the governing board of the county, and by the appropriate officers of the state. Their relation to the county is like that of a ward to a city. Having no corporate existence, no separate municipal authority, they cannot, says again the supreme court of the state in the case last cited, 'enter into contracts, directly or indirectly, nor assume obligations which a court might be called on to enforce.' Hence the precinct cannot become the obligor of precinct bonds, and we think it follows that the county, which does have a corporate existence, and can contract and be contracted with, and upon whose officers is imposed the duty not only of issuing the bonds, but of providing for the payment of them, is the political entity bound by the obligation and charged with the debt created thereby. The only difference between the two kinds of debt is that in one all the taxable property of the county is charged with its payment, and in the other only a part."

The bonds upon which this action is based, then, are the obligations of the county of Otoe issued by its board of county commissioners and held by an innocent purchaser. It is claimed that the board was without power to issue them, because it had never properly constituted Nebraska City precinct. But this contention sticks in the bark. The board of county commissioners had the power to properly constitute Nebraska City precinct. That board was given the authority, and charged with the duty, to divide its county into legal precincts, to make every precinct in that county according to the statutes of its state, and it was given the power to issue bonds on account of those precincts upon a favorable vote of their electors. The creation of Nebraska City precinct, in accordance with the provisions of the statutes, was, like the call for an election therein upon the proposition to issue the bonds, one of the conditions precedent to their issue. The power to comply with these conditions, and the power to comply with the former, as much as the power to comply with the latter, was vested in a single body, and that body was the board of county commissioners of Otoe county. It had plenary power to divide the county into precincts, to subdivide precincts and alter precinct lines, and it was perfectly practicable for this board to make Nebraska City precinct and every other precinct in the county in the way prescribed by the statutes, so that the boundaries of each one of them should correspond with those of the wards of any city of the second class located upon any portion of them. In the same body to which the power to comply with these conditions was given the statutes also vested the authority, and upon the same body they imposed the duty, to ascertain and determine whether or not this and all other precedent conditions to the issue of the bonds had been complied with before it issued them. Presumably it did investigate, ascertain, and determine this fact; for upon the face of the bonds which it issued it wrote this certificate:

"The question of issuing this bond and the thirty-nine others of said series, amounting in the aggregate to forty thousand dollars, was submitted, by the county commissioners of said county of Otoe, to a vote of the legal voters of Nebraska City precinct aforesaid, in the manner provided by law, at an election duly ordered and held on the sixteenth day of November, A. D. 1886, at which said election more than two-thirds of the votes were cast in favor (—) the proposition to issue said bonds; and the county commissioners of said county, being vested by law with authority for that purpose, having found that all the requirements of law necessary to authorize the issue and delivery of said bonds had been fully complied with, ordered that they be issued and delivered accordingly, and that they be and continue a subsisting debt against said precinct until they are paid and discharged."

These bonds have now been bought by a bona fide purchaser upon the faith of this certificate. Can this board or the county which issued these bonds now be heard, after the bondholder has parted with his money in reliance upon this certificate, to say, to defeat its bonds, that the certificate was false; that while it had ample power to make this precinct in accordance with the law, and while it certified that it had complied with the statute, the fact was that it had not done so, and therefore its bonds are void? This court has discussed and answered this question so often that it would be a work of supererogation to do more than to state the principles on which that answer rests, and to cite some of the authorities which sustain them. One who by his acts or representations, or by his silence when he ought to speak out, either intentionally, or through culpable negligence, induces another to believe certain facts, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny their existence, is conclusively estopped to interpose such denial. Corporations, municipal and quasi municipal bodies, and their officers, that have induced others to act to their prejudice by the issue of certificates or representations that they have performed acts which the law intrusted to them to perform, constitute no exception to this salutary rule. The recitals of the officers of a municipal or quasi municipal corporation, who are invested with the power to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed, that they have found that all the requirements of law necessary to authorize the issue of the bonds have been fully complied with, precludes inquiry, as against an innocent purchaser for value, as to whether or not the precedent condition challenged had been performed before the bonds were issued. *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593, 606; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652, 27 U. S. App. 244, 266, 268; *School Dist. v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Beal*, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433, 28 L. Ed. 966; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760. A corporation and its officers, who, by the apparent legality of their obligations, have induced purchasers to buy them, are estopped from denying their validity on the ground that in some of the preliminary proceedings which led to their execution, or in their execu-

tion itself, they failed to comply with some law, rule, or statute which they might have complied with, but which they carelessly neglected. *Speer v. Board*, 88 Fed. 749, 758, 32 C. C. A. 101, 111, 60 U. S. App. 38, 53. The creation of Nebraska City precinct in the way prescribed by the statutes of Nebraska was a condition precedent to the issue of these bonds of the county of Otoe upon the favorable vote of its electors. That county and its board of county commissioners had full power to create or modify that precinct so that it should be in accordance with the statutes of that state. They also had full power to determine whether or not that condition had been complied with, and to certify the answer to that question upon the face of the bonds. They negligently failed to comply with it, but clearly certified that they had done so. Upon the faith of that certificate, plaintiff has purchased the bonds. In morals, in equity, and at law they are now estopped to deny the truth of their certificate in order to relieve themselves from their obligations.

There is another reason why the defense which we have been considering cannot be sustained. It is that the general acquiescence by the inhabitants of a political subdivision organized under color of law, and by the departments and officers of the state and county having official relations with it, gives to the acts and contracts of those officers on its behalf as a subdivision *de facto* all the force and validity of their acts in its behalf as a subdivision *de jure*. The acts of ordinary municipal bodies organized under color of law depend far more upon general acquiescence than upon the legality of their action or the existence of every condition precedent prescribed by the statutes under which they organize and act. The interests of the public which depend upon such municipalities and their various subdivisions, the rights and the relations of private citizens which become fixed in reliance upon their existence, the injustice and confusion which must result from an *ex post facto* avoidance of their acts, commend the justice and demand the enforcement of the rule that, when a municipal body or a political subdivision of a state or county has, or its officers have, assumed, under color of authority, and have exercised for a considerable period of time, with the consent of the state and its citizens, powers of a kind recognized by the organic law, neither the corporation, subdivision, nor any private party can, in private litigation, question the legality of the existence of the corporation or subdivision. *Speer v. Board*, 88 Fed. 749, 764, 32 C. C. A. 101, 116, 60 U. S. App. 38, 62; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 787, 10 C. C. A. 637, 647, 27 U. S. App. 244, 259; *Ashley v. Board*, 60 Fed. 55, 61, 8 C. C. A. 455, 461, 16 U. S. App. 656, 671; *People v. Maynard*, 15 Mich. 463, 470; *School Dist. No. 25 v. State*, 29 Kan. 42, 49, 50; *City of St. Louis v. Shields*, 62 Mo. 247, 252; *State v. Carroll*, 38 Conn. 449, 471; *State v. Rich*, 20 Mo. 393, 396; *Clement v. Everest*, 29 Mich. 19, 23; *Donough v. Dewey*, 82 Mich. 309, 46 N. W. 782, 783; *Carleton v. People*, 10 Mich. 250; *Clark v. Com.*, 29 Pa. St. 129; *Com. v. McCombs*, 56 Pa. St. 436.

In *Speer v. Board*, a township in Kansas had been organized under an unconstitutional law, and had existed for the limited period of one year. The inhabitants of the township, the state, and county

officers recognized its existence, but years afterwards the supreme court of that state held that it had no existence, because the law under which it was organized was unconstitutional. After a full consideration of the question presented in that case, and a review of many authorities upon the question, this court held that an indebtedness incurred by that township could not be defeated on the ground that the law under which it was organized was unconstitutional, (1) because the validity of the organization of Kearney township could not be questioned collaterally in that action, and (2) because, even if it were organized under the unconstitutional law, that law, until it was challenged in, or declared void by, the judicial department of the government, was sufficient to confer color of legality upon the township, and it was still a *de facto* organization, whose acts and contracts were valid so far as they involved the interests of the public and of third parties who relied upon them. Reference is made to the opinion in that case, at pages 763-768, 88 Fed., pages 115-121, 32 C. C. A., pages 61-69, 60 U. S. App., for a discussion of the proposition upon which the decision is based, and a review of some of the authorities which sustain it. We will not repeat the discussion here. Suffice it to say that the principle recognized in that case is conclusive of the defense that the bonds in this case are void in the hands of an innocent third party because Nebraska City precinct did not exist. Nebraska City precinct was legally constituted by an order of the board of county commissioners on December 6, 1877. It remained legally constituted until, in 1885, the city of Nebraska City, which was located upon a part of this precinct, became a city of the second class, and the statute which we have quoted in an earlier part of this opinion, requiring the precinct boundaries to correspond with the ward boundaries of such a city, took effect upon this precinct.

On October 4, 1886, the boundaries of the precinct were changed by order of the board of county commissioners of Otoe county. But the precinct, as changed, included within its boundaries the city of Nebraska City and outlying territory, and its lines did not correspond with the lines of the wards in Nebraska City. While the precinct remained in this condition, and in November, 1886, the electors in the territory within the boundaries of this precinct fixed by the order of October 4, 1886, voted to issue these bonds. They were issued in December of that year, and they were purchased by the plaintiff in January, 1887. From October 4, 1886, until the year 1891 the lines of this precinct remained unchanged. The board of county commissioners then divided the precinct into several, so that the precinct lines within the city of Nebraska City corresponded with the lines of the wards therein, and the outlying territory was divided into two adjoining precincts. In the years 1887, 1888, 1890, 1891, 1892, 1893, and 1894 the county commissioners levied upon the property within the boundaries of the precinct as fixed by the order of October 4, 1886, the taxes necessary to pay the interest upon these bonds, and applied the money so raised to that purpose. From 1887 to 1891 constables and justices of the peace were elected, qualified, and served as officers of the precinct fixed by the order of October 4, 1886, and during all that time the county assessor was elected, quali-

fied, and made the only assessments of property for the purpose of county taxation in Nebraska City precinct, according to the lines fixed by that order. During all this time there was no other precinct government within the territory described by that order, and all the citizens and inhabitants in that district, and all the officers of the state and the county, recognized the territory bounded by that order as a legally constituted precinct of the county of Otoe. Taxes were levied and assessed by an assessor chosen in that precinct. Justices of the peace chosen therein doubtless tried and decided lawsuits, solemnized marriages, took and certified the acknowledgments of deeds. Constables elected in that precinct arrested and imprisoned offenders upon warrants issued by these justices. All the functions of a legally constituted precinct, all the functions of the officers of such a precinct, were discharged for more than four years, upon the theory that this was an existing precinct, without objection from state, county, or individual. Not only this, but this precinct was not organized without color of law. The board of county commissioners was fully empowered to constitute precincts and to prescribe their boundaries. The only defect was that in exercising this power it overlooked and failed to comply with a direction of the statute as to the mere manner of its exercise. While the existence of this precinct was thus recognized and acquiesced in without objection by public officers and private citizens, its electors complied with the provisions of the law, and the county issued and sold these bonds. It may be that if the state or the county, or any taxpayer of this precinct, had challenged its existence, or the right of the county or its officers to issue these bonds, by a writ of quo warranto, or by an application for an injunction, before public interests were affected or private rights had vested under them, the issue of the bonds might have been stayed. The assessor, the justices of the peace, and the constables might have been restrained from exercising their functions, and the board of county commissioners might have been compelled to change the boundaries of the precinct. But no such action was taken. The proposition to issue the bonds was presented to the board of county commissioners on October 6, 1886. On that day a special election in the precinct was called for November 16, 1886, and the bonds were not issued until December in that year. Here was ample time for an objector to present the question which seems to have been first raised after this precinct and its officers had been discharging their respective duties without question for more than seven years. It is too late now for public officers or private parties, in private litigation, to question the legality of the existence of this precinct, or of the contracts made on its behalf, in reliance upon which money has been advanced and rights have vested. When these bonds were issued and sold, every citizen of the territory comprised within the order of October 4, 1886, and called "Nebraska City Precinct," and every piece of property therein, was represented by the board of county commissioners of Otoe county in all the proceedings which culminated in the issue of these bonds. That board was the agent of these citizens and this property, under the statutes, to borrow the money which they voted to obtain upon the bonds. Under the color of law, it con-

stituted the precinct, called the election, issued the bonds, and no man objected. Under these circumstances, Nebraska City precinct was a precinct de facto, and the board of county commissioners were its governing officers de facto, and the silence and general acquiescence of the private citizens within it and the officers of the state and county, until after the rights of the bondholders had vested, estop them from questioning the existence of the precinct, or the validity of the acts of these officers, as against the purchasers of the bonds. The acts of these officers have all the force of the acts of officers de jure for a precinct legally constituted, and the owners of the property within the boundaries of the order of the board of county commissioners of October 4, 1886, are estopped, by their silence and acquiescence, from denying that the property within those limits is liable to taxation to raise the necessary amount to pay these bonds.

Another contention of counsel for the defendant in error is that the bonds are void because the proposition submitted to the voters of the precinct contained these words: "The said bonds, when signed as required by law, to be delivered to Wm. E. Hill, Robert Payne, and F. W. Rottman, as trustees for the persons who shall have paid for the right of way and depot grounds aforesaid;" and because the bonds were delivered to them, and the proceeds of them were applied to the purpose there indicated. But these facts do not appear upon the face of the bonds, and they contain not only the recital which we have heretofore quoted, to the effect that all the requirements of law necessary to authorize the issue and delivery of the bonds had been fully complied with, but also this statement: "This bond is one of forty of like date, issued to aid in the construction of the Missouri Pacific Railway Company's Railroad through said Nebraska City precinct, by purchase of right of way and grounds for depot therein." These recitals import that the bonds were issued in pursuance of a lawful and proper proposition, of a legal vote of the electors of the precinct, and of honest and just action on the part of the board of county commissioners under the statute. They relieve the innocent purchaser of all inquiry, notice, and knowledge of the actual proposition submitted, and of the action of the board thereon, and estop the county and the inhabitants of the precinct from denying that a legal proposition was submitted and sustained by a vote of the electors, and that the bonds are based upon such action. Board of Co. Com'rs v. National Life Ins. Co., 90 Fed. 228, 231, 32 C. C. A. 591, 594, 61 U. S. App. 53, 58; City of Evansville v. Dennett, 161 U. S. 434, 439, 443, 16 Sup. Ct. 613, 40 L. Ed. 760; Wesson v. Saline Co., 73 Fed. 917, 919, 20 C. C. A. 227, 229, 34 U. S. App. 680, 684; Rathbone v. Board, 83 Fed. 125, 131, 27 C. C. A. 477, 483, 49 U. S. App. 577, 589; City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449, 31 C. C. A. 585, 60 U. S. App. 78; Walnut v. Wade, 103 U. S. 683, 696, 26 L. Ed. 526; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593, 606; National Life Ins. Co. v. Board of Education, 62 Fed. 788, 792, 10 C. C. A. 637, 651, 27 U. S. App. 244, 266; Board v. Heed, 41 C. C. A. 668, 101 Fed. 768.

Nor is it any defense to the action of this innocent purchaser that the board of county commissioners of Otoe county certified upon the face of the bonds that they were issued for a lawful purpose, but actually issued them and applied their proceeds to an unlawful purpose. *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 275, 277, 30 C. C. A. 38, 41, 43, 57 U. S. App. 593, 600, 603; *Board of Com'rs of Seward Co. v. Aetna Life Ins. Co.*, 90 Fed. 222, 32 C. C. A. 585, 61 U. S. App. 41; *West Plains Tp. v. Sage*, 69 Fed. 943, 946, 16 C. C. A. 553, 557, 32 U. S. App. 725, 733; *Board of Com'rs of Barber Co. v. Society for Savings*, 41 C. C. A. 667, 101 Fed. 767. The judgment below is reversed, and the case is remanded to the court below, with directions to enter judgment for the plaintiff for the amount claimed in the complaint.

TRAVIS v. NEDERLAND LIFE INS. CO., Limited.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,380.

1. CONTRACT—EFFECT OF MODIFICATION OF PROPOSAL.

The addition of a new term or condition to a proposal before it has been accepted is, in legal effect, a withdrawal of that proposal, and the submission of a new proposition, of which the additional term or condition is a part.

2. SAME — ACCEPTANCE OF FORMER PROPOSITION AFTER MODIFICATION NUGATORY.

The acceptance of a former proposition, after the proposer has attached to it a new condition or term which is rejected, does not constitute a contract, because the minds of the parties never meet at the same time upon the same stipulations.

3. INSURANCE — WRITTEN APPLICATION A PROPOSITION — EFFECT OF MODIFICATION BEFORE ACCEPTANCE.

A written application for insurance is a proposition to contract, and not an agreement. Where, after the application was signed and mailed, but before it was accepted, the applicant attached a new term or condition, which the agents of the company declined to accede to, *held*, that the subsequent acceptance of the original proposition did not constitute a contract of insurance, because the minds of the parties never met at the same time upon the same stipulations.

4. WITNESS—EFFECT OF INTEREST—COMPETENCY TO TESTIFY TO TRANSACTIONS WITH DECEASED GOVERNED BY FEDERAL AND NOT BY STATE STATUTES.

Where congress has legislated upon the subject of the competency of witnesses in the courts of the United States, the statutes of the states and the decisions of their courts have no application. Congress has declared the effect of the interest of a witness in the issue tried upon his competency, and specified the cases in which he is incompetent to testify to a transaction with, or statement by, a deceased person, in section 853 of the Revised Statutes, and this legislation is controlling upon this subject in the courts of the United States, whatever the statutes of the states and the decisions of their courts upon the same subject may be.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was an action upon a policy of insurance of \$3,000 on the life of Edward M. Travis for the benefit of his wife, Olive M. Travis, the plaintiff in

error, and the defense was that no contract of insurance was ever consummated. There was a trial to a jury, and at the close of the evidence the court instructed them to return a verdict for the defendant upon this state of facts: The Nederland Life Insurance Company, Limited, the defendant in error, was a foreign corporation engaged in the business of life insurance. L. I. Duboucq, whose office was in New York City, was the president of its United States branch, and the only person in this country authorized to accept applications for insurance or to issue policies on its account. Edward Ferguson, whose office was in the city of Chicago, was the manager of its Western department. Leisander & Love were its general agents under Ferguson for the state of Iowa, with authority to procure applications for policies of insurance and to discharge the duties which usually devolve upon managers of agencies, and James H. B. Woodroffe was a soliciting agent under them. On November 11, 1896, Woodroffe obtained from Edward M. Travis his written application to the defendant for a policy of insurance of \$3,000 on his life for the benefit of his wife, the plaintiff, and his promissory notes for the amount of the first annual premium. Woodroffe mailed this application and these notes to Leisander & Love at Des Moines, Iowa, who forwarded the application by mail to Edward Ferguson at Chicago, used the notes as collateral to a loan which they obtained for themselves from a bank, and reported that the premium was paid. Ferguson mailed the application to Duboucq in New York for his acceptance or rejection. Travis was a medical examiner for the defendant in the town where he lived, and on November 12, 1896, the day after his application, he wrote to Leisander & Love that they should not send his policy to him if the company was to have another medical examiner, one McGrath, in his town, and its agent was to turn over examinations to the latter, as he had been doing. McGrath was at this time and continued throughout to be a medical examiner of the defendant in the town where Travis resided. On November 18, 1896, Travis wrote Ferguson at Chicago, and directed him not to send his policy if the company was to have two medical examiners in his town. This letter was referred by Ferguson to Leisander & Love, who, on November 20, 1896, wrote Travis to the effect that the company still had, and would continue to have, two medical examiners in his town, and that it would divide its business equally between them. This correspondence was not communicated to Mr. Duboucq prior to November 27, 1896, and on that day, in ignorance of the facts which it discloses, he approved the original application, and issued a policy in accordance with its terms, which was sent to Travis, and was received by him on December 3, 1896. On December 8, 1896, he returned this policy to Leisander & Love in a letter in which he stated that the reason for his action was that the company had two medical examiners in his town. There was further correspondence and subsequent conversations, but the contractual relations of Travis and the company remained in the same condition in which they were left on December 8, 1896, until he was drowned, on March 9, 1897. Counsel for plaintiff in error claim that upon this state of facts a contract was established, and the plaintiff should have recovered.

T. D. Healy (A. N. Botsford, M. F. Healy, J. W. McGrath, and Eugene Bryan, on the brief), for plaintiff in error.

N. T. Guernsey (H. T. Granger, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Propositions, negotiations, correspondence, conversations do not make a contract unless the minds of the parties meet upon the same stipulations and they consent to comply with them. Until this has been done, either party has the right to withdraw or to modify his proposition, to make new conditions or proposals, or to retire abso-

lutely from the negotiations. The addition of a new term or condition to an earlier proposal before the latter has been accepted is the withdrawal of the earlier proposition, and the submission of a new proposal of which the new condition or term is a part. From the time the new condition is submitted the earlier proposition is withdrawn, and it is no longer open to acceptance or rejection by the party to whom it was presented.

An application for life insurance is not a contract. It is only a proposal to contract on certain terms which the company to which it is presented is at perfect liberty to accept or to reject. It does not in any way bind the company to accept the risk proposed, to make the contract requested, or to issue a policy. Nor does it in any way bind the applicant to take the policy, to make the contract he proposed, or to pay the premium until his proposal has been accepted by the company and its policy has been issued. Until the meeting of the minds of the parties upon the terms of the same agreement is effected by an acceptance of the proposition contained in the application or of some other proposition, each party is entirely free from contractual obligations. The applicant may withdraw his application and refuse to take insurance on any terms. He may modify his proposal, may affix additional conditions or terms to it, or may make an entirely new proposition, while the company may refuse to entertain any proposition, or may reject that presented and submit a substitute. Nor is the freedom of the parties to retire from the negotiations or to modify their proposals, at any time before some proposition has been agreed upon by both, ever lost or affected by the fact that the applicant accompanies his proposal or application with a promise to pay the premium in the form of promissory notes, or even by an actual payment thereof. Until his application is accepted, such a promise or payment is conditional upon the acceptance, and his application is still no more than a proposition to take and to pay for the insurance if the company accepts his terms. The payment of the premium when the application is signed does not bind the company to accept his terms, nor does it estop the applicant from recovering the money he pays if the company rejects his proposal. These are fundamental rules of the law of contracts, which are constantly applied in this and other courts, and which are decisive of the case before us. *Paine v. Insurance Co.*, 51 Fed. 689, 691, 2 C. C. A. 459, 461, 10 U. S. App. 256, 263, 264; *Society v. McElroy*, 83 Fed. 631, 640, 28 C. C. A. 365, 374, 49 U. S. App. 548, 564; *McMaster v. Insurance Co.*, 40 C. C. A. 119, 99 Fed. 856, 866; *Giddings v. Insurance Co.*, 102 U. S. 108, 112, 26 L. Ed. 92; *Griffith v. Insurance Co. (Cal.)* 36 Pac. 113, 115; *Insurance Co. v. Young's Adm'r*, 23 Wall. 85, 107, 23 L. Ed. 152; *Insurance Co. v. Ewing*, 92 U. S. 377, 381, 23 L. Ed. 610; *Harnickell v. Insurance Co.*, 111 N. Y. 390, 399, 18 N. E. 632; *Whiting v. Insurance Co.*, 128 Mass. 240; *Markey v. Insurance Co.*, 118 Mass. 178; *Id.*, 126 Mass. 158; *Rogers v. Insurance Co.*, 41 Conn. 97, 106; *Insurance Co. v. Collier*, 38 N. J. Law, 480, 483; *Heiman v. Insurance Co.*, 17 Minn. 153, 157 (Gil. 127); *Hogben v. Insurance Co. (Conn.)* 38 Atl. 214-216.

Travis made his application for insurance and gave his notes for the first premium to Leisander & Love, the agents of the company, on November 11, 1896. But there could be no contract, and Travis and the agents all knew there would be no agreement between the company and the former, until his application was accepted by Dubourcq in New York; for he was the only officer of the defendant in the United States who had authority to accept applications or to issue policies for it. Until Dubourcq made an acceptance the company was free to reject, and Travis was free to withdraw, or to modify his application, or to make a new proposition in its place. On the day after he had signed it, and on November 18, 1896, he did withdraw it. He attached to it a new condition or term, the legal effect of which was to withdraw his former proposition, and to make a new one, of which this condition or term was a part. He notified the agents of the company that he would not take the insurance for which he had applied unless they would make him the sole medical examiner of the company in the town in which he resided, and they declined to do so. This notification had been given to the agents, and they had declined to accept this new condition of his proposition, seven days before the original application was accepted by Dubourcq in New York. He accepted the earlier proposal in ignorance of these facts. Could the company or the agents have enforced the collection of the notes which Travis gave them for the premium in this state of facts, after the agents had received his withdrawal of his original application, and after they had thus declined his new proposal? The question is susceptible of but one true answer. Would it not have been a perfect defense to those notes, in the hands of the company or its agents, that he had withdrawn his first application before it was accepted, and had made a new one, which they had declined to accept? Neither the agents nor the company could have overcome such a defense. The truth is that the minds of the parties to this negotiation never met upon the terms of any contract, and neither the notes nor the policy ever became effective. Before the original application was accepted in New York, Travis had withdrawn it, and had made another, which had not, indeed, been communicated to Dubourcq, but which had been received by the agents of the company, and which rendered it impossible for Dubourcq to make any contract which would bind Travis to the original application which he had lawfully withdrawn. When, on November 27, 1896, the mind of Dubourcq accepted and consented to the terms of the proposition contained in the original written application, the mind of Travis had receded and withdrawn its assent from those terms, and settled upon different terms, which no agent of the company ever accepted; so that there never was a time when the minds of the parties to this negotiation met upon, and they agreed to comply with, the same stipulations of any contract. This conclusion accords with reason, with the established precedents, and with the understanding of Travis in his lifetime; for within five days after he received the policy he returned it, and refused to take the insurance, because the terms of his new proposition had not been accepted. There was therefore no contract be-

tween the parties to this action, and no error in the charge of the court to the jury to return a verdict for the defendant.

It is assigned as error that the agent Leisander was permitted to testify to a conversation which he had with Travis after the policy was returned to the agents, to the effect that an agreement was reached between him and Travis that the policy should be returned to the company, and his notes for the premium should be destroyed, over the objection of the plaintiff in error that this testimony was incompetent, under the provisions of the statute of Iowa, because it related to a personal transaction between the witness and a person deceased. The contention of counsel for the plaintiff in error is that Leisander was disqualified, under section 4604 of the Code of Iowa of 1897, because he was the person through or under whom the plaintiff in error derived her interest by assignment or otherwise, and the statute of Iowa prohibits the examination of such a person as a witness to any personal transaction or communication between him and a person deceased. But it is only where the constitution, treaties, or statutes of the United States do not otherwise provide that the laws of the several states are to be regarded as rules of decision in trials at common law in the courts of the United States. Rev. St. § 721. In this case the statutes of the United States do otherwise provide. Section 858 of the Revised Statutes reads:

"Sec. 858. In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

A glance at this statute discloses the fact that the case before us does not fall within the proviso or exception to the general rule enacted by congress that no witness shall be excluded in any civil action because he is a party to or interested in the issue tried. Since congress has legislated upon this subject, the rule which it has established is controlling in the courts of the United States, and the testimony of this witness was properly received. The judgment below is affirmed.

LOGAN v. GOODWIN et al.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,387.

1. GARNISHMENT—INFORMALITY OF BOND WAIVED BY JOINING ISSUE.

A judgment in favor of a garnishee will not be sustained in an appellate court on account of the insufficiency or informality of the bond, when the garnishee and the defendants were duly served with the garnishee summons, the garnishee answered on the merits, and the action went to judgment on other grounds, without any objection to the bond.

2. APPEAL FROM JUDGMENT IN GARNISHMENT RUNS FROM ITS DATE.

The action in garnishment, under Gen. St. Kan. 1897, c. 95, §§ 227-247, is distinct from the action between the plaintiff and defendant, and results in a separate judgment. The time for appeal or writ of error to review the latter judgment runs from its date, and not from the date of the judgment between plaintiff and defendant.

3. APPEAL—EFFECT OF FAILURE TO OBTAIN SUPERSEDEAS.

The failure to obtain a supersedeas under section 1007 of the Revised Statutes does not affect the right or limit the time for an appeal or writ of error to review a decree or judgment.

4. SAME—STATE STATUTES INAPPLICABLE TO REVIEW OF JUDGMENTS OR DECREES IN FEDERAL COURTS.

Congress has established a complete system for the review of the judgments and decrees of the federal courts, and the provisions of the state statutes allowing and limiting the review of judgments or decrees in their courts are inapplicable to proceedings in the courts of the United States.

5. REMEDIAL STATE LAWS — PRESUMPTION OF ADOPTION BY FEDERAL COURTS.

The presumption is, in the absence of evidence, that the remedial laws of a state in force therein at the time of a proceeding taken thereunder in a federal court had been adopted by that court, under sections 915 and 916 of the Revised Statutes.

6. COURTS—PLEADING AND PRACTICE—QUESTION.

The question whether or not a notice given by a plaintiff to a garnishee that he elects to take issue on his answer, under section 232, c. 95, Gen. St. Kan. 1897, is a question of pleading and practice, governed by the statutes of Kansas, under section 914 of the Revised Statutes, which requires the proceedings and practice in actions at law in the federal courts to conform to those prescribed in the state courts.

7. GARNISHMENT—SERVICE OF NOTICE WITHOUT FILING RAISES ISSUE.

The service of a notice by the plaintiff upon the garnishee that he elects to take issue on the latter's answer, pursuant to the provisions of section 232, c. 95, Gen. St. Kan. 1897, raises the issues presented by the affidavit of the plaintiff and the affidavit of the garnishee, and entitles the former to a trial of them, although he has never filed the notice or proof of the service thereof with the court.

8. SAME—AFTER JUDGMENT AND BEFORE EXECUTION.

A judgment creditor is not entitled to institute and maintain garnishment proceedings upon his judgment or decree before issuing an execution thereon, under section 228, c. 95, Gen. St. Kan. 1897.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Kansas.

This writ of error assails a judgment in garnishment which was the result of the following proceedings: On April 23, 1897, F. G. Logan, the plaintiff in error, commenced an action in the court below against A. G. Goodwin, W. L. Chamberlin, I. Goodwin, and Grace C. Chamberlin, and filed an undertaking in garnishment, which recited that an order of garnishment had been issued, and which was conditioned to pay to the defendants, or any of them, any damages which they might sustain by reason thereof, if it should be determined that the order was wrongly obtained. This undertaking was filed in the court on April 23, 1897, and approved by the clerk. On September 13, 1897, an affidavit for garnishment was filed, to the effect that D. W. Mulvane had under his control property belonging to the defendants. A summons in garnishment issued, and was served upon Mulvane, who on October 8, 1897, filed an answer to the effect that he was in no manner and upon no account indebted or under liability to the defendants, unless by reason of \$2,000 in his possession, obtained from the Bank of Topeka in payment of a certain certificate of deposit issued to I. Goodwin. On September 15, 1898, the court made an order, upon the motion of I. Goodwin, that she might give a bond,

in pursuance of section 4299 of the General Statutes of Kansas of 1889, in the sum of \$4,000, for the discontinuance and discharge of the garnishment proceedings, and that upon the giving of said bond, conditioned and secured as by law required, and its due approval by the clerk of the court, the garnishment proceedings should be discharged. On September 17, 1898, Imo Goodwin gave a bond conditioned that she and her surety would pay to the plaintiff the amount of any judgment which might be recovered against her in the action, not exceeding \$4,000, and this bond was approved by the clerk of the court. On September 22, 1898, the court made an order that the funds in the hands of Mulvane should be released only upon the defendants' giving bond that in case judgment should be finally rendered against any of the defendants the money should be forthcoming and returned, to be applied on the judgment. On June 5, 1899, after a jury trial of the action, a judgment was rendered in favor of the plaintiff, Logan, and against the defendants A. G. Goodwin and W. L. Chamberlin, for the sum of \$3,991.21 and costs, and in favor of the defendants I. Goodwin and Grace C. Chamberlin, and against the plaintiff, Logan, for their costs in the action. On June 10, 1899, an affidavit in garnishment was filed, alleging the recovery of the judgment, and that D. W. Mulvane had in his possession the sum of \$2,000 in money, belonging to the defendants A. G. Goodwin and W. L. Chamberlin, or one of them. On the next day a proper undertaking in garnishment was filed and approved. A garnishee summons was issued and served, and on June 19, 1899, Mulvane made the same answer that he had made to the first garnishment. On the same day the attorneys for the plaintiff served upon him and filed a written notice that they elected to take issue on this answer. On June 22, 1899, the defendant Imo Goodwin moved for an order on the garnishee, Mulvane, that he should pay to her the \$2,000 mentioned in his answer, and the plaintiff, Logan, sought to proceed with the trial of the issue raised by the two answers of the garnishee, Mulvane. In support of his right to a trial of the issue presented by the answer of October 8, 1897, he offered to prove that on October 14, 1897, he served upon the garnishee, Mulvane, a written notice that he elected to take issue with him upon his answer as garnishee as to his indebtedness to A. G. Goodwin, and that he would maintain his liability as garnishee in said action. The court refused to permit the plaintiff to introduce this evidence. The plaintiff excepted, and the court subsequently ordered that the garnishment process of June, 1899, be vacated and set aside, that the answer of the garnishee, Mulvane, filed October 8, 1897, stand as conclusive of the truth of the facts therein stated; that the garnishee, Mulvane, pay over the money in his hands as shown by his answer to the defendant I. Goodwin; and that the plaintiff pay the costs of the garnishments. On January 9, 1900, the plaintiff, Logan, sued out a writ of error to reverse this judgment against him. The judgment between him and the defendants in the action is not in question in this court.

W. C. Perry (Eugene Hagan and Daniel B. Holmes, on the brief), for plaintiff in error.

Edwin A. Austin (E. G. Wilson, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The garnishment proceedings in this case were taken and the rights of the parties were adjudicated in the court below under chapter 151 of the Laws of Kansas of 1889 (2 Gen. St. Kan. 1897, c. 95, §§ 227-247). The two questions presented and decided in that court were: Does the service of a notice on the garnishee by the plaintiff that he elects to take issue on his answer, and will maintain him to be liable as garnishee, put the allegations of his answer at issue,

and entitle the plaintiff to a trial of his action against the garnishee, under section 232? And is the plaintiff entitled to maintain garnishment proceedings upon a judgment or decree before the issue of an execution thereon, under section 228 of these statutes? Counsel for the defendants in error seek in this court to avoid a consideration of these questions upon various grounds, which are entitled to little consideration. They say that the judgment below should be sustained because the bond in garnishment filed in April, 1897, recited that an order of garnishment had already been issued, while the affidavit for garnishment upon which the summons was issued was not filed until September 13, 1897. But the bond was approved by the clerk of the court, the garnishee summons was issued and served on the garnishee and the defendants, the case against the defendants was tried, and judgment was rendered against two of them, and the action between the plaintiff and the garnishee and the defendants then proceeded to judgment, without any objection or exception to the bond; and it is now too late for them to object to such judgment for the insufficiency of security, which the court could have permitted the plaintiff to remedy at any time, by giving a new or additional bond.

It is said that the judgment is right because the order of September 15, 1898, gave the defendant Imo Goodwin leave to file a bond, in pursuance of section 4299 of the Statutes of Kansas, and directed the discontinuance and discharge of the garnishment proceedings upon the giving of that bond. But the bond there given was conditioned only to pay to the plaintiff the amount of the judgment which might be recovered against the defendant Imo Goodwin, and it had no effect to discharge the garnishee from his liability on account of property or money in his control belonging to the other defendants in the action.

It is contended that the judgment in favor of the garnishee rendered on August 30, 1899, cannot be reviewed, because it was a part of the judgment against the defendants rendered on June 9, 1899, and the writ of error was not sued out until more than six months after the latter date. But section 238, c. 95, of the Statutes of Kansas provides that:

"The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant and all the provisions for enforcing judgment shall be applicable thereto; but where the garnishment is not in aid of an execution no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and if the defendant have judgment the garnishee action shall be dismissed with costs."

The action against the garnishee, therefore, was a separate civil action, which it was necessary to try at a different and subsequent time from that occupied by the trial of the main case against the defendants, and judgment in it was necessarily rendered at a later date. The plaintiff in error had a right to challenge the judgment against the garnishee by a writ of error within six months after its rendition, and he has done so.

It is said that the judgment in favor of the garnishee cannot be here reviewed, because it was not superseded under section 1007 of the Revised Statutes, and because the statutes of Kansas provide that a petition in error to review an order discharging or modifying an attachment or temporary injunction must be filed within 30 days after the date of the order, to prevent the latter from becoming operative. Gen. St. Kan. 1897, c. 95, § 595. But the failure to supersede a judgment or to stay the process upon it, under section 1007 of the Revised Statutes, in no way affects the right of the plaintiff in error to a review of the proceedings which resulted in it, or to its reversal; and the statute of Kansas to which reference is made is not applicable to proceedings by writ of error or by appeal in the federal courts, because congress has established a complete system governing their action in that regard. *Logan v. Goodwin* (C. C. A.) 101 Fed. 654.

Finally it is contended that the plaintiff was not entitled to any garnishment proceeding under chapter 151 of the Laws of Kansas of 1889, because that chapter was not in force in 1873, when sections 915 and 916 of the Revised Statutes of the United States were last enacted. These sections read:

"Sec. 915. In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy.

"Sec. 916. The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

The argument is that the remedy by garnishment which was provided by the laws of the state of Kansas in 1873, when section 915 was last enacted, consisted of sections 200-219, c. 80, of the Compiled Laws of Kansas of 1879, and that the plaintiff has not proceeded in accordance with the provisions of those statutes. Counsel for the defendants in error inform us in their brief that they have searched the records of the court below, and that they have found no rules by which that court has adopted the Kansas act of 1889. But the first question presented in this case does not arise under these sections of the statute, but is a question of pleading and practice, governed by section 914, which provides that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record

of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

The question whether or not the notice served upon the garnishee put his answer in issue was a question of pleading and practice, which was governed by the Kansas act of 1889, which existed and was in force at the time of the trial below. Moreover, the question whether or not a federal appellate court shall presume, in the absence of evidence, that some ancient statute, which the industry of counsel has discovered, but which was not presented to or considered by the trial court, was the true guide for its action, has already been considered in this court. *Bank v. Farwell*, 56 Fed. 570, 6 C. C. A. 24, 12 U. S. App. 409. We cannot be blind to the fact that it is the universal practice of the federal courts to grant such relief and to administer such remedies as are prescribed and allowed by the statutes of the states at the time when the relief and the remedies are sought. When parties seek attachments, garnishments, executions, provisional remedies of various kinds, in the courts of the United States, it is not the habit of counsel or of the court to search the statutes of a quarter of a century ago, and to conform the proceedings of the federal courts to those then in force in the courts of the several states, but they adopt and use the remedies prescribed by their state statutes in force at the time they act. A general and uniform practice becomes a general and established rule of the court, and in the absence of convincing evidence to the contrary the presumption in the appellate court is that the remedial statutes in force in the states at the time when proceedings under them were taken in the federal courts had been adopted by those courts, either by written rule or by general practice. This brings us to a consideration of the questions considered and decided in the court below.

The General Statutes of Kansas of 1897 (chapter 95) provide that, upon the filing of a proper affidavit and undertaking, a garnishee summons shall be issued by the clerk, and served upon the defendants and the garnishee (section 230); that within 20 days from the service of such garnishee summons the garnishee may file with the clerk of the court his affidavit; and that "the proceedings against such garnishee shall be deemed discontinued, and the plaintiff shall pay the garnishee two dollars for his costs, unless within twenty days thereafter the plaintiff serve notice on such garnishee that he elects to take issue on his answer as garnishee, and will maintain him to be liable as garnishee; in which case the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the petition and the garnishee's affidavit the answer thereto." Section 232. The court below refused to permit the plaintiff to prove that he served the notice prescribed by this statute upon the garnishee, and held that the latter's affidavit was conclusive of the truth of the facts therein stated, and that the plaintiff had no right to a trial of the issue which his affidavit and the affidavit of the garnishee presented. There is no opinion of the court in the record, but it is said that the ground of this decision was that the notice to the garnishee, and the proof of the service thereof, had never been filed in the court. But the parties to this

proceeding had no guide but the statute. The plaintiff could obtain his summons in garnishment and frame his issue in no other way than that prescribed by the statute. That statute provided that when the garnishee had filed his affidavit the plaintiff should be entitled to a trial of the issue presented by his own affidavit and that of the garnishee, on the sole condition that he served a notice on the garnishee that he elected to take issue on his answer within 20 days after it was filed. The plaintiff complied with the statute. It was not the province of the court, after he had done so, to affix other conditions to his right to a trial, and to deprive him of it because he had not complied with them. The statute declared that the plaintiff took issue with the garnishee, and was entitled to a trial of his issue if he served his notice. The decision of the court that he took no such issue, and could have no such trial unless he had also filed his notice, was in effect a repeal of the statute, because it declared that the service of the notice made no issue, and entitled him to no trial. It is said that it would be more convenient to have the notice and proof of service filed in the court, and that in no other way could the defendants surely learn whether or not the plaintiff had joined issue upon the answer of the garnishee. So it would be more convenient for the defendants to have the notice to the garnishee served upon them as well as upon the garnishee. These may be pertinent criticisms of the statute, well worthy the consideration of the legislature, which alone has the power to repeal or modify it. But the answer to them in this judicial proceeding is that the duty of the courts is to enforce, and not to modify or repeal, the acts of the legislative department of the government. In this proceeding the statute of Kansas controls, and it does not require the service of this notice on the defendants, or its filing in court. The only condition it attached to a right to a trial of the issue presented by the affidavits of the plaintiff and the garnishee was the service of the notice on the garnishee, and the plaintiff complied with that condition, and thereby secured his right to a trial of his case. The service of the notice by the plaintiff upon the garnishee that he elects to take issue on his answer under section 232, c. 95, of the General Statutes of Kansas of 1897, entitles him to a trial of the issue presented by the affidavit in garnishment, although that notice has not been filed in the court. It was error for the court below to refuse to permit proof of the service of this notice to be made.

The other question considered and decided by the court below was whether or not a judgment creditor was entitled to proceed by garnishment after his judgment against the defendants had been rendered, and before he had issued an execution thereon. No decision of any of the courts of Kansas on this question has been called to our attention, and the statutes which determine it read as follows:

"Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person, excepting a municipal corporation, who shall be indebted to, or have any property real or personal in his possession or under his control belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner hereinafter described." Sec-

tion 227, c. 95, Gen. St. Kan. 1897. "Either at the time of the issuing of the summons, or at any time thereafter before final judgment in any action to recover damages founded upon contract, express or implied, or upon judgment or decree, or at any time after the issuing in any case of an execution against property and before the time when it is returnable, the plaintiff or some person in his behalf may file with the clerk an affidavit stating the amount of the plaintiff's claim against the defendant or defendants over and above all offsets, and stating that he verily believes that some person, naming him, is indebted to or has property, real or personal, in his possession or under his control belonging to the defendant (or either or any of the defendants) in the action or execution, naming him, and that such defendant has not property liable to execution sufficient to satisfy the plaintiff's demand, and that the indebtedness or property mentioned in such affidavit is to the best of the knowledge and belief of the person making such affidavit not by law exempt from seizure or sale upon execution." Section 228. "The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions for enforcing judgments shall be applicable thereto; but when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and if the defendant have judgment, the garnishee action shall be dismissed with costs." Section 238.

The question is whether section 228 provides for garnishment proceedings in three classes of cases, viz. in actions upon contract before judgment or decree, in all actions after judgment or decree before execution is issued, and in all actions after the issuing of an execution and before the time it is returnable, or in only two classes of cases, to wit, in actions upon contract, express or implied, or upon judgment or decree before final judgment, and in all actions after the issuing of an execution, and before the time when it is returnable. The section in question is not very clear, and is perhaps susceptible of either construction. But the following considerations lead us to the conclusion that the latter is the correct view: In the first place, the natural grammatical construction of the section leads to the conclusion that the words "upon judgment or decree therein" modify the word "founded," and that the intention of the legislature was to say that, before final judgment, garnishee proceedings could be had in any action that was founded upon contract, express or implied, or that was founded upon judgment or decree. In the second place, if the construction of the statute were that garnishment proceedings could be instituted at any time upon judgment or decree, there would be no occasion for the provision which follows, to the effect that they may be instituted at any time after the issuing of an execution, and before the time when it is returnable, and the presumption is that the legislature did not make the latter provision without reason. Again, the provision of the section relative to the affidavit is that the plaintiff, or some one in his behalf, shall make oath that he believes that some person is indebted to, or has property belonging to, the defendant in the action or execution, not in the action, judgment, or execution; and this seems to indicate that the legislature contemplated that there were only two classes of cases in which the proceedings might be instituted, to wit, in the action before judgment, and in aid of the execution after it had been issued upon judgment. This view finds strong support in the provision of section 238 to the ef-

fect that when the garnishment is not in aid of an execution no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action. If garnishment proceedings might be instituted after a final judgment, and before an execution issued, there is no reason why there should not be an immediate trial of that action in garnishment; and the fact that only two classes of cases are provided for in this section—those in which no trial can be had until the plaintiff shall have judgment in the principal action, and those in which the garnishment is in aid of execution—strongly indicates that these are the only cases in which garnishment proceedings are authorized under sections 227 and 228 of this chapter. In view of the provisions of the various sections of this statute to which we have referred, our conclusion is that a plaintiff is not entitled to proceed by garnishment under them after he has obtained his judgment or decree against the defendant or defendants, and before he has caused an execution to be issued thereon. There was, therefore, no error in that portion of the judgment of the court below which vacated and quashed the garnishment proceedings of June, 1899. The judgment is reversed, and the case is remanded to the court below, with instructions to proceed to the trial of the issues in the garnishment action instituted in September, 1897, in conformity with the views expressed in this opinion, and to dismiss the garnishment proceedings instituted in June, 1899.

BUDGE v. UNITED SMELTING & REFINING CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 595.

SALES—CONSTRUCTION OF CONTRACT TO FURNISH TIMBERS FOR MINES—MEASURE OF QUANTITY.

Plaintiff contracted to furnish to defendant, a mining company, "all the mining timbers required and used" at its mines during a year, to be of certain specified dimensions, and delivered at either of three tunnels as requested, and in quantities as designated, by defendant. Defendant, on its part, agreed to pay a specified price for the timbers of a certain dimension, "about 600," and other prices for smaller timbers, depending on the place of delivery, "about 15,000." *Held*, that the covenant of the plaintiff to furnish all timbers "required and used" in the mines did not make the quantity so used the measure of the quantity defendant was required to take and pay for, so as to render its acceptance and use of but 15 of the larger timbers and 2,000 of the smaller a fulfillment of the contract on its part, where the full quantity had been procured by plaintiff, and was ready for delivery, but that it was bound by its own covenant to take and pay for the full quantity of 600 of the one dimension, and 15,000 of the other, without any material variation.

In Error to the Circuit Court of the United States for the District of Montana.

The plaintiff in error seeks to review a judgment which was rendered against him upon a demurrer to his complaint. In the complaint he alleged, in substance, the following facts: That on November 24, 1897, the plaintiff and the defendant entered into a contract, as follows: "That the party of the first part [the plaintiff] agrees to furnish to the party of the second part

[the defendant] all mining timbers required and used by the party of the second part on the Broadwater Mines lease at Neihart, county of Cascade, and state of Montana, during the year A. D. eighteen hundred and ninety-eight (1898). All mining timbers to be in the following dimensions: 8" to 10", 10" to 12", 12" to 14", at the small end, and sixteen (16) feet long. All lagging or cribbing to be from 4½" to 5½" at small end, and sixteen (16) feet long. The party of the first part agrees to deliver any or all of the above-mentioned mining timbers to tunnels Nos. 2, 3, and 8, as designated on the maps of the party of the first part, and in the sizes and quantities as required by the party of the second part. The party of the first part agrees to deliver to the party of the second part all the lagging or cribbing, the dimensions hereinbefore mentioned, at tunnels Nos. 2, 3, and 8, and said lagging or cribbing to be delivered as requested at the tunnels mentioned, and in quantities designated by the party of the second part. The party of the second part agrees to pay to the party of the first part for all the mining timbers from 8" to 10", 10" to 12", 12" to 14", at the small end, and sixteen (16) feet long, six cents per linear foot, about six hundred. For all lagging or cribbing received by the party of the second part, as follows:

Tunnel No. 2, price per piece, thirty (30) cents	} about 15,000.
Tunnel No. 3, price per piece, twenty-five cents	
Tunnel No. 8, price per piece, twenty (20) cents	

—The party of the first part agrees to take the count and measurements of the party of the second part, or their agent." That immediately after the execution of the contract the plaintiff employed a large number of men and teams to carry out the contract on his part, and proceeded to cut and haul six hundred mining timbers of the size and dimensions named in the contract, and fifteen thousand pieces of cribbing and lagging, as therein provided, and at great expense transported the same to Neihart, and there had the same ready for delivery to the defendant as provided in the contract, and that he fully performed said contract upon his part, but that the defendant received from the plaintiff only fifteen of the mining timbers, and two thousand of the pieces of lagging and cribbing, and refused to receive the remainder, to the plaintiff's damage in four thousand dollars.

Ransom Cooper and I. Parker Veazey, for plaintiff in error.

Toole, Bach & Toole, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The ruling of the circuit court in sustaining the demurrer was based upon the case of *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622,—a case in which the court was required to construe a contract to furnish cord wood for an army post. The view which the court took of the contract in that case is set forth in the language of the opinion as follows:

"The contract was not for the delivery of any particular lot or any particular quantity, but to deliver at the post of Fort Pembina eight hundred and eighty cords of wood, 'more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with army regulations, of the troops and employes of the garrison of said post, for the fiscal year beginning July 1, 1871.' These are the determinative words of the contract, and the quantity designated—eight hundred and eighty cords—is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. The substantial engagement was to furnish what should be determined to be necessary by the post commander for the regular supply for the year, in accordance with army regulations."

The contract which is under consideration in the present case, while similar in some respects to that in the *Brawley Case*, contains

covenants upon the part of the defendant which are sufficient to except it from the governing principle of that decision. The covenant on the part of the plaintiff was to furnish all mining timbers "required and used" by the defendant for the year, and all lagging or cribbing timber. The provision that the latter should be delivered as requested "at the tunnels mentioned," and "in the quantities designated," by the defendant, has reference only to the place and method of the delivery, and not to the total quantity required and used. The defendant, upon his part, covenanted to pay the plaintiff for all mining timbers, "about six hundred," and for all lagging and cribbing received by him, "about fifteen thousand." Here is a distinct promise to receive and pay for about 600 pieces of one kind of timber, and 15,000 of another. The qualification imported by the word "about" is not such as to admit of any material variation from the quantity named. Said Mr. Justice Bradley in *Brawley v. U. S.*:

"The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight."

The plaintiff, relying upon this covenant of the defendant, according to the allegations of the complaint, performed his part of the contract. He cut and prepared and had ready for delivery 600 pieces of the one class and 15,000 of the other class of timber, as specified in the contract. The defendant declined to receive more than 15 pieces of the first, and 2,000 of the second. Is he to be released from his contract because the plaintiff, by the terms of the contract upon his part, stipulated to furnish him such timbers as should be required and used by him during the year, and because but a small proportion of the whole amount was in fact used? We think he must be held by the terms of his own covenants to pay for 600 of the one and 15,000 of the other kind of timber, as specified in the contract. The determining words of the contract are the quantities of timber which are specified in the defendant's promise to pay, and not the words "all mining timbers required and used," contained in the plaintiff's covenants. The contract was not one in which the quantity of material to be delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the contracting parties had in mind the construction of a particular work, and the supply of the necessary material therefor; the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated. We may assume from the complaint that the defendant alone had knowledge of the number of pieces of timber he would require. He expressed that knowledge in definite figures in the agreement, and for the quantity thus expressed he promised to pay. The plaintiff, upon his part, has in good faith complied with his contract, and furnished the specified quantity. It would not only be unjust, but contrary, we think, to the fair intendment of the terms of the contract, to deny him his right to recover. The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with the foregoing views.

THOMPSON v. NORTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 597.

APPEAL.—REVIEW.—INSTRUCTIONS.

Where the charge of the court, as a whole, fairly presented to the jury the law applicable to the evidence, isolated sentences will not be considered by the appellate court, apart from their context, for the purpose of determining assignments of error thereon.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

William Martin, for plaintiff in error.

Crowley & Grosscup, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action for personal injuries alleged to have been sustained by Thomas A. Thompson, in whose behalf the action was brought by his guardian, by reason of the negligent operation of an engine on the railroad of the Northern Pacific Railroad Company. The case has once before been here, and is reported in 35 C. C. A. 357, 93 Fed. 384. The accident occurred on a bridge of the railroad company, constructed on Hood street, in the city of Tacoma, at its intersection with Fifteenth street. The bridge is built over Fifteenth street at such a height as to admit of the passage of teams, as well as foot passengers, under it. On its top were constructed three railroad tracks, separated by a solid wood fence about three feet high, extending the entire length of the bridge. Along the tracks that crossed the bridge, people were accustomed to travel on foot, with the knowledge, acquiescence, and license of the railroad company. Plaintiff in error had for many months prior to his injury been accustomed to pass along them in going to and from his work. He knew that trains and engines of the company were constantly passing over the tracks, and consequently that it was a place of danger. The accident occurred as he was going to his work one morning about 7 o'clock. A number of workmen were crossing the bridge at the time, and one—a man named Larson—was walking with plaintiff in error, but on another track. The plaintiff was walking along the left side of the middle track when he was struck. The engine that inflicted the damage approached from his rear. The evidence is decidedly conflicting as to whether warning of the approach of the engine was given by those in charge of it, and there is also some conflict in the evidence in other respects. Upon the first trial the trial court directed the jury to render a verdict for the defendant. The judgment was reversed for that reason, the court here holding that the case was one that should have been submitted to the jury under appropriate instructions. Upon the last trial the case was so submitted, and resulted in a verdict for the defendant, and is now brought here by writ of error solely because of alleged errors in the giving and refusal to give cer-

tain instructions. We have attentively read the instructions of the court below given to the jury, and are of opinion that, taken as a whole, they fairly covered all phases of the law applicable to the case made by the evidence. It is not permissible to select isolated sentences from the instructions, and consider them apart from the context. The instructions are certainly much more voluminous than was necessary, but that fact seems to have been occasioned by the requests of counsel. Taken as a whole, we think the instructions fairly presented to the jury the law applicable to the evidence, and that such instructions requested by the plaintiff in error which were refused, and which were otherwise unobjectionable, were covered by the instructions already given by the court. The judgment is affirmed.

PELLET et al. v. MANUFACTURERS' & MERCHANTS' INS. CO. OF
PITTSBURG, PA.

(Circuit Court of Appeals, Seventh Circuit. October 19, 1900.)

No. 663.

1. CONTRACT—CONSTRUCTION—BREACH.

Defendant, an insurance company, contracted with plaintiffs, who constituted a general insurance agency, constituting plaintiffs its general agents to have charge of all its business in certain states for a term of three years; plaintiffs to receive as compensation commissions on the business done. *Held*, that the contract was in effect one for the employment of plaintiffs as brokers, and, in the absence of express provision therefor, did not deprive defendant of the right to discontinue its business in all or any of the states named during the term, if in its judgment advisable, and that such discontinuance did not constitute a breach of the contract which would afford a basis for the recovery by plaintiffs of the prospective commissions they would have earned had the business been continued, as damages, whatever might be their right to recover for expenses incurred in reliance on the contract, or for loss of commissions on business already secured. Per Grosscup, Circuit Judge.

2. DAMAGES—BREACH OF CONTRACT—EVIDENCE.

Plaintiffs brought an action against defendant, an insurance company, to recover for breach of a contract by which plaintiffs were constituted general agents of defendant to have charge of its business in certain states for a term of three years, and to be paid by commissions on the business done. The breach alleged was the discontinuance by defendant of its business before the expiration of the term. The evidence introduced by plaintiffs to establish their damages consisted of statements showing the commissions earned under the contract prior to the alleged breach. It was also disclosed by their evidence that they represented other companies during the same time, that the expense of conducting their business was large, and that they secured the agency for another company as a substitute for defendant prior to and in anticipation of the alleged breach; but it did not appear what proportion of their expenses was properly chargeable to the business of defendant, nor what commissions were earned from the substituted company. *Held*, that such evidence was insufficient to furnish any measure of damages, conceding the breach of contract, and that prospective commissions estimated from past earnings could not be considered as an element of damages. Per Seaman, District Judge.

3. CONTRACT—ACTION FOR BREACH—ACCRUAL OF RIGHT OF ACTION.

An action to recover damages for breach of a contract of employment, brought while the employment still continues, before there has been any

actual breach, and before it is known whether any actual damages will result, is premature, and the plaintiff is not entitled to recover even nominal damages. Per Seaman, District Judge.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

The action in the Circuit Court was in assumpsit by the plaintiffs in error against the defendant in error, to recover damages for alleged breaches by the defendant in error of three certain agreements hereinafter referred to.

The plaintiffs in error, composing the firm of Pellet and Hunter, have been, ever since 1885 or 1886, and were at the times of the signing of the said agreements, and the bringing of the action below, engaged in a general fire insurance business, conducting and operating in such business a general agency throughout eight or nine states in the north west, and a local agency in Chicago. In the maintenance of said business they have, during said period, at their own expense, kept offices in the City of Chicago fully equipped for the transaction of their business, including clerks, stenographers, salaried special agents, and local agents, paid by percentage at various points throughout the field of their general agency, and other employes. In addition to the defendant in error, represented by plaintiffs in error under said agreements, the plaintiffs in error represented, as general agents, throughout the field of the north west five or six other companies, all of whom maintained their relations with the plaintiffs in error before, and after, the time of the alleged breaches of the said agreements by defendant in error.

The contract between the plaintiffs in error and the defendant in error, dated October 1st, 1897, is in the words and figures following:

"Agreement made this first day of October, A. D. 1897, by and between the Manufacturers' & Merchants' Insurance Company of Pittsburgh, Pa., and R. J. O. Hunter and Clarence S. Pellet, composing the firm of Pellet & Hunter, of Chicago, Illinois, Witnesseth:

"First. The said Manufacturers' and Merchants' Insurance Company does hereby appoint said Pellet & Hunter as General Agents in the territory hereinafter named, with full power and authority to appoint and remove agents and generally to conduct the business of said company under its instructions, within that territory.

"Second. The General Agency hereby created shall cover the entire states of Illinois, Michigan, Wisconsin, Missouri, Iowa, Nebraska, Ohio, Minnesota and Colorado, and all risks written by said Company on property within such states shall be written in or reported through the office of said Pellet & Hunter, at Chicago, Illinois.

"Third. The said Manufacturers' & Merchants' Insurance Company shall furnish whenever requested, full and complete statements, copies of charter and all documents, necessary to enable the said General Agents to enter said company for business in any of the states above named; the time of filing such papers, however, being left at the discretion of the said Pellet & Hunter.

"Fourth. The said Pellet & Hunter are to give all necessary and proper supervision to the business of said Company in their territory, and in person or by competent representatives to make thorough inspection from time to time of the risk reported to them from the various agents;—and shall forward to said Manufacturers' & Merchants' Insurance Company of Pittsburgh, Pa., with reasonable promptness, copies of all daily reports and endorsements received from agents and originals of their own business (the originals from agents to be kept in the office of Pellet & Hunter) and shall forward regularly—not later than the 27th day of each month—a detailed statement of the account of the business of such agency for the preceding month, and they shall be responsible for all premiums collected by agents appointed by them, and they shall make remittance to the said Company of the balance shown by such monthly statement to be due from them, not later than sixty days after the month for which such account is made up.

"Fifth. The said Pellet & Hunter shall retain during the existence of this contract a commission of thirty-three and one-third per cent. (33 $\frac{1}{3}$ %) on all net gross business reported through or by their office (by net gross business,

is meant premiums, less return premiums and all reductions by re-insurance) and in consideration of the sum so retained, they shall pay and bear all expense for supervision and inspection commissions to agents; all state, county and city taxes; all fees and charges of all state or municipal departments; adjustment expenses; and all other expenses and charges whatsoever, except only legal expenses in cases of litigation and the necessary blanks and forms for the proper carrying on of the business; and the balance, if any, of the said 33 $\frac{1}{3}$ % shall be retained by them as full compensation for their services as such General Agents. The said forms and blanks to be furnished at the expense of the said Manufacturers' & Merchants' Insurance Company—provided, however, that the said Pellet & Hunter shall be further entitled to a contingent commission of ten per cent (10%) on the net profits derived by the Company from their General Agency during the year ending September 30th, 1898, and each succeeding year, to be ascertained and paid after settlement of losses incurred during the year and after deducting the aforesaid 33 $\frac{1}{3}$ % and all other expenses paid for blanks, supplies and other matters pertaining to said General Agency, provided further, that if there shall be any unsettled losses by reason of dispute or litigation, such losses shall be treated as settled at the amount claimed by the assured, and so figured in determining the amount of contingent commission due said Pellet & Hunter and any difference in final settlement of said disputed or contested losses shall be added to or deducted from the losses of the succeeding year.

"Sixth. This contract shall continue for the term of three (3) years from the 30th day of September, A. D. 1897, provided however, that if at the expiration of the first year of its continuance, either party may desire to revoke or annul this contract, they shall have the right so to do, by giving to the other three months' written notice of their election so to do, and at the expiration of the date fixed in such notice, this contract shall cease and determine; such election to be made and such notice to be given, however, within ten (10) days after the expiration of the first year, or this contract shall again continue in full for a year, subject to a like revocation (in the manner as above provided) at the end of the second year."

A contract known as the "Five Companies Agreement," dated March 22nd, 1897, and the supplement thereto, executed March 19th, 1898, were substantially the same as the foregoing, except that the commission was fixed at thirty-three per centum instead of thirty-three and one-third per centum, and that they were to continue for three years from January 1st, 1897.

April 4th, 1899, the following agreement was entered into between the defendant in error and the Fidelity Insurance Company of Baltimore:

"That for and in consideration of the mutual covenants and agreements hereinafter expressed and set forth the said parties hereto have covenanted and agreed as follows, that is to say:

"First: Said Fidelity Company hereby reinsures and assumes at and from the hour of twelve o'clock noon (standard time) of Saturday, the first day of April, in the year eighteen and ninety-nine (1899), all outstanding policies and risks of said Manufacturers' Company, for insurance against loss or damage by fire or lightning on any property located in any part of United States of America or Canada, and the said Fidelity Company hereby assumes any and all liabilities under any and all outstanding policies or risks heretofore written by said Manufacturers' Company and for any and all policies or risks which may be written or undertaken by said Manufacturers' Company in pursuance of clause five of this contract.

"Second: In consideration of such reinsurance said Manufacturers' Company agrees to pay to said Fidelity Company, in the manner and at the time hereinafter specified, the full unearned gross pro rata premium on all policies in force as of April 1st, 1899, less sixty (60) per cent thereof, which said deduction is to cover all commissions and expenses incurred by said Manufacturers' Company in connection with said policies or risks.

"Third: Within fifteen days after the date of this agreement or contract of re-insurance, said Manufacturers' Company agrees to make a cash payment of and to pay forty thousand dollars to the said Fidelity Company on account of said unearned gross pro rata premiums provided to be paid by said Manufacturers' Company to said Fidelity Company in the next preceding

clause of this agreement and the said Manufacturers' Company hereby agrees to pay the balance of said entire amount of such unearned gross pro rata premiums to the said Fidelity Company on the completion of the computation of the total amount thereof, provided said payment shall be made by said Manufacturers' Company not later than the first day of May, 1899.

"Fourth: And said Manufacturers' Company hereby agrees and undertakes to furnish to said Fidelity Company complete schedules or bordereaux of all outstanding policies of said Manufacturers' Company, on forms to be supplied by said Fidelity Company, which schedules or bordereaux shall be completed and furnished and delivered to said Fidelity Company on or before the first day of May, 1899, and it is hereby expressly and mutually understood and agreed between the parties hereto that said schedules or bordereaux shall be complete and accurate in all particulars, according to said form, and that said Fidelity Company shall not assume or be liable under any Policy or Policies omitted from or not set forth on said schedules or bordereaux nor shall said Fidelity Company be liable under any policy for or in any greater amount or for any longer period or term than may be set forth on said schedules or bordereaux.

"Fifth: It is agreed that the said Manufacturers' Company may and shall continue to issue its policies and do business in its own name until the first day of May, 1899, but all business so done or policies so written, shall be on account of, for the benefit of, and under the direction of the Fidelity Company or its duly authorized agent; and it is agreed that the Fidelity Company shall assume all expenses incurred by said Manufacturers' Company in connection therewith and that it shall also pay all local state and national taxes incident thereto, and that all risks and policies written in pursuance of this section of this agreement shall be and are hereby re-insured by said Fidelity Company as provided in Section 1 of this agreement.

"Sixth: The Manufacturers' Company hereby agrees to retire from business on the first day of May, 1899, and it agrees to wind up its business and affairs and to dissolve itself as an active going concern as soon thereafter as may be; and said Manufacturers' Company further agrees to transfer and deliver to said Fidelity Company all its good will, right, title and interest in and to its business, daily reports, endorsements, registers and books of record; but the office fixtures and furniture and other property of said Manufacturers' Company not herein specified shall remain the property of said Manufacturers' Company.

"Seventh: It is further agreed that the Manufacturers' Company shall pay all local, state and national taxes of any and all kind accrued or accruing, or which may be payable or which may apply to or on the business reinsured by this contract, and taken over as of the first day of April, 1899; and that the said Fidelity Company shall not be liable for or be held for the same in any way, manner or form, it being understood and agreed that this clause of this contract refers and applies only to taxes accrued or accruing as hereinbefore set forth, on or before the first day of April, 1899, and that said Fidelity Company shall be liable and held for and pay all such taxes accrued and accruing after the first day of April, 1899.

"Eighth: In case default shall be made by said Manufacturers' Company in making any of the payments provided for in this contract, or in performing any of the obligations herein assumed, this contract shall become null and void, and the said Fidelity Company shall be released from any and all liability hereunder and shall be entitled to rescind the same.

"Ninth: It is further expressly understood and agreed between the parties hereto, that this contract shall only be effective as between the parties hereto, and that no holder of any policy in the Manufacturers' Company shall be entitled to enforce this contract as against the Fidelity Company, it being understood that any and all holders of policies of the Manufacturers' Company shall prosecute according to the usual course of business against said Manufacturers' Company, any and all claims arising under said policies and the Fidelity Company hereby agrees to pay all such claims legally arising and duly proven, and further, in case of any contest arising in connection with, or suit being brought for or on any such claim, said Fidelity Company agrees to defend the same and pay all costs and expenses incident thereto.

"Tenth: It is further agreed that all reinsurance and contracts or policies of reinsurance which said Manufacturers' Company has heretofore effected with other Insurance Companies, for the purpose of reducing its liabilities, shall be transferred to said Fidelity Company; and said Manufacturers' Company hereby agrees and undertakes to execute any and all proper instruments of transfer or assignment of the same; but in case any company so reinsuring objects to such transfer, then said Manufacturers' Company agrees and binds itself to cancel such reinsurance and to pay to said Fidelity Company the unearned premium thereof."

On the same day, April 4th, 1899, the defendant in error wrote to the plaintiffs in error as follows:

"This company has been purchased by the new Fidelity Ins. Co. of Baltimore, Md., Capital \$500,000, Surplus \$250,000, and policies will be guaranteed by same. Vice President Ammon and myself remain with the company without change.

"Mr. Barry, the President, is here and desires that the agents be advised to continue to write conservatively and give us lines on good dwellings and other preferred classes, a compliance with which, and push for profitable business will be considered as a personal favor by Mr. Ammon and myself."

The plaintiffs in error, on the 6th of April, 1899, replied as follows:

"We beg to acknowledge receipt of your favor of the 4th inst., advising us of the re-insurance of the Manufacturers' & Merchants' Insurance Company in the 'Fidelity Fire' of Baltimore, and as the effect of this and other acts of the company has been a virtual repudiation and abandonment on the Company's part of its contract with us as General Agents and destroys the value of said contract, we wish to notify you that we consider and treat said contract as having been terminated by your acts, so far as performance of it is concerned, and as continuing in force only for the purpose of enabling and entitling us to sue for such profits as we would have realized had we not been prevented by the Company's said acts from performance of the contract.

"We have no contract with the Fidelity Fire Insurance Co., and while they have acquired the business of the 'M. & M.' by re-insurance we cannot recognize that fact as carrying with it our contract with the 'M. & M.'"

"As you intimate in your letter a desire on the part of the 'Fidelity Fire' to have 'M. & M.' Agents continue to issue that Company's Policies, we have advised agents of our action aforesaid as General Agents and requested them to report all business written after the receipt of our notice to them to the office of the Company at Pittsburgh.

"All transactions up to this date will be closed up at the earliest possible moment. As our Local Agency Department in Chicago is involved with our General Agency Contract, we shall consider that as likewise terminated as far as performance is concerned, but as continuing for the purposes of recovering lost profits, and will ask you to kindly advise us by special instructions as to your wishes concerning future endorsement cancellations, losses and such matters.

"We desire also to notify you that the foregoing acts and statements apply equally to the agreement of March the 22nd, 1897, and an amendment thereto of March the 19th, 1898, providing for the issuing of Joint or Underwriters of Pennsylvania Policies, and that so far as the Manufacturers' and Merchants' Insurance Company is concerned we consider that contract as likewise terminated by your acts aforesaid, so far as performance of it is concerned, but as continuing in force only for the purpose of recovery of lost profits.

"We regret the outcome of this matter, but the treatment which we received growing out of the sale and re-insurance of the Company, the lack of consideration shown us and the utter ignoring of our rights or interests under our contract by the Company, leave us no alternative but the one above indicated."

To this the defendant in error, April 8th, 1899, replied as follows:

"It seems you do not understand the situation, or did not receive letter of the 4th inst. stating 'This Co. has been purchased by the new Fidelity Ins. Co. of Baltimore, Md., Capital \$500,000, Surplus \$250,000, and Policies will be guaranteed by same. Vice Prest. Ammon and myself remain with the Company without change. Mr. Barry, the President, is here, and desires that the agents be advised to continue to write conservatively and give us lines on good

dwellings and other preferred classes, a compliance with which, and push for profitable business will be considered as a personal favor by Mr. Ammon and myself.'

"You were fully advised of all that is known in the matter; the Co. is continuing, has never advised discontinuance. Haven't the stockholders a right to dispose of their stock, and purchasers a right to it and I see no valid reason for saying contract is violated. I was at meeting of Co.'s interested in Underwriters, and there has been nothing done as yet to disturb existing arrangements. Of course, if outsiders can stampede the business it is their interest to do so. The intent of purchaser of business is to keep on in old way, so personally I think there is a mistake."

Treating this course of affairs as a renunciation and abandonment of the agreements by the defendant in error, the plaintiffs in error, April 18th, 1899, brought the action below.

After introducing the foregoing, with other correspondence not necessary to set out, plaintiffs in error, to show damages, submitted evidence tending to show that the net amounts coming to the plaintiffs in error, under the commissions provided for in the agreements, were, for the preceding years, as follows:

1894	\$9850.39
1895	9130.70
1896	8034.30
1897	6006.60
1898	5234.67
And for three months preceding the bringing of the suit a loss of	108.79

Like evidence was submitted showing that under the Five Companies Contract the plaintiffs in error received for 1897, \$826.40, and for three months in 1899 sustained a loss of \$28.

The evidence disclosed that in arriving at these amounts there was charged against commissions provided for in the agreements the following: Department taxes, fees and certificates; state taxes; advertising statements; city taxes; fire department taxes; board and compact expenses; patrol taxes; city licenses; commissions to agents, and other deductions by agents; and adjustment expenses.

It was shown that the clerical expenses of conducting the business of the plaintiffs in error ran from thirteen thousand to sixteen thousand dollars a year; that the office rent was from four thousand seven hundred to four thousand seven hundred and fifty dollars a year; and that there were other expenses the figures of which were not given. The total expense was said by one of the plaintiffs in error to have been probably thirty thousand dollars.

These figures, relating to clerical expenses, office rent, etc., did not enter into the calculation of damages upon the theory of the plaintiffs in error, and were rejected by them in the court below, and in this court, as having no pertinency to the question of damages.

No evidence other than has been given, relating to damages, was submitted. At the conclusion of the evidence submitted by the plaintiffs in error the jury were instructed by the court to return a verdict for the defendant in error.

William H. Barnum, for plaintiff in error.

Frank H. Scott, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

After the foregoing statement of facts, GROSSCUP, Circuit Judge, delivered the opinion of the court, as follows:

The contract of October 1st, 1897, in substance, provided for the establishment of a general agency for the promotion of the business of the defendant in error within the territory named; appointing to

such agency the plaintiffs in error. On behalf of the general agents it was contracted that within the territory named they would supervise the business of the company; inspect the risks reported by the local agents; forward copies of all daily reports; be responsible for all premiums collected by local agents appointed by themselves; remit to the company the balances shown to be due to the company upon the monthly statements; bear all expenses of supervision and inspection; all commissions to agents; all state, county, and city taxes, fees and charges; and all other expenses and charges, except such as relate to litigation.

Upon the part of the Company it is contracted that out of the business thus done by these general agents they shall retain, as compensation for their services, during the period of the contract, a commission of thirty-three and one-third per centum on the net gross business reported through their office, and a contingent commission of ten per centum of the net profits derived by the company from this general agency.

The life of the contract is fixed at three years from the 30th of September, 1897, providing however, for an earlier discontinuance upon the giving of a designated notice.

The Five Companies' Contract of March 22nd, 1897, is, so far as the obligations between the companies and the agents are concerned, almost identical with the preceding contract, except that the commission is thirty-three per centum instead of thirty-three and one-third per centum, and that its life is fixed at three years from the 1st of January, 1897, subject to termination upon designated notice.

The plaintiffs in error conducted a general insurance agency, and represented, in addition to the defendant in error, five or six other companies. It is not claimed that, upon the strength of the making and continuance of the contracts sued upon, they enlarged their office expenses, increased their clerical force or other equipment, or in any way injuriously assumed liabilities, or made preparations, that would not otherwise have existed. Nor is it claimed, as a matter of damages, that they were in possession of, or that there afterwards came to them applications for insurance, which, in the natural order of business, the defendant in error would have accepted, had there been no discontinuance of its business. The sole injury claimed is the loss of commissions upon business, not yet in hand, but merely in expectancy, should the company, throughout the remaining period of the contract, accept, as in the past, such applications as the general agency would bring to it.

Unless, therefore, the contracts, either expressly or by implication, bound the defendant in error, throughout the period of the contracts, to a continued acceptance of such business as the plaintiffs in error might bring, irrespective of its own judgment upon the policy of diminishing or ceasing altogether such business, there exists no promise upon which the action can be predicated. The existence, in substance, of such a promise, within either the language or the implications of the agreements, lies at the basis of the right of the plaintiffs in error to complain. Can we find in the agreements, or reasonably read into them, any such promise?

A negative answer to this inquiry does not require us to hold that the defendant in error could, without suable injury to the plaintiffs in error, dismiss, before the termination of the contract, and without cause, the latter as their general agents, while continuing, through other agents, to accept business in the territory named. There may reasonably be an implication in the agreements that, throughout the period named, the plaintiffs in error shall continue as general agents, if the defendant in error continues within that territory to accept business. But an implied promise of that kind is substantially different from the supposed promise that lies at the basis of this action.

Nor is it necessary for us to hold, in answering negatively the inquiry stated, that for outlays made, and losses of commission on account of applications already obtained, in reliance upon a continuation of the relation to the end of the time stipulated, the plaintiffs in error would have no right to recover. An action for such injuries is not dependent upon the supposed promise under discussion.

We, recur, then, to the inquiry, Did the agreements bind the defendant in error, irrespective of its own judgment subsequently formed respecting the character, volume, or continuance of its business, to accept, throughout the period named, all such business as the plaintiffs in error might bring? Did the company abdicate to the general agents, except at the cost of a sum equal to one-third of its gross income from the territory named, the prerogative of determining what should be the scope of the company's business within the given territory?

The prerogative is an important one. It might well happen that, out of some consideration relating to its own policy, the company might choose to materially abridge its business within, or withdraw altogether from, the territory named. The laws of a state may become burdensome; the character of risk in a given district may change; a wise adjustment of its affairs may require a change of field of operations, or an entire liquidation of its business. Was it contemplated, in the execution of these agreements, that the judgment of the company upon these questions should be surrendered to the interests of the agents; at least that it could not act upon such judgment without continuing to compensate the agents, as if no such action had been taken? We think the agreements will bear no such interpretation.

The plaintiffs in error were, in substance, insurance brokers to the company. Their place was that of the middle-man; their office to procure for the company such risks as it was in the habit of accepting; their measure of compensation a percentage of the business done. The company bound itself to this measure of percentage, but did not bind itself that the volume of business done should be unchanged. There is nothing in the contract that shows that this vital power—the power of determining for itself the scope of its own business—is transferred from the discretion of the responsible owner, to the discretion of the brokers. An interpretation so far reaching can only rest on unmistakable expressions or implications to that end.

The language of the agreements does not justify such an interpretation. It is true that it is provided that the contract shall continue for the term of three years, subject to annulment by either party upon giving to the other three months' written notice; but, at most, this would sustain an action only for outlays made in reliance upon a continuance of the contract, or for commissions upon specific business already initiated; or possibly for commissions upon the business done within the territory through other agents than the plaintiffs in error after a causeless dismissal of the plaintiffs in error. The clause in question binds the company to a continuance of the relationship of principal and broker, and possibly to a recognition of the plaintiffs in error as the company's sole brokers, but there is no clause that wrests from the company the sole power to determine what shall be the extent of its business through these brokers in the given territory. The contract is searched in vain for the expression of any such understanding, or an implication to that effect.

A clearer conception of the cogency of this conclusion may be obtained by a look into similar relations in the other fields where brokers are employed. A broker employed exclusively to sell upon commission real estate, grain or live stock, through a given period, may insist that, if within that period sales are made through another agency, his commissions shall be paid notwithstanding. His right, in that respect, is founded upon the implied promise that he shall receive commissions upon all sales made. But if the owner of the real estate, grain or live stock chooses, in the exercise of his judgment, to retain his property, and make no sales, the broker may not recover according to the measure of his mere expectancy; for there is no implied contract that the owner shall be deprived of the right to determine when he shall sell, or how much he shall sell, or whether he shall sell at all.

We find nothing in the agreements under consideration that puts the defendant in error in any different relation to its brokers. It is bound, possibly, to them, to transact through them whatever business it may do within the territory named, and to pay them therefor the stipulated commission upon the business done; if so, it is bound, likewise, to observe these obligations through the period provided. But it is not bound, any more than is the owner of the real estate in the illustration given, to make good to the brokers what may have been their mere expectations of the business to be done. It has not made the agents its master in the control of matters that may go to the very heart of its affairs.

We are not aided in the case under consideration by *Morris v. Taliaferro*, 75 Ill. App. 182, and the line of cases of which it is an illustration, in which it is held that one employed by another for a given period at a given salary, and discharged before the period expires, has a right of action for the stipulated salary, or so much of it, at least, as he was not able to earn in other employment. Such cases proceed upon the existence of an express promise to pay a given sum of money upon the performance of a given service.

Nor are we aided by *Furnace Co. v. Magill*, 108 Ill. 656, a case in which the plaintiff agreed that he would carry during the season of

1873 from Escanaba to St. Joseph, in Michigan, for two dollars per ton seven thousand tons of ore, and from Marquette to St. Joseph for three dollars and a quarter per ton three thousand tons of ore "freight to be due and payable upon delivery of each cargo at St. Joseph." Upon the defendants' failure to furnish the ore as cargoes, though the plaintiff was ready and willing to carry them, an action for damages was brought. The court found that the transaction embodied a promise upon the part of the defendants to pay freight during that season between the points named on ten thousand tons of ore, and that the defendants' failure to pay such sum gave the plaintiff the basis for a cause of action. As in the line of cases just before referred to, there lies at the basis of this case the existence of a promise accurately measuring the extent of the defaulting party's obligation. It is the absence of just this element—a promise commensurate with the theory upon which the plaintiffs in error compute their damages—that makes the case under consideration one that can not be maintained.

In coming to this conclusion we have considered carefully *Lewis v. Insurance Co.*, 61 Mo. 534, and to the extent that that case involves the question here discussed are constrained to disapprove of it. We prefer to follow *In re English & Scottish Marine Ins. Co.*, 5 Ch. App. 737, on appeal from the Master of Rolls, in which an insurance company, having a contract with its agent similar to the one under discussion, voluntarily ceased to do business before the contract expired. A claim for the commissions having been included in an action for damages the court disallowed it, speaking through James, L. J., as follows:

"I am of the opinion that this was a contract which did not give the servant the right to determine what the extent of the business was to be. He could not call upon the directors to issue new policies or to take new risks if they were not minded to do it. He could not say, 'Such a person has brought in a policy of us and you must accept it,' because if he had a right to say, 'You must carry on business,' he would also have a right to say, 'You must carry on business in the usual and proper manner,' and that would be giving the servant the right of controlling the master in the manner in which he chose to carry on the business. Now I am quite satisfied that the meaning of this contract was nothing of the kind. It was never intended to give the servant the right of dictating as to the extent of the business, be it more or less or nothing, but he simply took the chances of the company finding it a profitable business and carrying it on."

Our conclusion respecting this question, going as it does to the whole claim made by the plaintiffs in error in the Circuit Court, dispenses with the need of disposing of the other questions presented. We hold that, upon the proofs submitted in the Circuit Court, no case for the plaintiffs in error was made out, and that, therefore, there was no error in the court's instruction for a verdict for the defendant in error.

The judgment of the Circuit Court is affirmed.

SEAMAN, District Judge. I concur in the decision to affirm the judgment rendered below in favor of the defendant, but am of opinion that other substantial grounds are presented on which it may rest,

without determining the close question whether breach of the contract in suit can be predicated alone upon the fact of the transfer of the entire business of the defendant company to the Fidelity Fire Insurance Company, and the notice thereupon given to the plaintiffs. The action was brought and all the testimony was introduced on behalf of the plaintiffs upon the theory that they were entitled to recover for the alleged breach, *prima facie* at least, a rate of compensation for their assumed earnings under the contract, during the remaining portions of its term, measured exclusively by the showing of income derived thereunder in the preceding years. Such view is clearly untenable under the authorities, but counsel for the plaintiffs insists that other evidence was produced tending to show the probability of a like amount of business in the future, on which they were entitled to go to the jury. It is a sufficient answer to this contention that no substantial evidence appears in the record to furnish even semblance of support for it. On the other hand, the case on the part of the plaintiffs disclosed at least two obstacles to any *prima facie* value of the showing thus made for measuring the damages, even on the assumption that the proofs were otherwise sufficient, namely: (1) Evidence of general expenses of the plaintiffs in conducting their agencies, aggregating about \$30,000 per annum, no part of which was included in their showing of earnings under the contract in suit, nor was any proof furnished to show the *pro rata* share which was applicable to the business transacted thereunder; (2) evidence that another insurance company was secured by them in the place of the defendant, before and in anticipation of the alleged breach, without proof either tending to show that the substituted company was not of equal value to the agency, or loss in any respect through the change. However the general rule may be as to the onus of proof for mitigating the damages, it seems clear that the plaintiffs must make the full disclosure when the fact of mitigation appears on their own side of the case, and the proof of its extent is wholly within their knowledge. Unexplained, either of these conceded facts is destructive of any presumptive value in their testimony of the amount of commissions derived under the contract prior to the breach.

Failing evidence to authorize a verdict for substantial damages, the question would remain to be considered whether the plaintiffs were nevertheless entitled to a judgment for nominal damages,—a question which arises only because the action came to the court below through removal from the state court, and thus may affect the allowance of costs. Section 968, Rev. St. This technical rule is not applicable unless the evidence on the part of the plaintiffs establishes a breach of the contract, and if the issue depended alone upon a construction of the contract, as held in the prevailing opinion, any doubt upon that point might well be resolved in favor of the judgment. But I am satisfied that other grounds of objection to the right of action are presented, which are at least equally sufficient, namely: (1) That suit was commenced while performance under the contract was continuing on the part of the plaintiffs, and under which they accepted benefits thereafter; (2) that the plaintiffs practically aban-

done the contract by accepting inconsistent obligations before the alleged act of abandonment on the part of the defendant, and when performance by the latter was neither refused nor made impossible; and, on the case as a whole, (3) that the undisputed circumstances show the action to be prematurely brought, as well as without substantial merit. Therefore the judgment is rightly affirmed.

WOODS, Circuit Judge, concurs in the result.

WALKER et al. v. HOUGHTELING.

(Circuit Court of Appeals, Seventh Circuit. October 25, 1900.)

No. 696.

APPEAL—FAILURE TO FILE BOND—POWER OF APPELLATE COURT.

Where a plaintiff in error has failed to comply with an order of the circuit court requiring him to file a bond on writ of error in a specified amount, but the writ of error has been issued and served, and the cause transferred to the circuit court of appeals, that court has power, although the time for suing out a writ of error has expired, to retain the cause, and to permit the filing of a bond in such amount as it may prescribe, but not to operate as a supersedeas.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

On Motion to Dismiss Writ of Error.

For former opinion, see 100 Fed. 253.

Otis K. Hutchinson, for plaintiffs in error.

John M. Harlan, for defendant in error.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. The defendant in error has moved to dismiss the writ of error because of the failure of the plaintiffs in error to file in the circuit court the bond required by the order of the court granting the writ. The judgment was entered on January 25, 1900, and on motion of the plaintiffs in error, the defendants below, for a writ of error to this court, it was ordered "that the bill of exceptions herein be filed within sixty days, and a bond on writ of error in the sum of three thousand seven hundred and fifty dollars," and afterwards the parties stipulated in writing that the time for filing the bond and bill of exceptions should be extended to April 28, 1900. On April 25, 1900, the bill of exceptions was filed, and on the same day the following entry was made:

"Now come the parties by their attorneys, and the defendants present their petition for writ of error and assignment of errors, and, it appearing that the bond on writ of error has been approved by the court and filed herein, it is ordered that a writ of error issue herein returnable in thirty days to the United States circuit court of appeals for this circuit."

The transcript also shows a copy of a writ of error in due form, attested on the 26th day of April, 1900, and indorsed with the ap-

proval of the judge of the court. The motion to dismiss is accompanied with a certificate of the clerk of the circuit court that on careful examination of the record and files of his office he had been unable to find any bond, and that the order of April 25th, "reciting the filing of such bond on writ of error, was apparently a mistake." The plaintiffs in error offer, and ask leave, to file such bond, not to operate as a supersedeas, as this court shall require. The defendant in error objects that, the time for the taking of the appeal having gone by, this court is without power to give such leave, and that, in any event, a bond in the sum prescribed by the order of the circuit court should be required. Reference has been made to the following cases touching the subject: *Boyce v. Grundy*, 6 Pet. 777, 8 L. Ed. 579; *Catlett v. Brodie*, 9 Wheat. 555, 6 L. Ed. 158; *The Dos Hermanos*, 10 Wheat. 311, 6 L. Ed. 328; *Adams v. Law*, 16 How. 148, 14 L. Ed. 880; *Anson v. Railroad Co.*, 25 How. 1, 16 L. Ed. 517; *Brobst v. Brobst*, 2 Wall. 96, 18 L. Ed. 387; *Seymour v. Freer*, 5 Wall. 822, 18 L. Ed. 564; *Edmonson v. Bloomshine*, 7 Wall. 306, 19 L. Ed. 91; *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. Ed. 127; *Chicago Dollar Directory Co. v. Chicago Directory Co.*, 24 U. S. App. 525, 13 C. C. A. 8, 65 Fed. 463. The power of the court in the premises is deemed clear, and it is ordered that the plaintiffs in error have leave to file with the clerk of the circuit court a bond in the sum of \$500, approved by the judge who presided at the trial of the cause, or by any judge of that court, but not to operate as a supersedeas; that within twenty days of the date of this order a certified copy of such bond be filed with the clerk of this court; and that thereupon the motion to dismiss shall be overruled, but in default of compliance with this order the motion shall be sustained.

COLUSA PARROT MINING & SMELTING CO. v. ANACONDA COPPER-MIN. CO.

(Circuit Court, D. Montana. September 20, 1900.)

COSTS—TAXATION—CONSTRUCTION OF RULES.

Under Cir. Ct. Rules 17 and 18, which were designed to conform the practice in regard to the taxation of costs, as nearly as practicable, to that of the state courts under the statute, a bill of costs filed by the successful party within the required time, properly itemized and verified, is prima facie evidence that the items thereof were necessarily incurred and are properly taxable, unless an item should appear otherwise on its face; and the burden of overcoming such prima facie proof rests on the adverse party filing objections, the party filing the bill being required to furnish further proof only in rebuttal. In case the clerk should determine that an item did not appear on its face to be properly taxable, he may receive evidence in support of the same.

On Motion for Leave to File Proofs in Support of a Bill of Costs.

F. E. Corbett and McHatton & Cotter, for plaintiff.

W. W. Dixon, Wm. Scallon, and J. K. Macdonald, for defendant.

KNOWLES, District Judge. This cause was tried on its merits, and judgment was rendered for the defendant. Within the time provided by a rule of this court the defendant filed with the clerk of the court an itemized bill of costs and disbursements, verified by the affidavit of one of its attorneys. Plaintiff filed objections to this bill of costs, and the matter came up before the clerk of the court for hearing. Defendant then offered to make proof as to its items of costs and disbursements in this proceeding. The clerk took this matter under advisement. Pending the consideration of this question by the clerk, the defendant made application to this court for 15 days' time in which to file its proofs as to the said items of costs and disbursements. The plaintiff resists this application. The question is thus presented to the court as to the proper construction of its rules 17 and 18, as to the burden of proof as to items of costs and disbursements in a cost bill: These rules are as follows:

"Rule 17. The party in whose favor a judgment at law or decree in equity is rendered, and who claims his costs, shall, within five days after the rendition of the verdict, or after notice of the decision of the court, referee, or commissioner—or if the entry of judgment or decree on the verdict or decision is delayed by order of the court, then before such entry is made—deliver to the clerk of the court, and serve on the attorney or solicitor of the adverse party, a copy thereof, together with a notice of application to have the same taxed, a memorandum of his costs and necessary disbursements in the action or proceeding, distinctly specifying each item so that the nature of the charge can be readily understood; which memorandum shall be verified by the oath of the party, or his agent, attorney, or solicitor, or by the clerk of such attorney or solicitor, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding, and shall be accompanied by the evidence of service thereof, and of said notice upon the attorney or solicitor of the adverse party: provided, that said memorandum of costs need not contain the legal fees of any marshal, clerk or other officer of the court, or any witness fees when an affidavit of such witness' attendance and distance travelled is made before the clerk of the court, specifying the number of days in actual attendance before the court, and the distance actually travelled in order to attend upon the court, and that such attendance was made and distance travelled at the instance of one or both of the parties to the action or suit, and filed with the clerk of the court. The notice specified above, of a decision, may be by the presence of the attorney or solicitor at its announcement, or by written notice from the clerk of the court, or the attorney or solicitor of the adverse party. The notice of the application to the clerk to tax the costs shall specify the day and hour at which such application shall be made, which shall not be less than one nor more than three days from the date of the notice. Upon a failure to file such memorandum, notice and evidence of costs, the same shall be deemed waived. * * *

"Rule 18. At the time specified in the notice, the party objecting to any item of costs contained in the said memorandum, or to any item of fees charged by any clerk, marshal, or witness, shall present his objections, either orally or in writing, specifying each item to which objection is made, and the ground of the objection, and file any affidavit, or other evidence relied on, if any there be, to support his objections, which evidence may be rebutted by other evidence. The clerk shall thereupon proceed to tax the costs, and shall allow such items specified in said memorandum, and the fees charged by any clerk, marshal or witness as are properly chargeable as costs, and shall include in the judgment or decree entered, any interest on the verdict or decision of the court from the time it was rendered. And he shall, within two days after the costs shall be finally taxed, insert the same in a blank left in the judgment or decree, for the purpose, and shall make a similar insertion of the costs in the copies and docket of the judgment or decree. The taxation of

costs made by the clerk shall be final, unless modified on appeal, as provided in rule 19."

These rules were made with a view of conforming, as near as could be, consistently with the laws of the United States, to the practice as to the taxation of costs in this court as provided by the laws of Montana, and contained in sections 507-510 of the Compiled Statutes of 1887, which read as follows:

"Sec. 507. The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court, within two days after the verdict or decision of the court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding; which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

"Sec. 508. But such memorandum need not include the legal fees or costs of any officer of the court, or any witness fees when an affidavit of such witness' attendance is required by law to be made.

"Sec. 509. If any party shall include in such memorandum any item to which he is not entitled, or if any clerk, sheriff, referee, or other officer shall include such item in the taxed costs, and a motion to retax the same shall be made by the party against whom the same is taxed, and if such motion to retax shall prevail, there shall be taxed, as a part of the cost of such motion, a docket fee of twenty-five dollars, and judgment therefor, with the other costs allowed by law, shall be entered against the party, sheriff, referee, clerk, or other officer who so unlawfully taxed the same, and the same may be off-set against any costs or judgment in favor of the party or officer so improperly taxing such cost, and against the party making such motion; or if no judgment exists, the court may direct that the party making such motion have execution therefor.

"Sec. 510. A party dissatisfied with the costs claimed may, within ten days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof, at chambers."

The statute of Montana is similar to the statute of California on the same subject. The statute of California has received a construction by the supreme court of that state, in the case of *Barnhart v. Kron*, 88 Cal. 447, 26 Pac. 210, where that court says:

"The memorandum of costs filed by the respondent is supported by the affidavit of his attorney 'that the foregoing items of costs and disbursements in this action are correct, and that the said disbursements have been necessarily incurred in the said action,' and, unless controverted, should control the decision of the court."

In the case of *City of San Francisco v. Collins*, 98 Cal. 263, 33 Pac. 57, the court says:

"The verified bill of costs filed by the appellant was prima facie evidence that the items thereof had been necessarily incurred, and since no objection was made in the trial court, nor here, on the ground that they were not proper costs necessarily incurred, the prima facie evidence must be taken as conclusive for the purpose of the appeal."

I am satisfied that the above rules of the court should be construed the same as the statute of California, as announced in the above-quoted decisions.

The language of rule 18 would indicate that the mode of practice adopted required the party objecting to the bill of costs to file his objections thereto, and it is provided that his objections shall be supported by any affidavit or other evidence relied on, and that this evi-

dence may be rebutted by other evidence. This rebutting evidence undoubtedly refers to evidence that may be introduced on the part of the party claiming the costs. The items of costs must be such as are allowed by law. If a party embraces within his items of costs expenses not allowed by law, there would be no necessity of any evidence to sustain any objection to the same, or to support the same. In the case of *Ethridge v. Jackson*, 2 Sawy. 600, Fed. Cas. No. 4,541, it was held that reference should be had to the state statute in determining what should be allowed as costs. In the case of *Miller v. Ditch Co.*, 91 Cal. 103, 27 Pac. 536, it is held that where items of costs, upon their face, do not appear proper and necessary, the burden should be on the claimant to introduce evidence to justify and sustain that the charges made were proper and necessary, and not upon the party contesting the same. This rule would require that some one should determine whether or not certain items of costs appear upon their face to have been proper and necessary, and of the class allowed by law. Under the rules of this court, in the first instance this duty would devolve on the clerk, and in such case there would be no objection to his receiving evidence in regard to the same, in determining whether or not an item of cost claimed was a proper and necessary charge. In this case, if the clerk should determine that upon its face a certain item of cost did not appear to be a proper and necessary charge, as such, he might receive evidence to determine whether this was correct; but where the item of cost appears to be proper, and of the class allowed by law as costs, then no evidence should be received from the claimant in regard to the same, except in rebuttal of evidence introduced by the party resisting the allowance and taxation of such charge. The filing and service of a properly itemized bill of costs, wherein each charge is so distinctly specified that it can be readily understood, and which is verified by the affidavit of the party or the attorney, prima facie establishes the validity thereof. Where the statute of the state prescribes the mode in which a party should proceed to have his costs taxed, that mode should be followed. Under the statute law of Montana now existing, it appears that the party claiming costs should file, within five days after notification of the judgment rendered in his favor, a memorandum of costs. If the losing party does not, within the time prescribed by law, file objections to such memorandum of costs, it is considered that he has agreed to the same. If, however, such losing party does file objections to the same, then the question of retaxing such costs is to be brought before the court or judge that tried the cause. Under the statute laws of the United States (Rev. St. § 983), it is provided that the costs of a case shall be taxed by a judge or clerk of the court. As the statute law of the state does not regulate the proceedings for taxing costs before a clerk of a court in which the cause was tried, I conceive that it is a matter which can be regulated by the rules of court. It is therefore held that the clerk may proceed to determine the question of the taxation of the costs in this case, and he may admit evidence as to whether any item charged was a proper and necessary expense, in accordance with the views above expressed.

In re WALSH.

(District Court, D. South Dakota, S. D. July 20, 1900.)

BANKRUPTCY—EXAMINATION OF BANKRUPT—PRIVILEGE FROM GIVING INCRIMINATING TESTIMONY.

A bankrupt, in his examination before the referee, cannot be required, over his claim of privilege, to give testimony which may tend to criminate him, unless the question asked is clearly cross-examination upon a matter as to which he has volunteered information, either in his petition or schedules, or in his previous testimony; the provision of Bankr. Act 1898, § 7a, subd. 9, that no testimony given by him shall be offered in evidence against him in any criminal proceeding, being short of the full immunity from prosecution, which alone can meet the requirement of the constitutional guaranty that no person shall be compelled in any criminal case to be a witness against himself.

In Bankruptcy.

C. H. Winsor, for bankrupt.

H. H. Keith, for certain creditors.

CARLAND, District Judge. This matter comes before the court in pursuance of an order to show cause issued by the court upon the filing of the certificate of the referee in bankruptcy located at Sioux Falls, wherein the referee certifies that in a proceeding before him in the matter of the bankruptcy of John W. Walsh, wherein the said bankrupt was being examined in connection with his bankruptcy, said bankrupt was shown two exhibits, D and E, which are attached to the referee's certificate, and which exhibits are statements made to John V. Farwell Co., of Chicago, Ill., purporting to be signed by the bankrupt, J. W. Walsh, and dated February 27, 1899. Upon the production of said exhibits to the witness, he was asked by attorneys for certain creditors:

"Q. I show you Exhibits D and E, and ask you if this is your signature. A. I refuse to answer. Q. Upon what grounds do you refuse to answer? A. Upon the grounds that the answer may tend to criminate me. Q. Who told you to make that answer? A. Nobody. Q. How, then, do you know that your answer will criminate? A. I do not. Q. Then why do you refuse to answer? A. Because the answer may tend to criminate me."

Upon the refusal of the witness to answer the question the referee ordered the witness to answer. The witness was again asked by counsel:

"Q. I show you the signature at the bottom of Exhibits D and E, and ask you if that is your signature."

The witness again answered:

"A. I refuse to answer, on the ground that it may tend to criminate me."

Whereupon the referee certified the matter to this court, and the matter is now before the court as a proceeding to punish the witness for contempt in not obeying the order of the referee to answer the questions propounded.

The question asked by the counsel of the witness on his examination before the referee appears to have been material to the inquiry then being had. It would be material upon the question as to

whether the bankrupt was entitled to exemptions, and perhaps upon other matters. It therefore was a question which the bankrupt ought to have answered unless he is protected by the constitutional guaranty found in the constitution of the United States that no person shall be compelled to be a witness against himself. There is no question about this guaranty, or that the witness is entitled to its protection, unless the phraseology of the bankruptcy law, which provides that no testimony elicited from the bankrupt shall be offered in evidence against him in any criminal proceeding, is as broad in its scope and effect, and guaranties as full protection, as the constitution of the United States.

In my opinion, the case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, forecloses any inquiry by this court as to whether or not such an expression in the bankruptcy law is as broad as the protection guarantied by the constitution of the United States. In that case the supreme court of the United States held that the general law of the United States, as found in Rev. St. § 860, which, so far as this case is concerned, is identical with the language of the bankruptcy law, was not as broad and effectual for the purpose of securing the liberty of the citizen as the language of the constitution of the United States, and, it not being a full protection, the witness was not bound to answer the questions set forth in that case. I know of no authority to the contrary, except the late case decided by the court of appeals in the Ninth circuit (*Mackel v. Rochester* [C. C. A.] 102 Fed. 314, 2 Nat. Bankr. N. 880, 4 Am. Bankr. R. 1); and, of course, when it comes to the proposition as to which court this court must follow, there is no question; it must follow the supreme court of the United States. Why this case of *Counselman v. Hitchcock* was not mentioned in the case in the court of appeals I do not know. The court seems to have based its decision on the case of *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, which was a case arising under the interstate commerce act, after the congress of the United States had amended it to do away with the difficulty that was found to exist in the case of *Counselman v. Hitchcock*.

Now, it is also alleged here by counsel that, the bankrupt having filed a voluntary petition in bankruptcy, the question here asked was in the nature of a cross-examination, and that, having volunteered information in regard to the matter, he could not stand upon his constitutional guaranty in refusing to be cross-examined. It does not appear to the court how the question asked could in any way be a cross-examination of any information that would be contained in the schedule which the bankrupt had voluntarily given. The question asked certainly might tend to criminate the witness. If the statement made to the John V. Farwell Company were false, and the Farwell Company relied upon it in furnishing these goods, then Walsh would be guilty of obtaining property under false pretenses.

Now, while it is very desirable, as the court of appeals in the Ninth circuit says, that the bankrupts should be compelled to answer these questions, so that the estate of the bankrupt should be properly administered and distributed, still the bankruptcy law, and the courts,

and all of us are bound by the superior provisions and paramount authority of the constitution of the United States, and all and everything must give way to its mandates. I can see that in some instances the fact that the bankrupt stands upon his constitutional guaranty would interfere with the proper administration of the bankruptcy law, but that is not a question which the court has the power to remedy. If the congress of the United States desires to draw from the bankrupt testimony that may tend to criminate him, it must by legislation provide, under the ruling in the case of *Brown v. Walker*, nothing short of immunity from prosecution. Not that it shall never be used in any criminal proceeding against him, but that he cannot be prosecuted by reason of any information gained in this manner.

This being the opinion of the court, it results that the rule to show cause must be discharged. I will say, however, that it is not every question that the bankrupt may refuse to answer. He would not be protected in case a question was clearly cross-examination of what he had volunteered himself, either in his petition and schedules, or any testimony he had already given before the referee. And, in questions where the referee is satisfied clearly that the bankrupt would not criminate himself by answering the same, he would not be entitled to this protection; but, upon the question here certified, I think the bankrupt was entitled to the guarantied privilege. Such will be the order of the court.

In re MINER et al.

(District Court, D. Massachusetts. May 31, 1900.)

BANKRUPTCY—PETITION IN INVOLUNTARY BANKRUPTCY—COMPUTING NUMBER OF CREDITORS.

Creditors who have assented to a general assignment made by their debtor, and who therefore cannot join in a petition in bankruptcy against him, are not to be counted, in determining the number of his creditors, under Bankr. Act 1898, § 59b; and, if the creditors who have not assented are less than 12 in number, one of such creditors may file the petition under said section.

In Bankruptcy. On petition in involuntary bankruptcy.

In the matter of the above petition it is agreed, for the purposes of this hearing, between the petitioning creditor and the debtors, that an assignment for the benefit of their creditors was made by Miner, Beal & Co., as set forth in their answer to said petition, which assignment was recorded in the office of the clerk of the city of Boston on the 24th day of February, 1900, and that their property was transferred thereunder to the trustees therein named, and that all of their creditors whose names are appended to said answer, except the petitioner, have assented in writing to said assignment, and have become parties thereto; that the petitioner was more than once requested, both by the debtors and the assignees, between February 7th and May 8th, to become a party to said assignment (the last request being made the day before the filing of this petition), and upon each of such requests the petitioner refused to become a party to said assignment; that all said creditors, except the petitioner, have received under the assignment a pro rata payment on account, under a partial distribution of the assets of the debtors, amounting to 11 per cent.,

the remaining assets in the hands of the trustees being sufficient to pay the petitioner an equal amount, or, if need be, the claim in full; that all said creditors are to be treated as creditors of said debtors, within the meaning of section 59 of the bankruptcy act of 1898, unless, by reason of such assent to said assignment, by so becoming parties thereto, or by receiving said payment, they cannot be considered as creditors of said debtors, in which event the petitioning creditor is the only creditor of said debtors, and having a provable claim against Miner, Beal & Co. exceeding \$34,000.

Morse & Friedman, for American Woolen Co.

M. F. Dickinson, Jr., for Miner, Beal & Co.

Jabez Fox, for assignees.

Hollis R. Bailey, for Allen Lane & Co. and others, creditors in opposition to petition.

E. O. Cooke, for Albert F. Cooke.

LOWELL, District Judge. In this case the respondents made a general assignment, which has been assented to by all the creditors, with two or three exceptions. One of the nonassenting creditors has filed this petition alone, alleging that all the creditors of the respondents are less than twelve in number, thus seeking to bring himself within section 59b. It was admitted at the argument that the creditors who had assented to the assignment could not join in the petition, but it was urged that they should be counted in reckoning the number of the respondents' creditors. Under the act of June 22, 1874 (18 Stat. 178, § 12), it was held that preferred creditors should not be reckoned, in computing the proportion of creditors required to join in a petition. In *re Israel*, Fed. Cas. No. 7,111; *Clinton v. Mayo*, Fed. Cas. No. 2,899; In *re Currier*, 2 Low. 436, Fed. Cas. No. 3,492. In the last case Judge Lowell said, "I add, therefore, to the reasons already given why the debt of Dana & Co. should not be counted, that they ought not to join in this petition." The learned judge thus considered that only those creditors who can join in a petition should be reckoned in computing the proportion who must join in order to make the petition valid. This is in accordance with the language of the statute; for otherwise the word "creditors," in the first line of section 59b, would have a different meaning from the same word in the third line of the same clause. Again in the same clause it is said that "one of such creditors" (that is to say, one of the creditors who are less than 12 in number) may file a petition, thus plainly implying that the creditors who may file a petition are identical with the creditors whose number is to be reckoned. It is not necessary to decide if the general assignment here made be a preference. In *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 1 Nat. Bankr. N. 409, a general assignment is said to be repugnant to the policy of the bankruptcy law, and to show an intent to delay, defeat, and hinder the execution of the act. See, also, In *re Gutwillig*, 1 Nat. Bankr. N. 554, 34 C. C. A. 377, 92 Fed. 337. If this assignment had provided for a preference, the petitioners' case would be clearly on that ground. If the debtor is not thrown into bankruptcy, their preference stands, and the law is evaded. In *re Israel*, *supra*. Here, if the debtor is not thrown into bankruptcy, the assignment stands, and the law is evaded. Even if a preference

be morally less objectionable than a general assignment, yet I am of opinion that the latter is so objectionable to the spirit of the act that those creditors who have assented to it are within the scope of the remarks made concerning preferred creditors in the cases above cited. For these reasons, because such is the letter of the act, because such was the construction of an analogous provision in the act of 1867, and because such seems to me the fair intent of the act as a whole, I hold that the creditors who have assented to the assignment are not to be reckoned in the computation required by section 59b. Adjudication to be made.

BRACKEN v. MILNER.

BRACKEN et al. v. SAME.

(Circuit Court, W. D. Missouri, S. D. October 6, 1900.)

Nos. 170, 171.

1. **BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—DEFALCATION WHILE ACTING IN FIDUCIARY CAPACITY.**

In the provision of Bankr. Act 1898, § 17, subd. 4, which exempts from the debts released by a discharge in bankruptcy debts created by the defalcation of the bankrupt "while acting as an officer or in any fiduciary capacity," the words "fiduciary capacity" embrace only technical trusts, and not those which the law implies from the contract, nor relations merely of general trust and confidence; and one who is intrusted with money of another to be loaned on approved security, and authorized to receive payments of the interest or principal of such loans, and remit the same to the lender, does not receive such payments in a fiduciary capacity, within the meaning of the statute, but merely as an agent, and a claim against him for money so collected, and not remitted, is not within the exemption, but is one from which he is released by a discharge in bankruptcy.

2. **SAME.**

An agent intrusted with money by his principals, to be loaned on trust deeds or mortgages, who takes a trust deed securing such a loan to himself as trustee, becomes technically a trustee with respect to the property or its proceeds which comes into his hands through a foreclosure of the security, and his failure to pay over such proceeds to the beneficiary, in compliance with the express requirement of the deed, results in a debt created by his defalcation while acting in a "fiduciary capacity," within Bankr. Act 1898, § 17, subd. 4, from which he is not released by a discharge.

3. **SAME—DEBT CREATED BY FRAUD.**

An agent intrusted with money of his principals to be loaned on real-estate security made such a loan, taking as security a trust deed to his partner as trustee. This deed he afterwards caused to be foreclosed, and bid in the property in his own name, but without paying therefor, and received a deed from the trustee. He made no report of the transaction to his principals, but subsequently conveyed the property away, and retained the proceeds. *Held*, that the transaction was outside of, and in violation of, his agency, and his liability to his principals resulting therefrom was a debt created by fraud, within the meaning of Bankr. Act 1898, § 17, subd. 4, from which he was not released by a discharge in bankruptcy.

4. **LIMITATIONS—FRAUDULENT CONCEALMENT—MISSOURI STATUTE.**

Under Rev. St. Mo. 1899, § 4290, which provides that where the commencement of an action is prevented by any improper act of the defend-

ant, limitation shall run only from the time such prevention ceases, limitation does not begin to run against an action to recover from an agent for converting to his own use money and property of his principals, who resided in a distant state, where he fraudulently represented to them in his letters that he had not received such money or property until they discovered the fraud.

At Law. On trial to the court without a jury.

J. T. White and J. P. McCamon, for plaintiffs.

Frank S. Heffernan, for defendant.

PHILIPS, District Judge. A jury having been waived by the parties, the above-entitled cases were submitted to the court on the evidence, arguments, and briefs of counsel. As they involve practically the same questions of fact and law, they will be considered in one opinion.

The plaintiffs for many years past were resident citizens of the state of Ohio. They had known the defendant from his boyhood, and had the utmost confidence in his personal integrity and business capacity. Shortly after the Civil War he located in the city of Springfield, Mo., and plaintiffs, who were partners in the mercantile business, and J. P. Bracken in his individual capacity, made arrangements with the defendant to loan money for them in southwest Missouri, secured by mortgages or deeds of trust on real estate. The defendant was to loan at given rates of interest, and report the description and quality of the land tendered as security to the plaintiffs for their approval. The notes taken for loans were to be executed to the plaintiffs, or whichever of them was making the loan, and the notes and deeds of trust were to be sent by defendant to them. The defendant was to look to the borrowers alone for his commission for services. He was to collect the annual interest for the plaintiffs, and look after the securities and the collections, and remit promptly to the plaintiffs all collections. Beginning back in the 80's plaintiffs sent him money under this arrangement, which they continued to do until some time early in the 90's. In some of the deeds of trust taken by the defendant his name was inserted as trustee, and in some of the loans made by him for plaintiffs other persons were made trustees in the deeds of trust. Beginning perhaps as far back as 1884, payments of annual interest due under the loans were not paid promptly, according to the defendant's reports by letter to the plaintiffs. These delinquencies increased as time wore on, and, upon inquiries made by plaintiffs of the defendant as to the cause thereof, he wrote them various excuses and explanations, making them occasional remittances to quiet their importunities. But matters grew worse, until in 1894 and 1895 the defendant almost ceased to make any replies to plaintiffs' repeated inquiries of him; and in June, 1895, one of the plaintiffs went to Springfield, Mo., to investigate these matters. After pressing the defendant for explanations for two or three days, he admitted that he had collected the moneys sued for in these actions at various times prior thereto, and had appropriated the same to his use in private transactions, with the expectation that some favorable turn would take

place in his fortunes which would enable him to make restitution. The only security he had to offer plaintiffs on his liabilities to them was a piece of real estate in the city of Springfield and 120 acres of land in Marion county, Ark. He executed to J. P. Bracken and O. M. Bracken separate deeds to this property, with the stipulation that the plaintiffs were to hold the deeds for three years, and, if the lands could be sold, part of the proceeds arising therefrom should be paid to certain parties to whom the defendant was obligated, and the residue applied on J. P. & O. M. Bracken's claims. On the property so conveyed, situate in Springfield, Mo., there was an underlying mortgage, and as plaintiffs' attorneys, on investigation, discovered that the mortgage debt was greater than the value of the property, they did not put the deed therefor on record, and when the property was foreclosed under the mortgage it did not realize enough to satisfy the mortgage debt. The three years having elapsed, the whole interest in the Arkansas land vested in J. P. & O. M. Bracken. Other important facts will appear in this opinion.

Some of the claims for damages to the partnership of J. P. Bracken and O. M. Bracken were assigned to J. P. Bracken. His action for damages embraces his claims based on his individual loans and on the interest of O. M. Bracken's claims for damages assigned to him. The action in behalf of J. P. & O. M. Bracken is based on damages resulting from their joint claims. Prior to the institution of these suits, the defendant, Milner, on his voluntary petition, was adjudged a bankrupt. He reported these claims sued on in his schedules as among his liabilities. Having received his final discharge in bankruptcy, he pleaded the same as a release from the claims sued on. He also interposes the plea of the statute of limitations.

The controlling question in this case is the effect of the discharge in bankruptcy on the claims sued for, and involves the construction of subdivision 4, § 17, Bankr. Act, which declares that "a discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." The conduct of the defendant in respect of his stewardship is so reprehensible that at the hearing of this case the inclination of my mind was to hold him liable on all of these claims. But an examination of the rulings of the supreme court on kindred statutes has unsettled these first impressions. The question turns upon the proper construction of the words, "defalcation while acting in any fiduciary capacity."

This question first came before the supreme court in *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236, under the bankrupt act of 1841. The language of the corresponding provision of that act excepted from the operation of a discharge in bankruptcy "debts created in consequence of defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." The case under consideration there was that of a factor who had defaulted in accounting for a balance due his principal. It was held that such person was not acting in a fiduciary capacity,

within the meaning of the statute. This ruling, in subsequent discussions by other courts, has been attempted to be restricted to the particular facts of that case; as in the case of *White v. Platt*, 5 Denio, 269, which contended that, as the proceeds of a sale made by a factor are not intended to be kept separate and apart from the funds of the agent, but who has permission to use the same "as the exigencies of his business required," the precise fund may not belong to the principal, but the balances are to be accounted for according to the course of dealing. Therefore such relation constitutes only an implied trust, and is to be distinguished from the relation of an agent in whom a special confidence is reposed, to whom is committed a note and the like to be collected, and who fails to remit the proceeds. In such case the argument is that the principal never parts with his title to the note while in the hands of the agent, nor the money in the hands of the agent arising from the collection of a note, which the agent is obliged, without more, to remit to his principal, and that this makes such transaction a special trust. But the language of the court in the *Chapman Case* combats this contention. The court said that the term "fiduciary capacity" thus construed would "include all debts arising from agencies," and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all of the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. "The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee' are not cases of implied, but special, trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract." The controlling feature of this enumeration is the distinct declaration that "the act speaks of technical trusts, and not those which the law implies from the contract." The argument was that the words, "in any other fiduciary capacity," were to be known by their associates,—executors, administrators, guardians, and trustees,—whose office is essentially that of technical trustees.

The comprehensive purport of this ruling was recognized by Judge Pardee in *Fulton v. Hammond* (C. C.) 11 Fed. 291, who differentiated the phraseology of the act of 1841 from the corresponding section in the bankrupt act of 1867, which omitted from the context the words "executor, administrator, guardian, and trustee," and employed the general term, "while acting in any fiduciary character." The argument of the learned judge was that, as the conclusion of the supreme court in the *Chapman Case* was largely influenced by the association of the words, "fiduciary capacity," with the words, "executor, administrator, guardian, and trustee," the omission of the latter words from the act of 1867 indicated an intention to enlarge the comprehension of the term, "in any fiduciary capacity." Accordingly he held that an agent who obtained possession of a note

for collection, and appropriated the proceeds to his own use, was not released therefrom by a discharge in bankruptcy.

But in the case of *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586, which arose under the act of 1867, the court held that the term "fraud" was designated by its association with the term "embezzlement," and was employed in the statute of 1867 in the same sense as in the statute of 1841, and meant positive fraud, involving moral turpitude, as distinguished from implied fraud, arising from passive conduct, which equity created. After quoting the language, *supra*, in *Chapman v. Forsyth*, the court observed: "A like process of reasoning may be properly employed in construing the corresponding section of the act of 1867."

The question again came before the supreme court under the act of 1867, in *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565, in which it is noted (pages 680, 681, 111 U. S., page 578, 4 Sup. Ct., and page 567, 28 L. Ed.) that some of the courts had taken the view of that act that "agents, factors, commission merchants, etc., acted in a fiduciary character, on the view that the act was conceived in broader and more general terms than the act of 1841"; while another class took the view "that the act of 1867 used the phrase, 'acting in a fiduciary character,' in the sense which it had received by construction in the act of 1841." After enumerating those diverse authorities, the court said: "We have examined these cases, and others bearing on the subject, but do not deem it necessary to refer to them more particularly, inasmuch as the question has recently been fully considered by this court, and the decision in *Chapman v. Forsyth* has been followed."

Among the cases cited by the court as holding the latter view is that of *Cronan v. Cotting*, 104 Mass. 245, in which it was distinctly held that the term, "in any fiduciary character," in the act of 1867, was employed by congress in the same sense, and with the same application, given to it by the supreme court in *Chapman v. Forsyth*, under the act of 1841. The court said:

"It is true that in the act of 1841 the phrase followed an enumeration of certain trusts of a marked character, and the association was regarded as an indication of the intent of congress in the use of that phrase. But that intent having been ascertained and declared by a judicial construction of the act, the language thenceforth bore a legal significance, in accordance with that construction. When the same, or substantially the same, language was subsequently used, for a similar purpose, in the bankrupt act of 1867, it is to be presumed that it was so used in view of the construction and legal import which had become attached to it by the interpretation of the proper constitutional tribunal."

The court further said that:

"The inference is quite as legitimate that congress omitted the enumeration of specific trusts, for the very reason that the term 'fiduciary capacity' had, by judicial construction, received a fixed definition, and with intent that the phrase should carry that definition into the new act. The specific enumeration was omitted because all were included in the general expression 'fiduciary.'"

This reasoning seems to me to be conclusive.

The supreme court in *Hennequin v. Clews*, *supra*, applied the construction given by it under the act of 1841 to the term "fiduciary

capacity" to the term "fiduciary character" employed in the act of 1867, and held that where A. hypothecated with B. securities which had been pledged to him to secure the obligation of another, and, failing to return them when such obligation was discharged, did not thereby create a debt by fraud or in a fiduciary capacity which was exempt from the operation of a discharge in bankruptcy, he held the security under a contract to return it when the purpose had been subserved, but his office was not that of a trustee under a technical trust.

So the supreme court of Massachusetts in the Cronan Case, *supra*, held that the term "fiduciary character" did not include the obligation of a creditor, to whom the debtor delivered the property in pledge, with directions to sell and apply the proceeds in satisfaction of the debt, and to pay over to the debtor the balance remaining after such satisfaction. The court said:

"We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises. * * * The debt, in this case, arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. * * * The debt did not result from, but preceded, that default."

In *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931, the court reviewed the decisions construing the phrase "fiduciary capacity" in the act of 1867, and readopted the language of the court in *Chapman v. Forsyth*. The court again asserted that, "within the meaning of the exception, a debt is not created by a person while acting in a 'fiduciary character,' merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms." The court quoted with approval the foregoing language of the supreme court of Massachusetts in the Cronan Case.

Judge Brown, in *Re Basch* (D. C.) 97 Fed. 761, has applied the same construction to the term "fiduciary capacity" under the present bankrupt act, and held that a debt due by the bankrupt in the character of a commission merchant, arising out of his failure to account for the value of goods consigned to him for sale on commission, on a contract to return the goods or their specific proceeds, is not a debt created by the bankrupt's "fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity," and was therefore released by his discharge in bankruptcy.

Applying these authoritative principles to this case, what was the character of Milner in respect of his default in failing to remit the moneys collected by him in those cases, where the collections were not made under foreclosure of the deeds of trust in which he was trustee? In such case his authority to collect did not arise from any provisions or recitations in the deeds of trust, but simply by virtue of his agency under the contract to collect the interest and principal, and remit the same to the plaintiffs. Was there any more special trust and confidence reposed in him than that reposed by any principal in the agent selected to take his money for invest-

ment in approved securities, look after the same, and attend to the collections for him? He was simply under contract obligation to remit as fast as collected. The defendant did not misapply the money sent him. He loaned it on approved securities. His default arose on failure to remit, as a mere agent, in some of the cases sued on. The court, therefore, holds that in respect of the collections made by the defendant independently of his trusteeship in the deed of trust, and in the absence of positive fraud, his liability therefor is released by his discharge in bankruptcy.

A different question arises in the instance where the defendant was trustee in some of the deeds of trust, which he of his own motion foreclosed, and appropriated the money arising from the sales. He did not report to plaintiffs, or either of them, the facts of such sales and the receipt of the money arising therefrom. On the contrary, he concealed these facts from the beneficiaries in the deeds of trust, and led them, by his letters, to believe that the debtors were delinquent, and the deeds of trust were in force. He had himself made trustee in certain of the deeds of trust, and thereby accepted the office. As such he was trustee of an express trust, and was therefore acting under a technical trust created by an instrument of writing. His duties as such trustee were clearly defined by the instrument, which empowered him to sell the mortgaged premises, in case of default, to the highest bidder, for cash, at public vendue; and on the payment of the purchase money he was to "receive the proceeds of sale, out of which shall be paid, first, the cost and expenses of this trust, and, next, all amounts expended as aforesaid, for taxes and other purposes, with interest as above mentioned, and, next, the amount that may remain unpaid on said note and interest thereon; * * * and the said party of the second part [the defendant] covenants faithfully to perform and fulfill the trust herein created." He received the money under the foreclosure sales as a technical trustee, and was bound by his office as such to pay over to the cestui que trust "the amount that may remain unpaid on said note." In other words, he received such money while acting, in the strictest sense, in a "fiduciary capacity." His liability, therefore, on these causes of action is not released by his discharge in bankruptcy. In this category are the collections made by him under the deeds of trust given by Giles P. Newbill and George B. Ramsay. While he was trustee under the deed of trust given by Jeffries, his collection of the debt thereby secured was not as trustee by foreclosure. It was paid to him voluntarily by Jeffries as the recognized agent of the plaintiffs, and therefore comes within the class of cases first discussed in this opinion.

A different question is presented in respect of what is known as the Neighbors transaction. On February 16, 1881, the defendant loaned for the two Brackens the sum of \$550 to W. D. Neighbors, secured by a deed of trust on real estate, executed to John W. Lisenby as trustee. This deed of trust he caused to be foreclosed by the trustee, and at the sale thereunder, on the 28th day of July, 1882, he bid the land in in his own name at the price of \$500. But for some unexplained reason the trustee's deed was not made to

him until the 23d day of February, 1889. There is no pretense that the defendant paid the \$500 to the trustee. This dealing he never reported to plaintiffs, but persistently kept the fact concealed from them, and led them to believe that the deed of trust continued in force until the visit of one of the plaintiffs, in June, 1895, when he stated that he had "traded the land off" in 1887 or 1888. What he got in exchange does not appear. This transaction was clearly outside of his agency. Conceding that it was permissible, for properly guarding the interest of his principals, to bid the land in at trustee's sale, he should have done so in their name, and had the deed made to them; or, having bidden it in in his own name, he should have reported the transaction to plaintiffs, and sent them the \$500, subject to their approval. This whole transaction is further characterized by the fact that Lisenby, trustee in the deed of trust, was at the time the defendant's partner in business. Therefore the transaction stands, in its moral aspects, little different from its legal effect had the defendant's own name been inserted as trustee. The result is that plaintiffs lost their security and the money. The thing, whatever it was, he got in exchange for the land, is gone, so that the plaintiffs are unable to fix upon it an equitable lien. The property did not come into his hands as agent, but in violation of his duty as agent. The whole manner of depriving plaintiffs of their security and money was mala fides, a gross and positive fraud, within the meaning of the term "fraud" employed in section 17, subd. 4, of the bankrupt act, and defendant's liability for damages resulting therefrom is not released by his discharge in bankruptcy.

In respect of the statute of limitations pleaded by defendant in these actions, it is sufficient to say that under section 4290, Rev. St. Mo. 1899, it is provided that "if any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited after the commencement of such action shall have ceased to be so prevented." As already shown, this defendant did not only conceal from the plaintiffs the fact of his having collected this money while they were residing in a distant state, but by his letters and whole conduct he purposely led them to believe that the debts had not been collected or the mortgages foreclosed. In such case the plaintiffs had five years in which to bring the action after the discovery of the fraud. The discovery was not made until June, 1895, and the suits were brought in March, 1900.

The defendant is entitled, on the accounting, to a credit for the value of the Arkansas land, estimated at the time when the three-years condition expired, which would have been in August, 1898. The evidence touching the value of this land is quite meager. It is rugged, unimproved land. A letter in evidence from the defendant to plaintiffs, stating to them that he could furnish them a purchaser therefor at \$2.50 an acre, virtually recommending its acceptance, indicates that he did not regard it of greater market value. The only other evidence touching this issue was the statement that the plaintiffs had asked \$10 an acre for the land. Dealing most liber-

ally with the defendant, the court will fix the value of said land at \$5 an acre, which would amount to \$600.

The only remaining question, then, is as to where this credit should be placed. As the deed was made to J. P. & O. M. Bracken, the credit should go on their joint claims against the defendant, and, on equitable principles, should be applied to the first default, and therefore the court applies it to the claim arising on the Neighbors transaction. Judgment will go against the defendant for the amount of the defalcation on the Ramsay and Newbill debts, and for the balance due on the Neighbors debt, after allowing a proper credit for the Arkansas land

WAYNE KNITTING MILLS et al. v. NUGENT.

(District Court, D. Kentucky. November 1, 1900.)

1. BANKRUPTCY—CUSTODIAN OF MONEY OF BANKRUPT—JURISDICTION OF REFEREE TO ORDER PAYMENT TO TRUSTEE.

An insolvent, shortly before the filing of a petition in involuntary bankruptcy against him, caused a large sum of money, which was his property, to be paid to his son, as his agent and custodian. After the father had been adjudged a bankrupt, on application of his trustee the referee issued an order requiring the son to show cause why he should not be required to pay the money to the trustee, to which order, when served on the respondent, he filed a response in which he denied the jurisdiction of the referee, but made no denial of his possession of the money, and no claim to it, or any part of it, as his own. On such response the referee ordered him to pay the money to the trustee, and, on his failure to comply with the order, adjudged him in contempt. Held that, in the absence of any claim to the money by the respondent, he could not be regarded as holding it adversely to the bankrupt, but he must be taken to have held it merely as agent, first for the bankrupt, to whom it belonged, and later for his trustee, who succeeded to his rights therein, and, the money being constructively in the possession of the court, the referee had jurisdiction, under the provisions of Bankr. Act, § 2, to bring the respondent into the proceedings, and to make the order with reference thereto in a summary manner, and that the court was empowered by section 2, subd. 13, of such act to enforce such order by imprisonment.

2. SAME—CONTEMPT—REFUSAL TO OBEY ORDER OF REFEREE.

The fact that respondent was under indictment, charged with a violation of Bankr. Act, § 20, in having received and retained such money for the purpose of defeating the operation of the bankrupt law, furnished no excuse for his failing to make a full disclosure of the facts in response to the referee's order to show cause, on the ground that such disclosure would tend to incriminate him, nor for his failure to obey the order of the referee, since he would not be incriminated by either a denial or an admission of the receipt of the money prior to the filing of the petition in bankruptcy, nor by any claim he might make to the same, nor would his right thereto be prejudiced by his paying over the money in obedience to the order.

In Bankruptcy.

W. W. & J. R. Watts, for trustee.

W. M. Smith, Zack Phelps, and Fred Forcht, Jr., for respondent.

EVANS, District Judge. In this case the petition in involuntary bankruptcy was filed against the bankrupt about 5 o'clock p. m.

February 19, 1900. Some hours earlier on that day the bankrupt, who for many years had been a prominent retail dry-goods merchant in the city of Louisville, Ky., sold and delivered to Herman Straus, another retail dry-goods merchant in the same city, his entire stock of merchandise, which was thereafter very speedily removed to the latter's store. The agreed price was \$12,000, and early in the afternoon of the same day a check on the German Bank for that amount, payable to the bankrupt, was given by the purchaser to him. He at once indorsed it, and handed it to his son and agent, W. T. Nugent, the respondent, to get for him the cash upon the check, which by 2 o'clock p. m. the respondent had done. On the 9th day of February, 1900, the bankrupt had mortgaged the house and lot in Louisville in which he resided to George L. Everbach and Frank Hohmann, executors, for \$4,500; and this money on the same day, or soon thereafter, came to the hands of the respondent, as agent of his father. Out of the \$12,000 thus obtained there were paid certain sums which are not in controversy, and out of the \$4,500 thus obtained certain other sums were paid, about which we need not concern ourselves. But at the time of the filing of the petition and at the time of the adjudication, on March 23, 1900, the respondent held in his hands, as custodian and agent for his father, \$10,100 received on the \$12,000 check, and \$4,133.45 received out of the proceeds of the mortgage. The creditors appointed Arthur E. Mueller trustee for the bankrupt's estate, and he on the 13th day of April, 1900, filed a petition before the referee asking for a rule against the bankrupt to show cause why he should not be required to pay the two sums last above mentioned, amounting to \$14,233.45, to the trustee. The bankrupt appeared, and, in substance, stated, in his response to the rule, that the entire sum was in the hands of his son, who had gone he knew not whither, and he found it impossible to pay the money for that reason. The referee, thinking this response insufficient, so adjudged, and ordered the bankrupt to pay the entire sum to the trustee. The bankrupt failing to do this, the referee held him to be guilty of contempt, and reported his action to the court, with the recommendation that the bankrupt be punished therefor. Pending the action of the court upon this report and recommendation, the bankrupt's counsel suggested to the court that the bankrupt, then about 80 years of age, was mentally unsound, whereupon the court ordered, and late in June, 1900, had, a special hearing upon this phase of the case, and was of opinion, from the evidence of the medical experts, that approaching senile imbecility possibly then made the bankrupt an unfit subject of punishment, or of the summary processes of the court. At all events, he was given the benefit of the doubt. For several months thereafter the son, W. T. Nugent, the respondent, had continued in hiding, but in October, 1900, was found, and soon afterwards was indicted in this court upon charges of receiving and concealing certain assets of the bankrupt. On the 13th day of April, 1900, upon the petition of the trustee, the respondent, W. T. Nugent, was enjoined from disposing of all or any part of the said *sum thus* in his hands, and was then ordered to show cause, if any

he could, within five days from the service of a copy of the order, why he should not be required to pay said sum of money to the said trustee. A copy of that order was served upon the respondent on October 8, 1900. On the 13th day of October he filed his sworn response in the following language:

"Defendant W. T. Nugent, for response to the order made herein on April 13, 1900, requiring him to appear and show cause why he shall not be required to pay \$14,435.95 to the trustee herein, says that, as shown by the pleadings, records, and the evidence in this case taken, and the entire proceedings had herein, neither the court nor the referee in bankruptcy herein has any jurisdiction, either of this respondent or the matter involved, to make any such order, or to require this respondent to answer thereto, because he says that said records herein show that if respondent received said money, or any part thereof, it was before the petition in bankruptcy was filed, and in that event neither the court nor the referee in bankruptcy can proceed against this respondent as herein attempted by order or rule to pay; and he hereby asks that this be taken as his response herein, and that said order be set aside and vacated. He says that at no time since the filing of the petition in bankruptcy herein has he received said \$14,435.95, or any part thereof. Defendant, for further response herein, says that he ought not to be required to respond as to the matters herein set forth, or any of them, because he says that within the last few days he has been indicted in the district court of the United States for the district of Kentucky, sitting at Louisville, charged with the offense of receiving said \$14,435.95 after the filing of the petition in bankruptcy against E. B. Nugent, and also with retaining same, and aiding and abetting in the retention thereof, both after the filing of said petition and the adjudging of said Nugent a bankrupt thereunder, for the purpose of defeating the bankrupt law. He says that said indictment is still pending, undetermined, and his response herein in regard to these matters would tend to criminate him thereunder. He says that this indictment grew out of the transactions upon which this litigation is based, and said indictment is based upon the identical transactions that he is now called upon to respond in reference thereto, and that he is now in jail under said charge, awaiting trial, and to compel him to respond herein would deprive him of the constitutional right guarantied to him by the constitution: that is, that he shall not be compelled to give evidence as against himself. And now, having fully responded herein, he prays that the order herein be set aside and vacated, and that he be dismissed from further response thereto.

"W. T. Nugent."

Upon a hearing thereof, the referee adjudged that the response was insufficient, and no further response was tendered, whereupon the rule was made absolute, and on October 16th the respondent was ordered to pay to the trustee, at 9:30 o'clock a. m. of the next day, the sum of \$14,233.45, being the amount in his hands in the manner stated, and belonging to the bankrupt's estate. The respondent having failed to obey this order, or to pay any part of the money, the referee adjudged him to be in contempt, and recommended that the court impose a punishment therefor. The court finds the facts of the case to be as above stated, with the addition that the entire amount (\$14,233.45) is the property of the bankrupt's estate alone; that it had been taken possession of and was held by W. T. Nugent as the agent only of his father up to and at the time of the adjudication; and that the respondent never claimed title to any part of it, nor made any claim of right to it by reason of any attempted transfer of title or ownership therein to him at any time, either in fraud of the bankrupt's creditors or otherwise, nor has

he ever claimed to have converted any part of it to his own use, nor in any wise to have claimed it adversely to the bankrupt or the trustee. The court is asked to review the said orders of the referee of October 16, 1900, which required the payment of the money by respondent, and which adjudged him to be in contempt for his failure to do it.

The response of W. T. Nugent, as will be seen from reading it, is put entirely upon two grounds. The first is that the court and referee are without jurisdiction in the premises, and the second is that respondent had been recently indicted for certain offenses against the laws of the United States, growing out of the transaction respecting the money. Inasmuch as any indictment in the premises must be presumed (in the absence of copies, which respondent has failed to produce) to be under section 29 of the bankrupt act, and as no offense there provided for is at all similar to the one which the referee held to be a contempt, viz. the failure to obey the orders indicated, that part of the response which refers to the indictment is so manifestly insufficient as to require no further treatment. It is not claimed by respondent that he is indicted for disobeying that order. The important inquiry is, had the referee power to make the order requiring payment by respondent of the moneys? If not, the matter is at an end; but, if he had the power, then it follows, almost as matter of course, that the refusal to obey the order was a contempt, which the court may punish under the express provisions of the act. Those provisions are found in section 2 of the act, and give to the courts of bankruptcy power (6) "to bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy"; (7) "to cause the estates of bankrupts to be collected, reduced to money and distributed, and to determine controversies in relation thereto"; (13) "to enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment"; (15) "to make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act"; and (16) "to punish persons for contempts committed before referees." Section 41 provides that "a person shall not, in proceedings before a referee, disobey or resist any lawful order, process, or writ."

It is contended that, as the money was delivered to respondent before the petition in bankruptcy was filed, as matter of law he must be regarded as an adverse holder of it, and that the only remedy left in such a case is a civil action under section 23 of the act, of which this court would have no jurisdiction; and authorities are cited to show that, where there was an adverse possession of money or property, it was held that such a proceeding only, and not a summary one, was available, and doubtless those authorities correctly state the law applicable to such a condition of fact. But that does not seem to be this case. It is contended that the money in this case must be regarded as having been converted by the son to his own use before the bankruptcy proceedings were instituted, and

that there was consequently an adverse possession; but this would require the court to do what the bankrupt did not venture to do in his response, notwithstanding the fact that there is nothing in section 29 which makes it an offense to have received any money or property of the bankrupt before the filing of the petition. This contention of counsel, based upon no fact stated in the response, would therefore require the court to find, as matter of fact, that the respondent had converted this money to his own use, and to have had an adverse right to it, as against his father, before 5 o'clock p. m. February 19, 1900. There is absolutely nothing in the record to warrant or to support such a conclusion, and the court declines to reach it. There is no pretense that he held it, up to that time, nor up to the time of adjudication, otherwise than as a mere agent and custodian; nor is there any proof which would warrant the conclusion that this money, or any part of it, was, before the hour of filing the petition, transferred to respondent in fraud of the creditors, nor, indeed, is there any claim in the response to that effect. The response is wholly silent as to whether the respondent has squandered the money, or still has it on hand. This silence is, per se, a forcible suggestion that it is still in his possession. If, as it clearly appears to the court was the fact, there was nothing but an agency upon respondent's part to receive this money as custodian thereof for his father, and if, as it also appears, this was in fact done, then the property, in legal contemplation, remained in the bankrupt's possession at the time of filing the petition, and also at the time of the adjudication. If this be so, then the respondent thereafter held it for the benefit of the trustee, who was substituted to the position of principal to this agent, and for whose benefit the agent thereafter held it; and it was the plain and manifest duty of the respondent, under these circumstances, and having regard to that relation, to pay it over to the trustee, instead of running off with it. Under the powers conferred upon the referee by the bankrupt act, and in his efforts to reduce to cash and administer the assets of the bankrupt, it seems to me clear that after bringing the respondent before the court by service of the rule, and in this way probably making him a party to the proceedings, which are meant to be quite informal, the referee had the power to order this custodian of this money belonging to this bankrupt's estate to deliver the same to the trustee, to the end that it might be administered in due course. This was done, in a summary way, it is true, but not until respondent was duly served with the process applicable to such a proceeding, and not until he had responded and virtually admitted the possession of the money, which, after adjudication, was practically in the custody of the law. It is probably as correct to state of proceedings under the present law, as it was to state of them under the act of 1867, that the filing of the petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction. Bank v. Sherman, 101 U. S. 406, 25 L. Ed. 866. Under section 70 of the present act, the title of the trustee relates back to the date of adjudication, with certain specified exceptions, the only pertinent one of which appears to be that of "property transferred by the bank-

rupt in fraud of his creditors." There is no claim made in the response that the money in the respondent's hands was ever so transferred to him. Indeed, we have the simple case of a bailee of the bankrupt, as such, holding the custody of certain money which came to his hands in the manner stated, and which he has been ordered to pay or deliver to the trustee, the officer of the court, who, by operation of law, has been substituted to all the rights of the bankrupt in that property. The court, in its opinion, has jurisdiction to enforce obedience to that order, although the respondent is not the bankrupt, but "another person," when, as appears to be the case here, he is properly before the court upon the rule and his response thereto. The case is somewhat similar to a proceeding in rem, and the court is but dealing with property which, under the facts of the case, is potentially in the custody of the law. The opinion of Judge Wheeler in the case *In re Brooks* (D. C.) 91 Fed. 508, is very satisfactory upon the question of jurisdiction. Light is also thrown upon it by the opinion in *White v. Schloerb*, 178 U. S. 547, 548, 20 Sup. Ct. 1007, 44 L. Ed. 1183. There could easily and safely have been a denial by respondent of the charge of receiving or concealing the money, or, failing in making a denial available for his purposes, there could have been a payment of the money into court. Neither was done. Any dilemma in which the respondent may find himself involved by reason of the indictment is of his own creation. If the suggestion—or, rather, hint—of its existence was made for the mere purpose of avoiding or evading the duty of making in his response a direct statement of his reasons for not delivering up the money in his hands, it is well that the court is not bound, without either statement or proof, to assume that the difficulty is real, and not affected, and offered merely with the hope of its being available as a convenient and possibly ingenious mode of avoiding either a frank statement of the facts, or else a denial of what is alleged against him. In the absence of either of these, the claim of danger of self-incrimination seems, for the most part, to be a mere abstraction, and in no wise a real difficulty. To the extent of being abstract or not well founded, it is not a proper or sufficient barrier behind which to hide this large sum from the court and the creditors. While the respondent may prudently and rightfully choose not to criminate himself by any statement in his pleading, there was urgent occasion to show facts of exculpation, and, in the nature of things, this could hardly criminate him; but the vice of the response is that it does not do it, nor does the respondent see fit to plead in such a way as to show that he is not guilty, although such a pleading could not possibly criminate him. He substantially rests the case upon a denial of jurisdiction in the court, and not upon any defense to the merits.

Our conclusion is that, upon the grounds indicated, this case appears to call in the most vehement manner upon the court to exert all its powers to get this large sum of money out of the hands of this unfaithful bailee for the benefit of the bankrupt's creditors. Over \$14,000 which manifestly belongs to the creditors, and not in any sense to the respondent, has been received by the latter in the

manner indicated, and is held by him under circumstances which present no appeal to the sympathies of any right-thinking man; and if, under the facts shown, his retention of this fund may be allowed, and if such retention is sanctioned by the court, and if it be so easy by this species of jugglery between a bankrupt father and his son,—if that be so easy of accomplishment,—the rights of creditors in such cases may be defeated with an ease and completeness that would make involuntary proceedings in bankruptcy a somewhat laughable mockery. This characteristic will not be willingly impressed upon such proceedings by this court.

Of the contention of respondent that he cannot respond freely, lest he criminate himself, it may be further remarked that there was the easiest possible way to avoid this, by paying the money into court, and there making any claim to it that he had, so that the questions could be settled here. There has been no effort made either to pay the money, or to state any fact to enable the court to decide whether the respondent has any sort of claim to it, or any reason to present why he should not place it where the creditors who are entitled to it may get it.

To sum up the whole matter: The respondent has the money in his hands as agent or bailee only. His possession is that of his principal. His principal was his father, up to a certain stage of these proceedings; but whether up to the filing of the petition, or up to the adjudication, we need not stop to inquire, as it is immaterial in this case. At one or the other of those times his principal, by operation of law, was changed, and an officer of this court was substituted for his father. That change in no way lessened the duty of paying the money to the proper principal upon notice and demand. After the change, however, the money was potentially in the custody of the law in these proceedings, and subject to the orders of the court. The rule and its service constituted sufficient notice and demand. The order made was that the respondent should pay the money to the proper officer. Disobedience of that order is made punishable as a contempt by the express provisions of the act. The court, therefore, has jurisdiction of the person and of the subject-matter. The rulings of the referee appear to be right, and are approved and confirmed, and his recommendation as to punishing the respondent for the contempt adjudged will be acted upon with appropriate vigor. Under the authority of section 725, Rev. St., and the cases of *Tinsley v. Anderson*, 171 U. S. 107, 18 Sup. Ct. 805, 43 L. Ed. 91, and *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207, the judgment of the court, in the exercise of its statutory discretion, will be that the respondent, W. T. Nugent, for his contempt aforesaid, be imprisoned in the county jail until he shall deliver to Arthur E. Mueller, the trustee, said sum of \$14,233.45; and the court will reserve the right to suspend or set aside this judgment and sentence upon the delivery and payment of the money as ordered.

In re GASSER.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 16.

1. ATTORNEY AT LAW—PRESUMPTION OF AUTHORITY TO ACT IN COURT.

An attorney at law, who is admitted to practice in a court, is presumed to be duly authorized to appear and act for any party whom he claims to represent in that court, and, in the absence of countervailing evidence or statutory prohibition, that presumption is conclusive.

2. SAME—AUTHORITY TO REPRESENT CREDITOR UNDER BANKRUPTCY LAW.

The bankruptcy law of 1898 (subdivision 9, § 1) and general order in bankruptcy No. 4 provide, and form No. 20 in bankruptcy contemplates, that an attorney at law admitted to practice in the United States district court will be presumed to be duly authorized to appear and act for any creditor whom he assumes to represent in bankruptcy proceedings, and in his behalf to oppose the discharge of the bankrupt, without any written power of attorney or authority so to do. The general presumption of law that he is authorized to appear and to do the acts on behalf of his client which he assumes to perform is recognized by the bankruptcy law and the general order, and, in the absence of countervailing evidence, it is conclusive.

(Syllabus by the Court.)

Petition for Review.

M. H. Boutelle (Thomas S. Wood, on the brief), for petitioner.
Frank Ford and J. W. Reynolds, for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is a petition under section 24, subd. b, of the bankruptcy law of 1898 (30 Stat. c. 541, p. 544), to review the ruling of the United States district court upon a question of law. The record presented is so meager that the petition might perhaps be dismissed upon the ground that it does not present the proceedings below upon which the court acted. But the burden was on the petitioner to show by the record presented to this court that there was error in the ruling below, and every presumption that is not negatived by the showing here presented must be indulged in support of that ruling. Under these presumptions, the facts upon which the court based its action must be assumed to be these: Creditors of the bankrupt, Matthew M. Gasser, had duly authorized attorneys at law who were admitted to practice in the United States district court for the district of Minnesota to appear and act in their behalf in the bankruptcy proceedings, but had not authorized them in writing to oppose the discharge of the bankrupt. These attorneys had appeared and acted on behalf of their clients, the creditors, at various stages of the proceeding, and when the petitioner applied for his discharge they filed objections and specifications in opposition to his application on behalf of the creditors whom they represented, and also on behalf of the trustee, for whom they had also been acting as attorneys at law. The bankrupt moved that the appearance and the objections of these creditors and of the trustee be stricken from the records and files of

the court because the trustee was not a party in interest, and because the objections were not signed by the creditors in person or by their duly authorized agent, attorney, or proxy. The court denied the motion.

It is unnecessary to consider the objection that the trustee, Mahon, was not a party in interest, because the attorneys signed the objections on behalf of the trustee and the creditors jointly, and, if they were authorized to appear and oppose the discharge of the bankrupt for the creditors, the order denying the motion to strike their objections from the files was right. The only question which the case presents, therefore, is whether or not attorneys at law admitted to practice in the United States district court may lawfully appear and oppose the application of a bankrupt for his discharge on behalf of creditors who are their clients without an express written power of attorney to do these specific acts. In the consideration of this question, the following authorities have been examined by the court: *Creditors v. Williams*, Fed. Cas. No. 3,379; *In re Palmer*, Fed. Cas. No. 10,682; *In re Smith*, Fed. Cas. No. 12,984; *In re Altenheim*, Fed. Cas. No. 268; *In re Hill*, Fed. Cas. No. 6,481; *In re Scott*, Fed. Cas. No. 12,519; *In re Blankfein* (D. C.) 97 Fed. 191; *In re Simonson* (D. C.) 92 Fed. 904; 1 Nat. Bankr. N. 180, 190, 205; *In re Pauly*, Id. 405; *In re Brown*, 2 Nat. Bankr. N. 590. But the answer which this question should receive is neither difficult nor doubtful.

Proceedings in bankruptcy are in the nature of a suit in equity, the ultimate relief in which is the distribution of the unexempt property of the bankrupt among his creditors, and the discharge of the bankrupt. All the proceedings are either in or under the direction of the United States district court. The appearance in court of an attorney at law licensed to practice there carries with it the presumption of authority to appear and act for his client in the proceeding in which he seeks to represent him. His mere appearance is *prima facie* evidence that he is duly authorized to represent and act for his client, and this presumption is conclusive in the absence of countervailing evidence. *Osborn v. Bank*, 9 Wheat. 738, 6 L. Ed. 204; *Hill v. Mendenhall*, 21 Wall. 453, 22 L. Ed. 616; *Insurance Co. v. Oakley*, 9 Paige, 496. Subdivision 9 of section 1 of the bankrupt law of 1898 provides that "‘creditor’ shall include any one who opposes a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy." General order in bankruptcy No. 2 reads: "The clerk or the referee shall endorse on each paper filed with him the day and hour of filing and a brief statement of its character." General order No. 4 contains these provisions: "Either party may appear and conduct the proceedings by attorney, who shall be an attorney or counselor authorized to practice in the circuit or district court. The name of the attorney or counselor, with his place of business, shall be entered upon the docket, with the date of the entry. All papers and proceedings offered by an attorney to be filed shall be endorsed as above required, and orders granted on motion shall contain the name of the party or attorney making the motion. Notices and orders

which are not, by the act or by these general orders, required to be served on the party personally may be served upon his attorney." Form No. 20 in bankruptcy, the form of the general letter of attorney in fact to be executed by a creditor, bears this caption: "General Letter of Attorney in Fact when Creditor is not Represented by Attorney at Law,"—thus clearly indicating that the supreme court were of the opinion that an attorney at law needed no letter of attorney in fact to authorize him to represent a creditor in bankruptcy proceedings. Attention is called to the fact that general order in bankruptcy No. 32 reads: "A creditor opposing the application of a bankrupt for his discharge or for the confirmation of a composition shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be enlarged by special order of the judge;" and that form No. 58 in bankruptcy, the form of specifications or grounds of opposition to a bankrupt's discharge, has the word "creditor" opposite the place for the signature at its foot; and the inference is sought to be drawn from the fact that nothing is said in this order or this form about the attorney of the creditor that the latter may not be represented by an attorney at law in the filing of his objections to the discharge of the bankrupt. But this is not a logical or permissible inference, in view of the fact that subdivision 9 of the first section of the bankrupt act declares that the term "creditor" may include his duly-authorized agent, attorney, or proxy, and in view of the law of the land that an attorney at law, admitted to practice in a court, is conclusively presumed, in the absence of proof to the contrary, to be duly authorized to act for any client or creditor in any proceeding in that court, unless some statute otherwise specifically provides. Our conclusion is that an attorney at law, admitted to practice in the United States district court, who enters his appearance and files objections to the discharge of a bankrupt on behalf of a creditor, must be presumed to have authority to do so without any special written power of attorney to take such action. Our reasons for this conclusion, in brief, are these: Proceedings in bankruptcy are proceedings in court. An attorney at law admitted to practice in a court is presumed to have authority to appear and act for any party whom he seeks to represent in that court. The bankruptcy law of 1898 provides that a creditor may file objections to and oppose the discharge of a bankrupt, and that the term "creditor" shall include the duly-authorized agent, attorney, or proxy of a creditor. An attorney at law admitted to practice in the court, who enters his appearance for a creditor in opposition to the discharge of a bankrupt, is presumed, under the general law, to be his duly-authorized attorney, and is therefore included under the term "creditor," and is authorized to appear and oppose the discharge of the bankrupt. There is no merit in the petition for review, and it is dismissed.

LITTLE et al. v. UNITED STATES.

(Circuit Court, D. Vermont. October 27, 1900.)

CUSTOMS DUTIES—BOOKS—STATE OR PUBLIC LIBRARIES.

County law library associations organized and maintained under Rev. St. Me. 1883, c. 55, which provides for the organization of such associations, and that their libraries shall be kept in rooms in the court houses provided by the counties, and shall be open to all the people of such counties, and to the support of which that and subsequent statutes devote certain fees and fines collected, are state institutions, and the library of each is a "state library," within the meaning of paragraph 503 of the tariff act of 1897, which places on the free list books imported solely for the use of state and public libraries.

Customs appeal from decision of board of general appraisers affirming an assessment of duty on certain imported law books.

Wilder L. Burnap, for appellants.

James L. Martin, U. S. Atty.

WHEELER, District Judge. Paragraph 503 of the tariff act of 1897 puts "books * * * specially imported not more than two copies in any one invoice, in good faith, * * * for the use or by the order of * * * any state or public library, and not for sale," on the free list. The appellants specially imported, through this collection district, two cases of law books, for the use of the Aroostook County Law Library Association, of Houlton, Me., which the collector assessed for duty at 25 per cent., under paragraph 403. The appellants protested that the books were free, under paragraph 503, and the board of general appraisers affirmed the classification, saying:

"In the absence of any evidence to the contrary, we must assume what is quite probable,—that the library of this association is a private one, designed solely for the use of members of the association, and therefore could not probably be considered as public, in any sense of the word."

Rev. Laws Me. c. 55, § 6, provide that, in every county where five or more attorneys reside, any five may procure themselves and the other resident attorneys to be incorporated for the purpose of establishing a law library, the name of which shall be, "Trustees of Law Library in County of ———;" that meetings shall be held in term time, at which the oldest member of the bar shall preside, and that they may choose a clerk, librarian, and treasurer; section 7, that the treasurer shall apply all the moneys, under the direction of the trustees, to form a law library; and chapter 8, § 11, that every county treasurer shall pay to the treasurer of the law library association of that county all money received from persons admitted as attorneys in the supreme judicial court. Other statutes have provided for the payment over of percentages of certain fines for this purpose in each county, not exceeding a certain sum, till the rate was made 20 per cent., and the amount not to exceed \$500. Laws 1893, c. 271. Evidence taken in this court, and undisputed, shows that this library association for whose use these books have been imported is one of these county associations, which was organized and has continued

under these laws; that the libraries are kept in rooms in the court houses provided by the counties, and are open and accessible to all the people of the counties, without restriction. Upon this evidence, these libraries seem clearly to be public. This system of county libraries extending throughout the state is a state system, and each one is, as a part of that system, a state institution, and not any the less so because the subject of the books of the libraries is not general, but is confined to law. All people are, by law, supposed to know the law; and the state of Maine appears to have taken these measures for providing these libraries, as a matter of public policy, in order that the people of the state may, to some extent, as they will, be actually as well as supposedly informed as to what the law is. In *Williams v. School District*, 33 Vt. 271, the exercise of the right of eminent domain by a school district to acquire a site for a school house was objected to because it would be for the use of the inhabitants of that district only, and not of the general public, and so not for a public use. But the several school districts of the towns were held to be a part of the general system of public education, and to be public in their character. As the case is now presented, the decision of the board of general appraisers must be reversed, and the classifications of the merchandise as dutiable set aside. Decision reversed

WIELAND et al. v. COLLECTOR OF PORT OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 591.

CUSTOMS DUTIES—CLASSIFICATION—SARDINES.

Small fish packed in oil in quarter tins of the size and style designated in paragraph 208 of the tariff act of 1894 (28 Stat. 523), and so labeled as to be known to the trade generally as "sardines in oil," are dutiable as such under that paragraph, and not under paragraph 211 as fish in cans, not specially provided for, although they are not in fact sardines, but sprats, and are known among importers as "sprats in oil."

Appeal from the Circuit Court of the United States for the Northern District of California.

F. J. Castelhun (Lloyd & Wood, of counsel), for appellants.

Edward J. Banning, Asst. U. S. Atty. (Frank L. Coombs, U. S. Atty., of counsel), for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an appeal from the judgment of the circuit court (98 Fed. 99) sustaining the decision of the board of United States general appraisers of New York in overruling the protest made by appellant against the liquidation, entry, assessment, and payment of duties exacted by the collector of the port of San Francisco at the rate of 2½ cents per quarter tin on imported sprats in oil, packed in tins, labeled "Sardines in Oil." The facts are: That on May 29, 1897, appellant imported from Bordeaux,

France, three lots of fish in oil to the port of San Francisco, under entries numbered 6,247, 6,248, and 6,249. That entry 6,247 consisted of 650 cases, each case containing 100 quarter tins labeled on one side "Fabricants de Sardines à L'huile"; the other, "Loquer & Cie., Douarnenez, France," and on one end "Poissons à L'huile." The market value of this lot was \$2,681.49. That entry No. 6,248 consisted of 100 cases, each containing 100 quarter tins, labeled in all respects as entry No. 6,247. The market value of this lot was \$412.54. That entry No. 6,249 consisted of 249 cases, each containing 100 quarter tins, labeled as follows: "Le Keriolec & Cie." on one side, "Sardines à L'huile" on the other; "Usine à Concarneau, France," on one end, and on the other end "Poissons Choisis." The market value of this lot was \$981.57. Appellee admits that the specific definition of the fish in question is "sprats in oil"; but his contention is that the testimony in its entirety shows that sprats put up in oil, packed and labeled as those in question were, are known to the trade as "sardines in oil," and that such commercial designation must prevail.

The court, upon the testimony, found that:

"(5) The said fish in oil of all three entries were 'sprats in oil,' and were invoiced as 'sprats in oil.' (6) The said fish in oil were sprats, and belong to the same family of the clupeidæ as do sardines. The smaller fish of this family are prepared and canned in oil as are sardines, but the latter are superior to sprats, and sell for more. (7) The fish in the consignments in question went under the general name of 'sardines.'"

And upon these facts found as a matter of law that the imported merchandise was properly classified as sardines, and is subject to duty at the rate of $2\frac{1}{2}$ cents per quarter tin, under paragraph 208 of the act of congress of August 27, 1894, entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes" (28 Stat. 509), and that the decision of the board of United States general appraisers that such merchandise was subject to duty at such rate should be sustained.

Appellant claims that the evidence does not sustain the finding of the court that the fish in question went under the general name of "sardines"; that the court erred in deciding that the merchandise in question (especially invoices 6,248 and 6,249) was subject to duty at $2\frac{1}{2}$ cents per quarter tin, under paragraph 208 of the tariff act of 1894 (28 Stat. 523); and its contention is that the merchandise in its entirety was only subject to a duty at the rate of 20 per cent. ad valorem, under paragraph 211 of the same act. These paragraphs read as follows:

"208.—Anchovies and sardines, packed in oil or otherwise, in tin boxes measuring not more than five inches long, four inches wide, and three and one-half inches deep, ten cents per whole box; in half boxes, measuring not more than five inches long, four inches wide, and one and five-eighths inches deep, five cents each; in quarter boxes, measuring not more than four and three-fourths inches long, three and one-half inches wide, and one and one-fourth inches deep, two and one-half cents each."

"211.—Fish in cans or packages made of tin or other material, except anchovies and sardines and fish packed in any other manner, not specially enumerated or provided for in this act, twenty per centum ad valorem."

We are of opinion that the findings of the court are sustained by the weight of the evidence, and that the conclusions of law arrived at are correct, and that the fish in the invoices should be "properly" designated for customs duties under the general name of sardines. It is true that appellant introduced several witnesses whose testimony tended to show that the fish in the cans were, among importers, commercially known as "sprats in oil," and that they were neither bought nor sold as "sardines." On the other hand, the testimony of retail dealers is equally positive that similar consignments of fish were bought and sold by and known to the retail trade as "sardines." Appellant claims, upon the authority of *Lamb v. Robertson* (C. C.) 38 Fed. 716, *Reiss v. Magone* (C. C.) 39 Fed. 105, 108, and *Hills Co. v. U. S.*, 39 C. C. A. 500, 99 Fed. 264, that the testimony of importers and wholesale dealers must prevail over the testimony of retail dealers. But in the present case it appears that several of the witnesses who testified in behalf of the appellant that the fish contained in the cans were not sardines, but sprats in oil, admitted upon cross-examination that tins of fish marked and labeled as the tins in the present case were would be commercially known to the trade generally as "sardines in oil." The tariff laws are, as a general rule, written in the language of commerce, rather than in the language of science.

In *Re Herrman* (C. C.) 52 Fed. 941, 944, it is said:

"Some words are to be taken in their popular and ordinary signification, as they would be understood by all the world. Failing that, there is a well-known rule, reiterated over and over again, that, if words have a special meaning in trade and commerce, they are to be given that special meaning when we find them in tariff statutes. I know of no third rule that, because congress frames its statutes after advising with manufacturing experts, words should in some instances be given the technical meaning which the manufacturers give to them. * * * An article may be bought and sold by the specific name which indicates that precise article, and still a group of such articles may be known to trade and commerce by a commercial term, which includes them in a special group."

In *Schmieder v. Barney*, 113 U. S. 645, 647, 5 Sup. Ct. 624, 625, 28 L. Ed. 1130, 1131, the court said:

"Undoubtedly the language of tariff acts is to be construed according to its commercial signification, but it will always be understood to have the same meaning in commerce that it has in the community at large, unless the contrary is shown. *Swan v. Arthur*, 103 U. S. 597, 598, 26 L. Ed. 525."

In *Twine Co. v. Worthington*, 141 U. S. 468, 471, 12 Sup. Ct. 55, 56, 35 L. Ed. 821, 823, the court said:

"It is a cardinal rule of this court that in fixing the classification of goods for the payment of duties the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied. In *re Two Hundred Chests of Tea*, 9 Wheat. 430, 438, 6 L. Ed. 128; *U. S. v. One Hundred and Twelve Casks of Sugar*, 8 Pet. 277, 8 L. Ed. 944; *Elliott v. Swartwout*, 10 Pet. 137, 9 L. Ed. 373; *Curtis v. Martin*, 3 How. 106, 11 L. Ed. 516; *Arthur v. Morrison*, 96 U. S. 108, 24 L. Ed. 764; *Swan v. Arthur*, 103 U. S. 597, 26 L. Ed. 525; *Schmieder v. Barney*, 113 U. S. 645, 5 Sup. Ct. 624, 28 L. Ed. 1130; *Arthur's Ex'r's*

v. Butterfield, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643; Robertson v. Salomon, 180 U. S. 412, 9 Sup. Ct. 559, 32 L. Ed. 995."

Numerous other authorities are cited upon this subject in a note to Dennison Mfg. Co. v. U. S., 18 C. C. A. 545 (s. c. 72 Fed. 258).

In Meyer v. U. S. (C. C.) 86 Fed. 120, the merchandise in question comprised two varieties of fish packed in oil, and labeled, respectively, "Kieler Sprotten in Oil," and "Sardelles de Scandinavie." They were classified for duty at 2½ cents per box, under the provisions of paragraph 208 of the act of 1894, for "anchovies and sardines packed in oil in quarter boxes," and were claimed to be dutiable at 20 per cent. ad valorem, under the provisions of paragraph 211 of said act, as "fish in cases or packages made of tin, except anchovies and sardines." The court, after overruling the decision of the board of general appraisers as to the sardelles, said:

"The other fish are called 'Kieler sprats.' They are probably neither genuine sardines nor anchovies. This point, however, is not material. The evidence shows that, when pickled and packed in half barrels, they are commercially known as 'Norwegian anchovies'; if put up in tins, and labeled 'sardines,' they are commercially known as 'smoked sardines'; and, if labeled 'sprats,' they are commercially known as 'sprats.' The evidence before the board sufficiently supports the finding that these fish are commercially known as 'smoked sardines in oil.' The whole evidence tends to show that little fish of this general character, when thus put up in oil in tin boxes, are commercially recognized as belonging to the general class 'sardines,' although this particular species, when labeled 'sprats,' are known as 'Kieler sprats.' The facts bring the case within the rule enunciated in *Re Herrman*, 52 Fed. 941. The decision of the board of general appraisers affirming the act of the collector with reference to sprats is affirmed."

In the light of all the evidence, and of the principles of law as announced in the authorities we have cited, our conclusion is that the judgment of the circuit court is correct, and should be affirmed, with costs. It is so ordered.

SALLA et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 600.

POST OFFICE — CONSPIRACY TO OBSTRUCT PASSAGE OF MAILS — ELEMENTS OF OFFENSE.

An indictment charging defendants with conspiring "to unlawfully, willfully, maliciously, and knowingly" delay and obstruct, etc., the passage of a railway car and train, "which said railway car and train were then and there carrying and transporting the mails of the United States," is insufficient to charge a conspiracy to violate Rev. St. § 3995, by "knowingly and willfully" obstructing the passage of the mails, since it fails to charge that defendants knew that said car and train were carrying the mails, without which there could be no conspiracy to violate the statute.

In Error to the District Court of the United States for the District of Idaho.

The plaintiffs in error seek to review the judgment of the district court of the United States for the district of Idaho in a case in which they were con-

victed of a conspiracy to commit an offense against the United States. The facts on which the indictment was based are the following: On April 29, 1899, the Northern Pacific Railway train was boarded by a large number of armed men at different points between the towns of Burke and Wallace. When the train reached Wallace some of these men compelled the engineer to run his train over the track of the Oregon Railroad & Navigation Company to Wardner Junction, a place about 12 miles west of Wallace. They then proceeded to the mill of the Bunker Hill & Sullivan Mining & Concentrating Company, near Wardner Junction, and destroyed it by the use of dynamite, after which they dispersed, and returned on the train towards Wallace and the points from which they had come. There were three counts to the indictment, but on the trial, at the conclusion of the evidence, the second and third counts were ordered dismissed. The indictment in the first count charged that the plaintiffs in error did "unlawfully, wickedly, and maliciously confederate and conspire together to commit an offense against the United States; that is to say, to unlawfully, willfully, maliciously, and knowingly delay, prevent, obstruct, and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company, by the said Northern Pacific Railway Company, the said Northern Pacific Railway Company then and there being engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the United States." The indictment then proceeded to charge the commission of an overt act in pursuance of said conspiracy. The plaintiffs in error demurred to the indictment, and, after verdict thereon, moved in arrest of judgment, upon the ground that the facts stated in said count of the indictment do not constitute a public offense.

Reddy, Campbell & Metson, for plaintiffs in error.
R. V. Cozier, for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We think that on the authority of *U. S. v. Carll*, 105 U. S. 611, 26 L. Ed. 1135, and *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, the indictment is insufficient to sustain the judgment. In *U. S. v. Carll* the indictment was found under section 5431 of the Revised Statutes, which denounces a penalty against "every person who, with intent to defraud, passes, utters, publishes, or sells, * * * any falsely-made, forged, counterfeited, or altered obligation, or other security of the United States." The indictment charged that the defendant "feloniously, and with intent to defraud the Bank of the Metropolis, * * * did pass, utter, and publish upon and to the said Bank of the Metropolis a falsely-made, forged, counterfeited, and altered obligation and security of the United States." It was held that the indictment was insufficient, even after verdict, for the reason that it did not allege that the defendant knew the obligation to be false, forged, or counterfeited. In delivering the opinion of the court, Mr. Justice Gray said:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. * * * The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the

common-law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object."

In *Pettibone v. U. S.* the defendants were indicted, under section 5440 of the Revised Statutes, for conspiring to commit an offense against the United States by violating section 5399, which provides as follows:

"Every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars, or by imprisonment not more than three months, or both."

The indictment in that case alleged that the defendants unlawfully, willfully, and feloniously conspired, combined, and agreed to commit an offense against the United States, to wit, "to corruptly, and by force and threats, obstruct and impede the due administration of justice in the aforesaid United States circuit court for the Ninth judicial circuit, district of Idaho," by unlawfully, willfully, and feloniously, by force and violence and threats of violence, intimidating and compelling the employes of the Bunker Hill & Sullivan Mining & Concentrating Company to cease and abandon work in and upon the mines of said company and other property, which was alleged to be in violation of the terms of the injunction which had been issued from said circuit court of the United States for the district of Idaho, and directed to the plaintiffs in error. The court said:

"The construction that applies to the first branch of section 5399 must be applied to the second, and, if it were essential that the person accused should know that the witness or officer was a witness or officer in order to conviction of the charge of influencing, intimidating, or impeding such witness or officer in the discharge of his duty, so it must be necessary for the accused to have knowledge or notice or information of the pendency of proceedings in the United States court, or the progress of the administration of justice therein, before he can be found guilty of obstructing or impeding, or endeavoring to obstruct or impede, the same. * * * It seems clear that an indictment against a person for corruptly, or by threats or force, endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such. And the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew, or had notice, that justice was being administered in such court."

The language so quoted from the *Pettibone Case* fully answers the question which is propounded in the present case. The indictment here charges a conspiracy to commit an offense against the United States by conspiring together to unlawfully prevent, delay, and obstruct a certain railway car and train which carried the mails of the United States. It does not charge that the conspiracy had for its purpose to knowingly obstruct the mails. If it had so charged, the word "knowingly" might be said to have implied an imputation of knowledge that the United States mails were upon the train.

The word "knowingly," as used in the indictment, refers only to the action of the defendants in delaying the passage of the certain railway car and train. It is alleged that they willfully and knowingly delayed and obstructed the movement of the train. While it is true that the laws make the railways of the United States postal roads for carrying the mail, and a large number of passenger trains are engaged in carrying the mail, it is nevertheless true that many passenger trains do not carry the mail. The defendants in this case are not charged with the overt act of obstructing the passage of the mails or a carrier of the mails, but with a conspiracy. It is the confederation and conspiracy to commit an offense against the United States that they are called upon to answer for. As charged in the indictment, the conspiracy is declared to have had for its purpose to knowingly hinder and delay the movement and passage of a certain railway car and train, which car it is subsequently alleged carried the mails of the United States. It is no offense against the United States to hinder and delay the passage of a railway car, and consequently it is no offense to conspire or confederate for that purpose. Such an offense must be dealt with under the laws of the state. The conspiracy, as charged in the indictment, lacks an essential ingredient to an offense against the United States, to wit, that the defendants knew that the mails of the United States were carried upon the train which they conspired to obstruct. It may be that they all had such knowledge, or that the facts and circumstances shown in the evidence were sufficient to charge them with such knowledge, but that does not dispense with the necessity of setting forth in the indictment all the elements of the wrongful act which they conspired to commit. Says Hawkins (book 2, c. 25, § 60): "In an indictment nothing material shall be taken by intendment or implication." The authorities above cited sustain the proposition that an indictment for a conspiracy to commit an offense against the United States must charge every element of the offense as fully as if the indictment were for its perpetration. The analogy between the indictment in this case and that in the Pettibone Case is complete. In the Pettibone Case the indictment was held fatally defective for its failure to allege that the defendants knew of the pendency of proceedings in the court and the issuance of the injunction. Without the knowledge that justice was being administered in the court, it was ruled that the defendants could not be charged with conspiring corruptly, or by force or threats, to obstruct or impede, or to endeavor to obstruct or impede, its due administration. The judgment is reversed, and the cause remanded, with instructions to quash the indictment and discharge the defendants.

ALLAN B. WRISLEY CO. v. IOWA SOAP CO. et al.

(Circuit Court, S. D. Iowa, E. D. September 29, 1900.)

No. 231.

1. UNFAIR COMPETITION—SIMILARITY OF NAME.

Complainant and its predecessor in interest had for many years manufactured and sold a soap under the name of "Old Country Soap," which was used as a trade-mark. Defendant commenced the manufacture and sale of a soap under the name of "Our Country Soap." The boxes in which defendant shipped its soap and the wrappers around the bars were dissimilar from complainants in the printed matter thereon and in the color of the lettering, and each, as well as the bars themselves, contained defendant's name and address, which did not resemble complainant's. The bars of each party, while similar in color and general appearance to those of the other, had stamped upon one side the name of the soap, and on the other the name of the maker. *Held*, that the mere similarity of name, in view of the other facts, was not sufficient to constitute unfair competition, it not appearing to be such as to deceive a buyer of ordinary intelligence and observation into buying defendant's soap for that of complainant.¹

2. TRADE-NAMES—PROTECTION IN EQUITY—USE FOR PURPOSE OF DECEIT.

A complainant using the name of "Old Country Soap" on a soap manufactured in the United States for the purpose of inducing persons who came to this country from Europe to believe such soap was made in the "old country," is not entitled to protection in the use of such name as a trade-name by a court of equity.

In Equity. Suit for infringement of trade-mark and unfair competition. On motion for preliminary injunction.

Taylor E. Brown, for plaintiff.

W. E. Blake, for defendants.

MCPHERSON, District Judge. This is an application for a temporary injunction, and comes to this court by reason of diverse citizenship and the amount involved. Complainant shows that it is engaged in the manufacture of laundry soap at Chicago, Ill., and that it is the successor in business to one Allan B. Wrisley, who established his business in Chicago in 1862, and that more than 20 years ago he adopted as a trade-mark for his laundry soap the word symbol "Old Country," and that plaintiff corporation is still engaged in that business, and uses said trade-mark. It further alleges that said soap is of good quality, and has a splendid reputation as such, and is in great demand. The plaintiff further alleges that it has complied with the statutes of the United States pertaining to trade-marks, and that its rights are covered by certificate No. 29,285, of date December 8, 1896, and complains that defendant is not only infringing upon its rights in the manufacture and sale of the soap, but that defendant is guilty of unfair competition:

The pleadings and the evidence, including exhibits, show that plaintiff and its predecessor, Mr. Wrisley, have been manufacturing and

¹ Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

selling said soap in Chicago for more than 20 years, and that said soap has acquired the name of "Old Country Soap," sometimes "Country Soap," and sometimes "Old C Soap," and that defendant is manufacturing and selling, and has been since some time in the year 1898, a soap called "Our Country Soap."

It would be academic, and a display of assumed learning, to quote from many of the authorities. I content myself by referring to but one or two cases. *Pittsburg Crushed Steel Co. v. Diamond Steel Co.*, 61 U. S. App. 22, 89 Fed. 706, 32 C. C. A. 324.

This case is by the circuit court of appeals from this circuit. The rule, as stated in that case by Judge Sanborn, is not only a clear statement of the rule as found in the many cases with which the books abound, but, of course, is binding on this court. It is there said:

"Every suit of this character is founded on the fact that the action, or proposed action, of the defendant has deceived, or is calculated to deceive, ordinary purchasers buying with usual care, so that they have purchased, or will probably purchase, the goods of the defendant under the mistaken belief that they are those of the complainant, to the serious damage of the latter. The deception, or probable deception, of the ordinary purchaser to such an extent that he buys, or probably will buy, the property of one manufacturer or vendor in the belief that it is that of another, is a *sine qua non* of the maintenance of such a suit, because every one has the undoubted right to sell his own goods or goods of his own manufacture as such, however much such sales may diminish or injure the business of his competitors."

And much more of like import is found in the opinion in that case. The foregoing is a correct statement of the rule. One person shall not be allowed to go out in channels of trade, and represent himself to be the person of the complainant, and on the reputation of complainant sell his (defendant's) goods. And it is equally unfair, and as much a wrong, for a defendant, by the adoption of symbols, labels, wrappers, packages, and names, to go out into the channels of trade, and lead consumers to believe that his goods are the goods of complainant. But, short of this, the man first in business or manufacturing cannot stifle all other trade, and control the entire market.

There is nothing more in the law of infringement of trade-marks or unfair competition as applicable to this case. Believing the foregoing to be the law, nothing remains but to apply the facts of the case to the law.

Both parties shipped their soap, from their respective places of manufacture, to the trade, in pine boxes of about the same size. On complainant's boxes are the words, "Allan B. Wisley Old Country Soap. 479, 481, 483 Fifth Ave., Chicago," which words are in large blue lettering.

Defendant's boxes are marked on one side, in large black letters, "Our Country's Soap, Manufactured by Iowa Soap Co." On the other side, in red letters, is a guaranty, and then "Iowa Soap Co., Burlington, Ia."

The bars of soap in each case are supposed to be one pound, and are of about the same size. Plaintiff's bar of soap is marked "Allan B. Wisley, Chicago," in letters cut in the soap on a smooth surface on the bar. On the other side "Old Country Soap" lettered in the same way.

Defendant's soap is lettered on one side "Our Country Soap," and on the other "Iowa Soap Co., Burlington, Iowa." The said lettering on both sides is in a panel cut out of the soap.

Plaintiff's wrapper around each bar of soap has in large blue lettering as follows: "Allan B. Wrisley's (Trade-Mark) Old Country Soap. Allan B. Wrisley." His address or place of manufacture is not given on the wrapper.

Defendant's wrapper, on one side, in large red letters on a blue field, in part of an American eagle, is "Our Country's Soap." On the other side, "Iowa Soap Co., Manufacturers, Burlington, Iowa." Also a lot of blue stars.

The soap of each party is yellow, defendant's being a deep yellow and plaintiff's a light yellow; but the bar soap of plaintiff in evidence is apparently an old one, and I suspect that in bars each of the same age they would be more alike in color, and yet this is mere surmise. Such is a description of the boxes in which the soap is shipped, the wrappers around the soap, and the soap itself, and the lettering both on the bars of soap and on the wrappers and on the boxes.

Plaintiff's soap is called "Old Country Soap"; defendant's soap is called "Our Country's Soap." Plaintiff has been in the business of manufacturing and selling "Old Country Soap" for a time long prior to the time defendant commenced to manufacture and sell its soap.

So the question of fact is, would a person of ordinary intelligence be misled into buying defendant's soap when wanting the soap of plaintiff?

The affidavits show that in a few isolated cases parties have asked for plaintiff's soap, and have received defendant's. But the affidavits show that these were few in number, and in most of the instances, in my opinion, were bought by parties seeking evidence for this case, and by parties who were playing detective, and not the legitimate result of actual trade. The affidavits are very unsatisfactory as to these isolated cases, but my judgment is that neither from the sight, nor from the sound of the names, of the soap could any person of ordinary intelligence be misled into buying the one, supposing he was buying the other soap.

Justice Brewer covers this matter in a case in the circuit court of appeals from this circuit so much better than I can that I refer to what he says. *Lorillard Co. v. Peper*, 57 U. S. App. 565, 86 Fed. 956, 30 C. C. A. 496.

This was a contention over tobacco packages. The plaintiff's tobacco was called "Tube Rose"; defendant's tobacco was called "True Smoke." Both packages were alike in form. The labels on each were made of red and blue lettering, but the lettering was different in size. But both plaintiff's and defendant's packages contained the two following sentences: "Notice. The manufacturer of this tobacco has complied with all requirements of law," and "Every person is cautioned under the penalties of law not to use this package for tobacco again." These two sentences in one case were in blue lettering and the other a dull yellow.

Justice Brewer, in writing the opinion, among other things, said:

"The question is whether, taking defendant's package and label as a whole, it so far copies or resembles plaintiff's package and label that a person of ordinary intelligence would be misled into buying the one supposing he was buying the other. The elaborate descriptions of the points of resemblance or those of difference are, taken by themselves alone, always unsatisfactory. The eye at a glance takes in the whole of one exhibit and the whole of another, and the comparison thus made of the two is the surest and the only satisfactory way of satisfying the judgment as to the existence of the alleged deceptive imitation. * * * No one who is looking for Lorillard's tobacco could for a moment be deceived into believing that this was that tobacco. There is no similarity between the names. Neither the number of syllables nor the number of letters is the same, and there is only one letter in the two names alike. The other principal mode of identification is the name under which the article passes, and herein the difference between the two names, although perhaps not so pronounced, is still marked and obvious. 'Tube Rose' and 'True Smoke,' when spoken, do not sound alike, and do not suggest the same idea; and while, considering the number of letters and the letters themselves, there is more of similarity than between the names of the manufacturers, yet the contrast between the two is apparent at a glance. * * * Summing it all up, while there are certain minor points of resemblance which have been forcibly urged upon our attention by counsel for the plaintiff, yet, looking at the two packages with their labels, it appears it is clear that they are so essentially different that no one of ordinary intelligence desiring to buy the one kind of tobacco would be misled into buying a package of the other."

When speaking of the evidence that tended to show that some parties had made purchases of defendant's tobacco believing it plaintiff's, and that some witness had testified to such sales, Justice Brewer said:

"We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens in isolated instances that some person was so careless as not to detect the difference. It may well be that, where many sales were made, some individuals, not particularly attentive, may have purchased the defendant's supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences; and the fact that they have happened, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels."

I cannot understand how any one could be misled or deceived into buying defendant's soap believing he was getting that of plaintiff. A child who could not read would readily discern the difference, not only as to the box for shipment, but the wrappers around the soap, and the soap itself; and, if the child wanted the one soap, he could not be easily deceived into buying the other. In my opinion, there is no such resemblance either in box or in wrapper, or in the soap, or in name, as to deceive a child, to say nothing of a person of ordinary intelligence,—the test urged by Justice Brewer.

There is another matter that ought, in my opinion, to defeat the right of plaintiff to the injunction herein.

The plaintiff corporation, in order to confer jurisdiction upon this court, alleges that it is a citizen of the state of Illinois.

It could do this only upon the conclusive presumption of law that every stockholder is a citizen of Illinois. It was admitted in the argument by counsel for complainant that Allan B. Wrisley is an American citizen, residing at Chicago, Ill., and that the corporation comes before the court with a soap by the name of "Old Country Soap." I have no doubt whatever that the purpose of plaintiff is to make the

people in a German community believe that its soap is manufactured in Germany, or at least from a recipe coming from that country; and in an English community that it is a soap manufactured in England; or at least from a recipe coming from England; and so on in all other communities having a foreign population. One of plaintiff's advertisements, used in the argument by consent of parties, tends to show that such is plaintiff's purpose, and yet the fact is that plaintiff's soap is made in Chicago, Ill., and is manufactured by an Illinois corporation, as successor of Mr. Wrisley, an American citizen.

The long and short of this matter is that complainant comes into court upon proof that tends to show that it is practicing a deception, and has been for years. On defendant's box, and on defendant's wrappers, and on defendant's soap the fact is made known that the soap is manufactured at Burlington, Iowa, and the very name indicates that the soap is American soap.

Plaintiff does not come into court with the right to maintain its action in thus practicing this deception.

So I find and conclude that there is no such similarity, either in the name or appearance of the soap, or appearance of the wrappers, or appearance of the boxes, as to warrant the conclusion that plaintiff's trade-mark has been infringed upon, or that defendant is guilty of unfair competition.

And for both reasons hereinbefore set forth the plaintiff should not have a temporary writ of injunction, and the same is denied.

NATIONAL FOLDING BOX & PAPER CO. v. ROBERTSON et al.

(Circuit Court of Appeals, Second Circuit. October 24, 1900.)

No. 41.

PATENTS—APPEAL FROM ORDER GRANTING PRELIMINARY INJUNCTION—EFFECT OF EXPIRATION OF PATENT.

A preliminary injunction against the infringement of a patent terminates with the expiration of the patent by limitation, and an appeal from the order granting such injunction, pending and undetermined at the time of such expiration, will be dismissed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

Walter D. Edmonds and Philip C. Peek, for the motion.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. This is a motion to dismiss an appeal taken from an order enjoining defendants pendente lite in a suit for infringing letters patent. The ground of the application is that the patent in suit expired by limitation, October 9, 1900. Precisely the same point was raised in the circuit court of appeals for the First circuit. Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co., 9 C. C. A. 450, 61 Fed. 208. That court held that, in view of the expiration of the patent, the interlocutory injunction appealed from terminated, and that there was therefore "nothing remaining for a judgment of

this court to act upon. In this condition of the cause the court will no further consider whether the injunction was or was not properly granted, but will dismiss the appeal." In this expression of opinion we entirely concur. The motion is granted.

EXCELSIOR WOODEN-PIPE CO. v. ALLEN et al.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 596.

PATENTS—SUIT BY LICENSEE FOR INFRINGEMENT—PARTIES.

The grant by a patentee of an exclusive license to sell the patented article in a specified territory carries with it the implied authority to join him, even against his will, as a party plaintiff in suits against infringers, and such right will not be defeated merely by a claim of the patentee that the license has been revoked for a violation of its conditions, nor by the fact that he has granted a second license to the defendant, and is, therefore, interested adversely to his co-plaintiff, where, by reason of his nonresidence, he cannot be served with process as a defendant; since he is an indispensable party, and the court has power to arrange the parties as their interests demand, and decree such relief as may be appropriate between all the parties.

Appeal from the Circuit Court of the United States for the Northern District of California.

The appeal in this case is taken from a final order and decree dismissing the suit as to one of the parties complainant. The Excelsior Wooden-Pipe Company, claiming to be the licensee of patent rights granted to it by Charles P. Allen, the inventor and patentee of an improvement relating to wooden pipes, joined the said Charles P. Allen as a co-complainant in a suit against the Pacific Construction Company, claiming that the latter had infringed the rights so conveyed to the licensee. The bill alleged that the said Charles P. Allen, by an instrument in writing of date December 20, 1892, granted unto the Excelsior Redwood Company, a corporation, its successors and assigns, the exclusive right, license, and privilege within Northern California and other states and territories of manufacturing and selling wooden pipe under and in accordance with the letters patent to the full end of the term thereof, and that thereafter the Excelsior Redwood Company, with the written consent of said patentee, transferred to the appellant the said exclusive license. Charles P. Allen moved to dismiss the suit as to him for the reason that it was brought by the Excelsior Wooden-Pipe Company, and that he was made a party complainant without his knowledge or consent, and that the license by virtue of which the Excelsior Wooden-Pipe Company manufactured and sold pipe under said patent had been revoked prior to the commencement of the suit. The motion was supported by the affidavit of said Allen, in which he admitted the execution of the license, but deposed that the license by its terms provided that upon the breach of certain conditions therein contained it should be at once revoked; and that the said Excelsior Wooden-Pipe Company, ever since the granting of the said license, had repeatedly and continuously violated the said conditions; and that the contract "is now, and has been for a long time, revoked, and null and void." There was filed, also, the affidavit of one of the officers of the Pacific Construction Company, the defendant in the suit, stating that the said defendant Allen had, about a year prior to the suit, granted to the defendant a license to manufacture wooden pipe, and had stated to it that the license granted to the complainant was null and void, and had ceased to exist. Affiant alleged that, in order to determine the validity of the license which was claimed by the complainant, it was necessary that the said Allen be made a

party defendant in said suit, and prayed that he be made such defendant. Opposing these affidavits was the affidavit of the manager of the Excelsior Wooden-Pipe Company denying that the said corporation had violated the conditions of the license which had been granted to it, and denying that the license was revoked. Upon these affidavits the court sustained the motion to dismiss as to the complainant Allen.

William F. Booth and N. A. Acker, for appellant.

Frank H. Gould, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The questions which are involved in this case were fully considered by this court in the case of *Brush Electric Co. v. California Electric Light Co.*, 3 C. C. A. 368, 52 Fed. 945, in which it was held that the grant by the owner of a patent of an exclusive license to sell the patented article in a specified territory carries with it the implied authority to join the patentee, even against his will, as a party plaintiff in suits against infringers. It is unnecessary to reconsider the grounds upon which that conclusion was reached. It is contended that a different question is here presented from the fact that the patentee has denied the existence of the license to his co-complainant, and has granted a license to the defendant. It is said that thereby he has assumed a position which is antagonistic to that of his co-complainant, necessitating the dismissal of the bill as to him, and justifying his joinder as a defendant, if the complainant has a cause of suit for infringement. We find no material difference between the facts of the two cases. In the former case the Brush Electric Company sustained the same relation to the patent that Charles P. Allen does in the present case. The Electric Improvement Company in San José was sued for infringement by the California Electric Light Company, which claimed to have a license from the Brush Electric Company, the owner of the patent; and the latter corporation was joined as a party complainant. It moved that it be dismissed from the suit upon the ground that the suit was brought without its knowledge or consent, and against its will, and in violation of its right as owner of the patent, claiming that the license was forfeited by reason of the attempt of the licensee to subdivide the same. In that case, as in the case at bar, the licensor was a nonresident of the state in which the suit was begun, and for want of service could not have been made a party defendant. It is urged, however, that the facts shown in the defendant's affidavit on the motion to dismiss in the present case would have justified an allegation in the bill that Allen, the patentee, was a joint infringer with the defendant, provided the complainant's license still subsisted; and that under the authority of *Littlefield v. Perry*, 21 Wall. 205, 22 L. Ed. 577, the patentee could have been joined in the suit only as a defendant. In the case referred to, the court remarked:

"Here, however, the patentee is the infringer, and, as he cannot sue himself, the licensee is powerless, so far as the courts of the United States are con-

cerned, unless he can sue in his own name. A court of equity looks to substance, rather than form. When it has jurisdiction of parties, it grants the appropriate relief, without regard to whether they come as plaintiff or defendant."

It may be conceded in the present case that upon the assumption that the statements contained in the defendant's affidavit are true the patentee might have been joined as a party defendant, but this does not meet the proposition that in the case as made upon the bill the patentee was a proper party complainant, and that upon the showing made on the motion and the affidavits the court should not have dismissed the suit as to him. It was admitted in the affidavits that the license which the complainant set forth in the bill had been executed. It was alleged, it is true, that the license was coupled with conditions, that the conditions had been violated, and the license revoked; but the nature of the conditions was not set forth, nor was it alleged in what way they had been violated, or how a forfeiture was incurred or revocation was made. It was not stated that a court had decreed a forfeiture. It was not even asserted that the complainant had been notified of such forfeiture or revocation. So far as the court was advised of the facts by the affidavits, revocation existed only in the mind of the patentee, and was but the assertion of his own construction of his rights in the premises. Shall a court of equity, upon such a showing, prejudge the rights of the complainant in a bill of equity, and dismiss his suit? To dismiss in this case as to the patentee is to dismiss from the suit an indispensable party. It results in the dismissal of the bill, since the patentee, a nonresident of the territorial jurisdiction of the court, cannot be served with process as a defendant. That the patentee is in such a suit an indispensable party is held in *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504, and *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923. In the latter case the court said:

"In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice,—as where the patentee is the infringer, and cannot sue himself."

We entertain no doubt that the court should have retained jurisdiction of the suit as it was presented. When he granted the license to the appellant, the patentee granted the implied authority to use his name as a complainant in any suit necessary to protect the rights of the licensee. It has not been shown that the license so granted is not now in full force and effect. The result arrived at by the court was not based upon a plea in abatement, and upon evidence taken to determine the question of the existence of a license, but was reached upon the *ex parte* statement of the patentee himself, alleging as a conclusion of law that the license for breach of its conditions had been revoked.

Nor is a court of equity divested of its power to decree appropriate and final relief from the fact, if it be a fact, that the patentee has conspired with the defendant to infringe the rights of the licensee. If his attitude towards his co-complainant is antagonistic, it does not

follow that he must be dismissed from the suit. The former practice of courts of chancery which required the dismissal of a bill in case of the joinder of complainants whose interests were antagonistic has given place to a more equitable procedure, which recognizes the power of the court to so arrange the parties to the suit as their interests demand, to make a complainant a defendant, and to decree relief to all parties before it, whether they appear as complainants or defendants, so long as they are all the necessary parties to the controversy. *Boughton v. Allen*, 11 Paige, 321; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Bowen v. Idley*, 1 Edw. Ch. 148; *Le Fort v. Delafield*, 3 Edw. Ch. 32; *Parkman's Adm'r v. Aicardi*, 34 Ala. 393; *Suydam v. Dequindre*, Har. (Mich.) 347; *U. S. v. Union Pac. R. Co.*, 98 U. S. 569, 25 L. Ed. 143. In the case last cited the court said:

"It is no objection to granting such relief that the company is a defendant, for by the flexibility of chancery practice a person whose interests in the subject of litigation are on the same side with the complainant may be made a defendant."

In 1 Daniell, Ch. Prac. (5th Ed.) 235, it is said:

"The consequences of a misjoinder of plaintiffs such as above considered are no longer the same as formerly, for then the bill would have been dismissed, whereas now the court is empowered to grant such relief as the circumstances of the case require, to direct such amendments as it shall see fit, and to treat any of the plaintiffs as defendants."

We think there can be no question that, if at any time during the progress of the cause it had appeared that the patentee sustained a relation to the controversy such as to require that he be treated as a defendant, the court had the power to deal with him as such, and to mold the final decree so as to determine the rights of all the parties to the controversy. The decree is reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

JONES SPECIAL MACH. CO. v. PENTUCKET VARIABLE STITCH
SEWING-MACH. CO.

(Circuit Court of Appeals, First Circuit. October 17, 1900.)

No. 289.

PATENTS—INFRINGEMENT—SEWING MACHINES.

The Woodward patent, No. 354,499, for a sewing machine, describes a machine the only novel feature of which is the combination of a universally movable work feeder with an automatic thread holding and releasing device, both of which devices, used separately, were old, and, if the combination of the patent be conceded invention, the claims are entitled only to a narrow construction, and must be restricted to the precise construction described. As so limited, claims 4 and 6 of the patent held not infringed.

Appeal from the Circuit Court of the United States for the District of Maine.

George O. G. Coale, for appellant.

William Quinby, for appellee.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

BROWN, District Judge. The patent in suit is No. 354,499, dated December 14, 1886, issued to the appellee, as assignee of Woodward, for a sewing machine. The questions in the circuit court were of the validity of the patent, and of infringement, and were decided in favor of the complainant below. 93 Fed. 669. We will use the words "complainant" and "defendant" to signify the relation of the parties to the original proceeding in the circuit court.

Claims 4 and 6, whereof infringement is charged, are as follows:

"(4) In a sewing machine of the class described, having a universally movable work feeder, the combination, with the needle, shuttle, automatic work feeder, and a tension device adapted to produce a constant tension on the thread, of automatic thread holding and releasing devices, substantially as described, whereby the needle thread is held while the shuttle is entering the needle loop, and released while the work is being moved by the work feeder, as set forth."

"(6) The combination of the needle, the shuttle, the work feeder, an automatic thread grasping and releasing device, and a tension device, all arranged and operating substantially as and for the purpose specified."

In the prior art is the closely-related patent to Woodward & Keith, No. 316,927. The subject-matter of the two patents is stated in each in the following words:

"This invention has for its object to provide a sewing machine capable of forming elongated stitches on the surface of material to be ornamented, and of arranging said stitches in a variety of ornamental forms."

The machine of each patent has a "universally movable work feeder," which arranges the stitches in a variety of ornamental forms. The earlier machine was particularly adapted to leather work or to use upon stiff material. Woodward, who was one of the patentees of the earlier patent and the inventor of the device of the patent in suit, was led to make changes in the earlier machine by the suggestion of a manufacturer of knit goods that it would be of great value to produce the stitch on knit goods. This commercial suggestion led to an attempt to adapt the old machine to knit goods. The difficulty in using the old machine on goods of this class is described by Metcalf, complainant's expert, who says that the cause of the trouble which the improvement described in the patent was intended to remedy was "the practical impossibility of making a soft yielding fabric like knit goods pull the requisite amount of thread down by the feeding movement against a tension sufficient for the other purposes of the stitch-forming operation."

It is important to note that, in both machines above referred to, "each feed movement of the cloth draws down from the needle-thread supply the amount of thread necessary to extend from the needle hole last made to the needle hole next to be made." The thread-drawing movement, which secures a supply of thread to go through the material, may be disregarded in this case. It is characteristic of these machines that the material acts in pulling off a thread supply against tension. Leather was strong enough to do this, but when knit goods were introduced in the prior machine they yielded to the strain on the

thread, and the goods puckered. This was remedied by the obvious means of reducing the constant tension; the relation between feed and constant tension being so adjusted that the thin material could draw the thread without puckering. We are clearly of the opinion that no inventive work was done by Woodward until after the adoption of the manufacturer's suggestion, and after the attempt to use the old machine with a reduced tension. There was no novelty or invention in the adjustment of the constant tension to the strength of material in order to avoid puckering. When this was done, the movements of the cloth and of the feed were simultaneous, as in the old machine.

It was found, however, that the reduced tension, though it would avoid puckering and solve the feed difficulty, and the pull-off difficulty, led to new difficulties not encountered in the prior machine. Thus the shuttle, passing through the loop, would drag from the light constant tension a certain amount of thread not desired, and would leave a loose loop of waste thread underneath the goods; also it was found that the take-up, instead of drawing thread from the loop alone, would draw thread from the light constant tension. These defects were remedied by the addition of a new element to the old machine, namely, "automatic thread holding and releasing devices," and this is all there is in the claims in issue to distinguish them from the prior patent. By this element (using language from the fourth claim), "the needle thread is held while the shuttle is entering the needle loop, and released while the work is being moved by the work feeder, as set forth."

It will thus be seen that in the machine of the patent in suit the thread is subject to two tensions,—the light constant tension adjusted to and co-operating with the feed and pull-off, the heavier tension adjusted to the action of shuttle and take-up,—whereas, in the old machine, the thread was under a uniform tension adapted to the stitch-forming operations as well as to feed and pull-off. It will be observed, also, that a constant tension device is an element of the claims in issue. The specification, referring to the constant tension, states, "Only sufficient tension is required to cause the thread to lie smoothly on the surface of the work." The prior art discloses the use, in straight-seam sewing machines, of two tensions, whereby, through an intermittent check, a light tension is imposed when thread is drawn from the supply, and a heavier tension at other times.

In the patent to Tripp, 282,410, 1883, is shown an intermittent tension. The specification states also, "especially when sewing fine or fancy goods, what is commonly known as 'puckering' is avoided by reason of the thread being rigidly held during the passage of the shuttle, and released subsequently to the proper normal tension for the thinnest goods." Other references are Cowperthwaite, No. 13,630; Whitehill, No. 184,938; Macy & Hobbs, No. 40,000; Willcox & Carleton, No. 116,521; Barton & Willcox, No. 255,581; Blodgett & Lerow, reissue No. 188; Willcox, No. 43,819. In the prior art is also the universally movable work holder or feed, shown in patents to St. Amant, No. 145,025; Cornely, No. 148,182; Cushman, Nos. 165,798 and 167,747; and House, No. 206,239.

The intermittent tension and universally movable work holder or feed are not found combined in any previous machine. The complainant, however, is precluded by the prior art and the character of the claims, as well as by the concessions of its expert, from claiming broadly this combination, and we think it apparent that the relation between intermittent tension and stitch-forming operations might well be the same in a machine with a universal feed and in one with a straight feed.

Mr. Metcalf states "that the opening and shutting of an intermittent tension was a well-known means of varying the resistance opposed to the drawing down of thread, and that, therefore, the novelty of the mode of operation under consideration must be determined by the operative relation between the thread holding and releasing devices as a whole and the feed device as a whole." He says, also, that "the material thing is the presence and the timing of this reduction of resistance, and not the kind of mechanism used for effecting it," and that the holding and releasing mechanism is so timed relatively to the feed as to enable the feed to draw down needle thread against a less resistance than that which operates at certain other parts of the process.

Counsel for the complainant insists upon the novelty in the timing of the operation of feed and intermittent tension, and says: "The essential thing is that the needle thread is and must be gripped and held during the setting of the stitch and released during the feed." One reason for this is that the feed and pull-off are simultaneous. We may describe the timing of the action of the intermittent check by saying that it holds the thread during the setting of the stitch, and releases it during the action of the pull-off. This description fits both the complainant's device and the devices of the prior art, and is old. Or we may describe the timing by saying that the check holds the thread during the setting of the stitch, and releases it during the feed. These words are applicable, but they imply an entirely fallacious view of the inventor's problem. As a matter of fact, the relation of tension and feed necessary to prevent puckering is a relation of constant tension and feed. A light, uniform, constant tension, that would lay the thread smoothly upon the material, was adopted. This done, the material would feed properly, and this, we have already said, preceded any inventive act. There remained, then, only the difficulties which arose from the adoption of this obvious mechanical expedient of a lighter tension for feed and pull-off. These were difficulties of the stitch-forming operation, and were solved precisely as in the prior art by an intermittent check to hold the thread during the action of shuttle and take-up. To retain this heavy tension after it had done its required work would have interfered directly with what had been done to relieve the material in the thread-drawing function. To have kept it on longer would have been an absurdity; and the contention that there was inventive thought in releasing the heavy tension to the feed amounts merely to a claim that there was invention in not doing an absurd thing absolutely inconsistent with the prior art of reducing the constant tension. The inventor's view is stated by him as follows:

"When I had a tension light enough so that the goods could be carried without puckering them or drawing them together, I had no means, with the present devices for the take-up, of drawing back the loop which the shuttle made to pass the shuttle thread through. * * * I then had to experiment to find out some means whereby an extra tension or a lock on the supply thread, while the take-up was operating, would assure the loop to be drawn back instead of drawing from the supply end. After that it was only a question of running sufficient light tension that the goods could be carried along without puckering, and at the same time laying a silk thread or floss straight upon the goods."

His experiments were subordinate to the main requirement of a light constant tension. The constructor's thought was to run under a light tension, except during the stitch-forming operation. Mr. Metcalf says, in effect, that it was to time the release of a heavy tension to the feed movement. This seems an inverted and fallacious way of expressing what was done by Woodward. We may say, of course, that the machine works under a light tension, increased during the stitch-forming operation, or that it works under a heavy tension, released during the thread-drawing operation. These may be regarded as equivalent expressions for the same thing, and this thing was old. Mr. Metcalf employs, however, the word "feed" instead of "thread-drawing operation"; insisting upon the importance of the relation between the feed and the release of the heavy tension, and asserting that this is novel.

The word "feed" admits of some ambiguity. The "feed mechanism" is a part of the machine, which clamps and controls the material. The material, when so clamped, partakes of the movements of the feed mechanism. The material may thus be considered a part of the feed. The feed mechanism operates in the machine of the patent in suit exactly as in the Woodward & Keith machine. This feed mechanism was capable of acting against a heavy tension sufficient for the stitch-forming operations. A light tension was required only for the free movement of the cloth. The continuance of a heavy strain sufficient to set the stitch would therefore not interfere with the movement of the feed mechanism. Therefore, were the intermittent tension not released during this movement, the new machine would operate substantially as the old. The release of the heavy tension, therefore, is related to the material, and not to the feed mechanism, and is simply in order that the material may proceed under that light constant tension which is found necessary to prevent puckering and to lay the stitches smooth. But, as we have said, all this was involved in the adjustment of constant tension to feed of the cloth. The release of the heavy tension at the time of the movement of the cloth was therefore nothing more or less than adopting what Mr. Metcalf calls "well-known means of varying the resistance opposed to the drawing down of thread." In other words, there is no new relation between the release of intermittent tension and the object to be effected thereby. We are therefore of the opinion that, if the claims are of any validity, they, in any event, cannot be given the breadth of construction for which the complainant contends, but must be restricted to the precise construction described in the patent.

Upon the question of infringement, it might therefore be sufficient

to say that the defendant does not have a constant tension adjusted to the thread-drawing capacity of the cloth, and sufficient to cause the thread to lie smoothly on the surface of the work, nor automatic thread holding and releasing devices, released while the work is being moved by the work feeder, as described in the patent in suit. We are of the opinion, however, that the defendant has clearly shown distinct mechanical differences between its machine and that of the complainant, which satisfy us that the constructor of the defendant's machine is entitled to credit for solving the difficulties of adapting the Woodward & Keith machine, or a machine of that class, to knit goods, without copying from the complainant.

Whether the commercial suggestion that knit goods with the Woodward & Keith stitches would find a market was derived from the complainant is immaterial. This idea was not the complainant's, and cannot be monopolized. In remedying the defects of the old machine applied to the new fabric, the defendant's constructor, instead of following the plan of Woodward, to draw down the thread by the cloth, took the pull-off function from the cloth, and gave it to the take-ups, which, by a positive movement, drew off the amount of thread required for the new stitch. This relieved entirely the difficulty that arose from the former thread-drawing function of the cloth. This thread positively drawn was given up as slack thread to the feed. In adopting a positively operated pull-off, the constructor was nearer to the devices of Barton & Willcox and Whitehill than to anything suggested by the complainant's patent. Instead of laying the thread smooth upon the work under the constant tension of the complainant, the defendant's machine has slack thread, under no constant tension at the time of feed. There is no co-operation of constant tension and feed, as in the complainant's device. The undercheck of the defendant, whereby strain is taken from the work while the shuttle is passing through the loop, has no counterpart in complainant's machine. Without referring to other matters of defense, we are satisfied that, in respect to the matters in issue, the defendant's machine is a mechanical organization built upon a plan entirely different from that of the complainant's machine, and that there is no infringement. The decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with costs, and the costs of appeal are awarded to the appellant.

THE NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. October 13, 1900.)

No. 889.

1. ADMIRALTY—APPEALS—NECESSARY PARTIES.

Sureties on a stipulation entered into under Rev. St. § 941, and the admiralty rules for the release of a vessel seized in a suit for collision, do not become parties to the suit in any such sense as to require that they should be joined in an appeal taken by the claimant, whose sureties they are, from a judgment in the suit, although such judgment is joint in form against the stipulators, unless some extraneous question has

arisen in the suit, involving the scope of the bond or the obligation of the sureties thereon.

2. SAME—TIME FOR TAKING APPEAL.

An appeal from a district court in admiralty to the circuit court of appeals, under Act March 3, 1891, § 11, may be taken any time within six months after the entry of the decree or order appealed from.

3. SAME—APPEALABLE DECREE.

A decree entered by a district court in a suit in admiralty, after receipt of a mandate from the supreme court, may be reviewed by an appeal to the circuit court of appeals as to matters not considered by the supreme court, and left open by the mandate.

Appeal from the District Court of the United States for the Eastern District of Michigan.

On motion to dismiss appeal. It appears from the record that a libel was filed by the appellee against the propeller New York to recover the damages sustained by the steamer Conemaugh and her cargo by reason of a collision with the New York. The Union Steamboat Company intervened, as owner of the New York, filed its answer denying all liability, and also gave a stipulation for the release of the propeller, which had been seized under process of the court, which stipulation was signed by the American Surety Company, as surety for the owner. There was a final decree holding the New York liable for all the damages. This decree was reversed upon appeal to this court, the Conemaugh being held alone at fault. 54 U. S. App. 248, 27 C. C. A. 154, 82 Fed. 819. A writ of certiorari was allowed by the supreme court, and the case again heard. That court held both the New York and Conemaugh to be at fault, but that the insurers of the Conemaugh's cargo, who had intervened, were entitled to recover their full damages against the New York, notwithstanding the equal fault of the Conemaugh. The cause was remanded to the district court, with directions to enter a decree in accordance with the opinion of the supreme court. The opinion is reported in 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. —. Thereupon the district court, on the 24th of March, 1899, entered a decree that all the cargo damages should be paid by the New York, and, in addition thereto, one-half of the damages sustained by the Conemaugh. The appellant sought to recoup the decree in favor of the Conemaugh to the extent of one-half of the cargo damages recovered by cargo owners or their underwriters against the New York. This relief the district court denied. Thereupon appellants applied to the supreme court for a writ of mandamus compelling Judge Swan to grant such recoupment. The writ was denied upon the ground that the mandate had not been disobeyed, in that the question of the right of the New York to recoup one-half of the decree against her for cargo damages from the moiety of damages awarded to the Conemaugh was not passed upon or decided by the court. Thereupon appellants prayed an appeal to this court from the decree of March 24, 1899, which was allowed. The matter now comes on to be heard upon the motion of the appellees to dismiss the appeal thus allowed.

F. H. Canfield and Harvey D. Goulder, for the motion.

C. E. Kremer, opposed.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. The first ground upon which the motion to dismiss the appeal is predicated is because the American Surety Company did not join in the appeal, and has never refused, upon notification, to join in the appeal. It is well settled that all parties against whom a joint judgment or decree is rendered must join in proceedings for review in an appellate court, or that it must appear that those who

have not joined had notice of the application for the appeal or writ of error, and refused or neglected to join therein. *Owings v. Kincannon*, 7 Pet. 399, 8 L. Ed. 727; *Masterson v. Herndon*, 10 Wall. 416, 19 L. Ed. 953; *Mason v. U. S.*, 136 U. S. 581, 10 Sup. Ct. 1062, 34 L. Ed. 345; *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. 39, 36 L. Ed. 933; *Davis v. Trust Co.*, 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563. The principle is that the same controversy cannot come up in fragments. To make the doctrine applicable, the controversy must be one to which there are two or more parties jointly interested as parties to the same litigation. If the decree or judgment be joint in form, but in law or fact separable, the mere form of the decree will not make it such a joint decree as to require those nominally joined to unite in appellate proceedings. *Hanrick v. Patrick*, 119 U. S. 156, 163, 7 Sup. Ct. 147, 30 L. Ed. 396. The decree complained of is, in substance, that the libellant, the Erie & Western Transportation Company, recover from the Union Steamboat Company "and the American Surety Company, its surety, upon the bond or stipulation herein filed," etc., \$13,083.33, being one-half of the damages to the said Conemaugh, less one-half of the damages suffered by the New York, and \$19,627.67 on account of owners and underwriters of the Conemaugh's cargo, being the amount of cargo damages represented by the said libellant as trustee. Though joint in form, if in law or fact the decree is separable it was not necessary that the surety company should join the Erie & Western Transportation Company in the particular appeal shown to have been allowed in this case. The stipulation upon which the surety company became bound as surety was one entered into under section 941, Rev. St. U. S., and admiralty rule 21. Such a stipulation stands in the place of the vessel, and its obligation is discharged by compliance with the order or decree of the court against the owner or claimant, and the liability may be enforced by "judgment thereon against both the principal and sureties" at the time of rendering the decree in the original cause. The suit or controversy in this case was between the intervening owner or claimant of the New York and the libellant and others, intervening as cargo owners or cargo underwriters. To that controversy the surety upon the stipulation was not a party. Neither does the record indicate that any question arose touching the obligation of the surety company, or in any way involving the terms of the stipulation bond. If any such question had been made, the surety would doubtless have a right to be heard, and to take an appeal from any decree affecting its liability.

The case of *Ex parte Sawyers*, 21 Wall. 236, 22 L. Ed. 617, has been relied upon by appellees as supporting their motion. In that case a decree was sought in the circuit court against the sureties upon an appeal bond executed upon an appeal allowed to the circuit court from the decree of the district court. The circuit court had directed that the sureties show cause, if any they had, why an execution should not issue against them. This they did, and the circuit court held that they were not liable upon this alleged stipulation. Antecedently there had been an appeal to the supreme court, and the refusal of the circuit court to issue an execution

against the appellants' sureties upon the appeal bond mentioned occurred after the original decree of the circuit court had been affirmed by the supreme court and the cause remanded. Upon the refusal of the circuit court, proceeding under the mandate of the supreme court, to order execution against the sureties aforesaid, an application was made to the supreme court to compel the circuit court to order an execution against the sureties in the stipulation. A mandamus was refused because the supreme court had simply affirmed the decree of the circuit court, and had given no instructions touching anything which remained to be done. The circuit court was therefore left free to determine for itself what was thus required. The decree of the circuit court which had been affirmed had not unconditionally ordered an execution to issue, and some action was therefore necessary before any could issue. When the action of the circuit court was invoked in this respect, the court declined to order execution, because it was of opinion that the sureties were not liable under their stipulation. The action of the circuit court was therefore subject to review only by appeal, and not by mandamus. It is true that the court does add that "the sureties upon the stipulation are entitled to an appeal from any decree that may be rendered against them," and that "a decree against the principal respondents does not necessarily include them." But this language must be interpreted in the light of the facts which the court was then dealing with. The question there was not one arising upon the doctrine of summons and severance, nor did it arise upon such a bond as is here involved. But more important still is the fact that the court was then dealing with a case where it appeared that a question had actually arisen as to the liability of the sureties upon this stipulation. This was a matter wholly extraneous to the matters in controversy between their principal and the appellants, and was a controversy to which they were parties, and therefore entitled to an appeal. The very question presented by the motion now under consideration arose in the circuit court of appeals for the Fourth circuit, in the case of *The Glide*, reported in 24 C. C. A. 46, 78 Fed. 152, and 18 C. C. A. 504, 72 Fed. 200. It was there held that the sureties upon a stipulation bond for the release of the vessel were in no such sense parties to the controversy as to require that they should be joined in an appeal taken by the owner of the vessel, whose sureties they were. Upon principle, this must be so. Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is "a pledge or substitute for the property proceeded against," and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. *Williams & B. Adm. Jur.* p. 286; *Lane v. Townsend*, Fed. Cas. No. 8,054. Unless some extraneous question arises, involving the scope or obligation of the sureties in such a bond, they are not necessary parties to an appeal taken by any of the parties to the record. We have also been referred to the case of *Estis v. Trabue*, 128 U. S. 225, 9 Sup. Ct. 58, 32 L. Ed. 437, as supporting the contention of the appellees. That case did not involve such a stipulation as is here in question. The

sureties there held to be affected by the decree were sureties upon a forthcoming bond executed in an attachment proceeding by claimants who intervened as the owners of the property attached for the debt of another. Neither is the case of *Railroad Co. v. Sweeny* (C. C. A.) 103 Fed. 342, in point; for that was a case arising under a mechanic's lien statute, which required the plaintiff to make all persons claiming liens against the same property parties defendant to an action for the foreclosure of the lien claimed, where the plaintiff claims such liens to be inferior to his own. It was there held that all persons so made defendants should be notified to join in an appeal taken by the principal defendant from a decree which forever bound and foreclosed every such claim in the property in question. The effect of such a decree was to cut off or subordinate the liens claimed by the parties made defendants as claiming liens in the same property, and, to prevent separate appeals involving the rank of the plaintiff's lien, it was proper they should join, or refuse on notice, in an appeal by the principal defendant, the common debtor. We fail to see any greater reason for regarding the stipulators, sureties in such a bond, as necessary parties to an appeal, than there is for regarding the sureties in a cost bond as parties to the controversy. In both cases the principal controls the litigation, and the sureties are bound by the result. In both cases, if a question arises as to the obligation of the surety, the latter, to the extent of this interest, should be heard, and for this purpose might appeal. Undoubtedly, if the suit is upon a bond, and the judgment is against the surety as well as the principal, both must join. But the reason is that the bond and its obligation is then the thing in controversy, and constitutes the subject-matter of the litigation. To this class of cases the case of *Estis v. Trabue* belongs.

2. The decree appealed from was entered March 24, 1900. This appeal was taken within six months thereafter. Section 11 of the act of March 3, 1891, under which this court was organized, provides:

"That no appeal or writ of error by which any judgment or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed: provided, however, that in all cases in which a lesser time is now by law limited for appeals or writs of error, such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit court of appeals."

The contention is that a "lesser time" for appeals was by law allowed when this act was passed, and that such "lesser time" applies to appeals in admiralty causes. This contention is based on the forty-fifth admiralty rule. But that rule applied only to appeals from the district to the circuit court, and had no application to appeals from the circuit court. The appellate jurisdiction of the circuit court was abolished by section 4 of the act of 1891, and this court has been given the appellate jurisdiction formerly vested in the supreme court in admiralty cases. The only law limiting the time within which an appeal may be taken in admiralty cases from the circuit court is that prescribed by the eleventh section of the act of 1891. The appeal was therefore taken in time.

3. It is next urged that the decree below was entered in obedience to the mandate of the supreme court, and is therefore not subject to review by this court, and that the appeal should therefore be dismissed. The appellant petitioned the supreme court to require the district court to enter a decree in accordance with its opinion and mandate, by allowing the New York to recoup the decree in favor of the Conemaugh to the extent of one-half of the cargo damages recovered against the New York, the Conemaugh being equally at fault. This relief was denied upon the ground that "no question of recouping one-half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by the court." *Ex parte Union Steamboat Co.*, 178 U. S. 317, 320, 20 Sup. Ct. 904, 44 L. Ed. 1084. The supreme court further said that:

"Under the cases of *The Albert Dumois*, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751, and *The Chattahoochee*, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, this should have been done. This may be so, but it is an entirely new question, quite unaffected by the case of *The New York*, and, if the court erred in refusing to allow such recoupment, the remedy is by appeal, and not by mandamus."

If this was a new question, left open by the mandate and opinion of the supreme court, the district court was at liberty to consider and decide the question of recoupment, entirely unaffected by the mandate, and the action of that court in allowing or denying such recoupment is open to review in this circuit court of appeals only. *Mason v. Mining Co.*, 153 U. S. 361, 14 Sup. Ct. 847, 38 L. Ed. 745. The motion to dismiss the appeal is denied.

GILCHRIST et al. v. CHICAGO INS. CO. et al.¹

(Circuit Court of Appeals, Seventh Circuit. May 19, 1899.)

No. 446.

1. ADMIRALTY—APPEALS—QUESTIONS REVIEWABLE.

Under section 11 of Act March 3, 1891, creating the circuit courts of appeals (26 Stat. 826, c. 517), which provides that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals," an appeal in an admiralty cause, which by such act is taken to that court instead of to the circuit court, as formerly, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the circuit courts prior to the passage of that act; and, under the settled rule, such an appeal vacates entirely the decree of the district court, and brings the cause up for trial de novo upon every issue raised by the pleadings, those determined by the district court in favor of the appellant as well as those determined against him.

2. MARINE INSURANCE—ABANDONMENT OF VESSEL—LIABILITY OF UNDERWRITERS FOR SERVICES IN SAVING VESSEL.

An abandonment of a vessel to the insurers after her loss relates back to the time of the disaster, and the title becomes vested in the under-

¹ Rehearing denied March 2, 1900.

writers as of that date, and they are responsible for reasonable expenses incurred by the master after that date in an attempt to save the vessel, especially where they were represented at the place of the disaster by an agent during a large part of the time the work is being done, and approved the action of the master.

3. SAME—EXTENT OF LIABILITY.

In such case the underwriters become the owners by the abandonment, as of the date of the disaster, of the entire vessel, and not merely of the insured interest, each being a part owner in the proportion that his insurance bore to the entire insurance; and each is liable, under Act June 26, 1884 (23 Stat. 53, 57, c. 121, § 18), for the same proportion of the entire indebtedness incurred by the master for work done in the attempt to rescue the vessel.

Appeal from the District Court of the United States for the Northern District of Illinois.

In Admiralty.

Robert Rae, for appellants.

C. E. Kremer and John C. Richberg, for appellees.

Before HARLAN, Circuit Justice, and WOODS, Circuit Judge.

HARLAN, Circuit Justice. The case made by the amended libel is as follows:

On or about the 6th of May, 1894, the schooner American Union, owned by the respondent Annetta S. Godman, while prosecuting a voyage on Lake Huron, was stranded at Thompson's Harbor, and thereafter, on the 19th of May, 1894, went to pieces and became a total wreck.

Before and at the time of the disaster the respondent companies were underwriters on the vessel, as follows: Chicago Insurance Company of Chicago, \$1,500; London Assurance Company of London, England, \$1,500; Western Assurance Company of Toronto, Canada, \$2,000; and Commercial Union Assurance Company of London, England, \$1,000.

At the time of the insurance the vessel was valued at \$9,000, so that its owner became and was her own insurer for \$3,000.

The respective policies of the underwriters provided that "no abandonment in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company or its authorized agent; nor unless it shall be efficient, if accepted, to convey to, and vest in, the said insurance company an unincumbered and perfect title to the subject abandoned."

On the 19th of May, 1894, James Godman, the master and attorney in fact of the owner, made a verbal abandonment of the vessel, and afterwards, on the same day, in accordance with the provisions of the policies, made a like abandonment in writing, serving the respondents with proofs of loss on the 4th day of June, 1894. No objection was made to the abandonment on the part of the underwriters.

The policies also contained a provision that, "in case of loss or misfortune to said vessel, it shall be lawful and necessary to and for the insured, her agents, factors, servants, and assigns, to give insurers

prompt notice of the disaster, and submit the plan adopted for recovering and saving the property, and to make all reasonable exertions in and about the defense, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery and the holding of a survey, made under oath by two persons, * * * the insured is to cause the same to be forthwith prepared in accordance with the surveyors' specifications;" and they further provided that "to the expenditures and amount whereof the said insurance company will contribute according to the proportion the sum insured bears to the valuation aforesaid."

While the vessel lay stranded, as above stated, the respondents employed libelants, the present appellants, as wreckers for the purpose of saving the vessel or as much thereof as could be saved.

In pursuance of that employment, the libelants went to the wreck with a large and valuable amount of wrecking apparatus, tackle, apparel, and furniture, box hawsers, lighters, and diving outfits, and a large number of men, worked at and upon the vessel for a period covering (including the return of the outfit to the port of departure) some 30 days or more, and laid out and expended in the saving of the vessel, at the request of the agents of the respondents, a very large sum of money; the job being completed on or about the 18th of May, 1894.

The services so rendered were necessary and proper in order to save the vessel, and the prices charged for labor and materials, pumps, hawsers, lighters, and diving outfits, amounting to the sum of \$3,665.75, with interest from May 18, 1894, were reasonable and customary for like services.

The libelants saved from the wreck the vessel's tackle, apparel, furniture, anchors, chains, boats, rigging, sails, and the like, which were taken possession of by the wrecking master of the underwriters and sold, the proceeds being received by him as the representative of the underwriters.

By the custom of the Great Lakes and seas, and by the maritime law, the salvage charges were in the nature of general average charges and expenditures, and by the custom of merchants were to be adjusted and paid as such.

An adjustment of the expenditures was made at the port of Chicago, according to the custom at that port, by competent adjusters of marine losses, copies of the adjustment being served on the respondents, respectively, before the time fixed for the payment of the loss to the owner by the underwriters, and within 60 days from the date of abandonment and proofs of loss served by the owner upon the underwriters.

The libelants claimed that there was due to them the above sum of \$3,665.75, with interest.

The Western Assurance Company of Toronto in its answer denied that it ever employed the libelants or any one else as wreckers for the purpose of saving the vessel or as much thereof as could be saved, or that it ever authorized the employment of the libelants or any one else for that purpose, or that the libelants in pursuance of any agreement with the respondent performed the wrecking services

set forth in the libel, and averred that, if any of the salvage mentioned in the libel was received and sold by any one, it was not as its representative or agent or on its behalf. It alleged that it insured the owner of the vessel against loss by the perils of navigation for \$2,000, upon a valuation of \$9,000 for the vessel, with the right to demand other and further insurance upon the vessel for \$4,000, leaving an uninsured interest at the risk of the owner of the vessel of \$3,000, so that the interest of the respondent amounted to and did not exceed a two-ninths interest, and it could in no event be held liable for any charges or claims incurred on behalf of the vessel to the extent of more than two-ninths thereof. It further alleged that in consequence of the loss of the vessel, together with her freight, if any there was pending, the same was totally lost, and was of no further value, and respondent claimed the benefit of the act of congress passed June 26, 1884, and of the eighteenth section thereof, wherein it is provided that the individual liability of one who has an interest in the vessel shall be limited to the proportion of any and all debts and liabilities which such interest in the vessel bears to the whole, and that the aggregate liabilities of such interest in the vessel on account of the same shall not exceed the value of the vessel and freight pending. The respondent, in claiming the benefit of that act, said that by the total loss of the vessel and her freight pending it was not liable for the whole or any part of the claim of the libelants, and that if any liability ever existed the same was and became extinguished by the total loss of the vessel and her pending freight.

Similar defenses were made by the other underwriters, who filed a joint answer to the amended libel.

Respondent Annetta S. Godman, in her answer to the original libel, after stating that the vessel became a complete wreck, and that the master gave notice of the abandonment of the vessel to the underwriters, averred that as soon after such abandonment as she had opportunity to do so, namely, on the 4th of June, 1894, she served her proofs of loss on the insurance companies, executing a written abandonment as required by the policies of the respective companies; that on the same day she conveyed all her right, title, and interest in the vessel, her bills of sale and abandonment being duly accepted by the companies without objection; and that afterwards all of the underwriters paid the full amount of her loss to the extent of the face of the policies. She also averred that the underwriters by virtue of the abandonment became from the moment of the casualty the owners of the vessel, and that she (respondent) ceased to have any interest therein, and that the master of the vessel became the master of the underwriters from that time until the vessel became a total loss. She further insisted that in consequence of the abandonment and loss of the vessel, together with her freight, if any there was pending, the vessel became and was a total loss, and was completely destroyed, and of no further value to her at the moment of the casualty; but if it should be found that she was owner of any interest in the vessel after the moment of the casualty, or would be liable for any portion of the salvage services, she claimed the benefit of the act of congress of June 26, 1884, § 18.

After the district court filed its opinion in the case (79 Fed. 970), but before a decree was entered, that court, on motion of the libelants, dismissed the libel as to the respondent Annetta S. Godman.

A decree was rendered in the district court adjudging that the libelants recover from respondents, the underwriters, the sum of \$2,296, or two-thirds of the amount claimed, each underwriter paying in proportion to its interest in the vessel. From that decree the libelants have prayed and were allowed by the district court an appeal to this court. In a petition for an appeal which was allowed August 2, 1897, the libelants stated that they would seek a new decision on so much of the cause as denied to petitioners the whole of their demand.

After the decree in the district court the respondents filed what is called in the record a "writ of cross errors," to the effect that the court erred (1) in finding that the respondents were not entitled to the benefit of the act of congress passed June 26, 1884; (2) in finding that the respondents, and each of them, were not entitled to limit their liability for the libelants' claim to the amount and value of so much of the schooner American Union as was saved by their efforts; (3) in finding that the respondents employed or contracted with the libelants, or ratified the contract and employment of the libelants by Capt. Godman; and (4) in finding that there was any sum whatever due from the respondents, or either of them, to the libelants, and in entering a decree against the respondents.

1. The appellants contend that the present appeal was from so much of the decree as denied the full amount of their claim, and that the case can be heard in this court *de novo* only as to that part of the decree. The contention of the appellees, on the other hand, is that the appeal vacates altogether the decree of the district court, and that the cause may be heard *de novo* in respect of every matter covered by the pleadings.

Prior to the passage of the act of March 3, 1891 (26 Stat. 826, c. 517), creating the circuit court of appeals, it was well established that on an appeal in admiralty from a district court to a circuit court the cause was to be tried anew, as if no decree had been rendered. In *Yeaton v. U. S.*, 5 Cranch, 281, 283, 3 L. Ed. 101, Chief Justice Marshall said:

"The majority of this court is clearly of opinion that in admiralty cases an appeal suspends the sentence altogether, and that it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the district to the circuit courts of the United States, but in this court also."

In *The Lucille*, 19 Wall. 73, 22 L. Ed. 64, the court, speaking by Mr. Justice Miller, said:

"An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or if asked for, is contemplated,—a new trial, in which the judgment of the court is regarded as though it had never been rendered. A new decree is to be made in the circuit court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the district court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should therefore be complete within itself."

In *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1181, 30 L. Ed. 1178, Mr. Justice Blatchford, delivering the unanimous judgment of the court, said:

"The claimants not having appealed to the circuit court, it is suggested that they are liable for at least the amount awarded by the district court, and that the circuit court could not reduce that amount, but had jurisdiction, on the actual appeal, only to increase it. It is well settled, however, that an appeal in admiralty from the district court to the circuit court vacates altogether the decree of the district court, and that the case is tried *de novo* in the circuit court. We do not think that the fact that the claimants did not appeal from the decree of the district court alters the rule. When the libelants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

See, also, *The Charles Morgan*, 115 U. S. 69, 75, 5 Sup. Ct. 1172, 29 L. Ed. 316, and *The Louisville*, 154 U. S. 657, 14 Sup. Ct. 1190, 25 L. Ed. 771.

We do not think that the rule has been changed by the above act of March 3, 1891, under which an appeal from a district court goes to the circuit court of appeals, and not to the circuit court. The clause in that act (section 11), that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals," does not prevent a circuit court of appeals, when hearing an appeal in admiralty, from exercising all the power that a circuit court could have exercised in a like case prior to the act of 1891. On the contrary, that clause implies that an admiralty appeal by the libelant in the circuit court of appeals, under the act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the circuit courts prior to the passage of that act. It results that this court may properly consider and determine every issue raised by the pleadings, and, without regard to the decree below, direct such a decree to be entered here as is consistent with law. If, in our judgment, the libelants are not entitled to a decree in any amount,—and such is the contention of the underwriters,—we may dismiss the libel, notwithstanding the underwriters did not themselves directly appeal from the decree.

2. The facts as to the stranding of the vessel, the employment of the libelants by the master, the verbal abandonment to the underwriters, followed by a written abandonment and service of proofs of loss on the 4th of June, 1894, are substantially as stated in the amended libel. It may be here stated, in the words of the district court, that although it was supposed, on the 18th of May, that the vessel had been saved, "on the 19th a fresh wind came up which had the effect of pounding her to pieces upon the shore, leaving no salvage, except a few chains and other like things, not amounting to over \$300 in value. While the libelants were engaged in their work under the employment of the master, an agent of the underwriters was sent on their behalf to assist in the work. He came on the 13th of May,

and remained for several days thereafter, participating actively in the superintendence of the work, giving directions, and approving what the master had already done."

What was the effect of the abandonment, so far as the underwriters were concerned? Plainly, such abandonment related to the time of the original disaster, May 6, 1894, and the title became vested in the underwriters as of that date. If this be so, it would seem, upon principle, that the underwriters cannot escape responsibility altogether for the expenses reasonably incurred under the direction or employment of the master after the stranding of the vessel, particularly when, as in this case, they were represented at the place of the disaster during a large part of the time when efforts were made to save the vessel, and, in effect, approved all that was done by the libellants and the master. In the case of *The Sarah Ann*, 2 Sumn. 206, 210, Fed. Cas. No. 12,342, Mr. Justice Story said:

"When a loss takes place for which an abandonment may be made, the master is not exclusively the agent of the original owners of the ship, but he is the agent of those who retroactively become owners of the ship in consequence of that event, if an abandonment is made and is justifiable. The common doctrine is that the master is the agent of all concerned in the voyage, and that he becomes, by relation, the agent of the underwriters, whenever an abandonment has been accepted, from the time of the loss to which the abandonment refers, although the abandonment may not have been offered or accepted until months after the event."

In *Wallace v. Insurance Co.* (C. C.) 22 Fed. 66, 73, Mr. Justice Matthews said:

"If the loss is partial only, then the expenses incurred are to be borne by each in proportion to the interests covered by the policy and those at the risk of the owners. But if the loss, under the terms of the policy, is a total loss, whether actual or constructive, any expenditures made by either constitute a part of the loss, and, as by the abandonment the whole interest in the subject of the insurance vests in the insurer, the whole expense falls upon him, without recourse upon the insured."

So, in 2 Phil. Ins. § 1708, p. 382:

"An abandonment, considered as an assignment of property, must have reference to the time of the loss, for only that which is constructively lost can be abandoned, and, to know what is lost, reference must necessarily be had to the time of the loss. From that time the insurers are, to most purposes at least, entitled to the advantages and subject to the liabilities of ownership. This is not inconsistent with the principle that the right of abandonment depends upon the state of the existing facts; which means, as we have seen, that the facts of which the assured is informed, and which he makes known to the underwriters as the ground of his abandonment, must constitute a total loss, and also that the loss must not have ceased to be total in the meantime. The abandonment must be authorized by the existing facts, but as an assignment it operates retrospectively from the time of the loss."

"A valid abandonment," says Kent, "has a retrospective effect, and does of itself, and without any deed of cession, and prior to the actual payment of the loss, transfer the right of property to the insurer to the extent of the insurance; and if, after an abandonment, duly made and accepted, the ship should be recovered, and proceed and make a prosperous voyage, the insurer, as owner, would reap the profits." 3 Kent, Comm. 319.

In *Arn. Ins.* (2d Ed.) p. 1178, it is said:

"The true principle seems to be that it thus acts as a transfer, not only from the time that notice of abandonment is given, but, by a retrospective

operation, from the moment of the casualty that gave the right to abandon, from which time the underwriters, by virtue of the notice of abandonment, are subrogated into the place of the assured, as complete owners of the abandoned property, so far as it is covered by the insurance."

See, also, *Abb. Shipp.* p. 117, note; *Lown. Ins.* § 263; *Insurance Co. v. Svendsen*, 77 Fed. 220, 228; and *Coolidge v. Insurance Co.*, 15 Mass. 341, 346.

3. Assuming that the written abandonment to the underwriters had the effect to place them in the position of owners of the vessel, as of the date of the disaster, to what extent were they liable for the expenses incurred in the efforts to save the property between the stranding of the vessel and the date of the service upon them of the written proofs of loss? We are of opinion that the eighteenth section of the act of June 26, 1884 (23 Stat. 53, 57, c. 121), furnishes the answer to this question. That section provides:

"Sec. 18. That the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of the vessel on account of the same shall not exceed the value of such vessel and freight pending: provided, that this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners."

The liability of the underwriters in the present case arises, not from any personal contract by them with the libelants, but from the rule of law which, in the case of a valid abandonment, makes the insurer the owner of the vessel from the time of the original disaster. If there be more than one underwriter, each one, after a valid abandonment, has an interest in the property, as owner, to the extent of its insurance as compared with the aggregate insurance by all the underwriters, and each is liable, upon that basis, for all expenses reasonably and properly incurred after the disaster in order to save the vessel, not exceeding the value of the vessel and the freight pending; that is, within the limit prescribed by the act of 1884, the underwriters are liable not as partners, but each for itself, to the extent of its interest in the vessel, and the interest of each is determined by the proportion which the amount insured by it bears to the whole insurance on the vessel. Upon the abandonment by the insured the underwriters became, as of the date of the disaster, the owners of the entire interest, right, and title of *Mrs. Godman*, and, if the vessel had been saved and restored to its original condition, they would have reaped any profits arising from such restoration. So that the liability of the underwriters must be ascertained upon the basis of their ownership after the abandonment, and as of the date of the original disaster, of the entire property, and not upon the basis that one-third of the property not insured was to be deemed the property of *Mrs. Godman*. The fact that the libelants might have looked to her, as the original owner, upon her personal contract, made with them through her agent, does not relieve the underwriters from the liability arising out of their becoming the owners of the entire property from the date of the disaster, in virtue of the abandonment to

them. Nor did the dismissal of the libel as to Mrs. Godman affect the rights of the libelants as against the underwriters.

In this view, the district court erred in adjudging that the respondent companies were liable only for two-thirds of the claim of the libelants. Each underwriter is liable for such part of the whole claim as is represented by the amount it insured as compared with the whole insurance on the vessel. Let a decree be entered upon that basis

Judge SHOWALTER participated in the hearing, but not in the decision of this case.

OLSON v. OREGON COAL & NAVIGATION CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 589.

MARITIME LAW—INJURY OF SEAMAN—LIABILITY OF SHIPOWNER.

A corporation which is the owner of a ship, and which has exercised due care in making her seaworthy for a voyage, in her equipment and supplies, and the selection of her officers and crew, cannot be held responsible for the proper performance of the details of navigation during the voyage, and is not liable for an injury received by a member of the crew through the negligence of an officer or another member in leaving a hatchway open, the navigation of the ship during the voyage being a common undertaking, for which all the ship's company in their several stations are employed, and in respect of which they are regarded by the maritime law, as well as the common law, as fellow servants.

Appeal from the District Court of the United States for the Northern District of California.

H. W. Hutton, for appellant.

Geo. W. Towle, Jr., for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The question presented by this appeal is as to the sufficiency of the libel, the exceptions to which were sustained by the court below. 96 Fed. 109. The suit was for damages for injuries sustained by the libelant in a fall through an open hatchway in the deck of the steamer Empire, on which he was employed in the capacity of ship carpenter. It is alleged in the libel that the defendant corporation is and was, at the times mentioned in the libel, the owner of and engaged in operating the steamer named; that on the 22d day of February, 1897, the steamer left the Broadway wharf, in the city and county of San Francisco, Cal., bound on a voyage to Coos Bay, in the state of Oregon, for a cargo of coal; that she had no cargo on board, and was by reason of that fact "liable to sudden, unusual, and violent motions when in waters agitated by the winds"; that at the time of her departure the bar off the harbor of San Francisco was breaking badly, and that, although there were covers on board the vessel for the hatches,

the ship crossed the bar with her after hatch open; thereby making the deck of the steamer unsafe and dangerous, and that while the libellant was performing his duty upon the steamer as ship carpenter, in going from the after part of the vessel to the forward part, he, without any fault on his part, was thrown from his feet by a roll of the steamer, and, by reason of the after hatch being uncovered, he was thrown down that hatch, and fell a distance of about 30 feet, onto the shaft alley of the steamer, and thereby suffered a compound comminuted fracture of the right thigh, by reason of which he was compelled to go to the United States marine hospital in the city and county of San Francisco, and has been there confined ever since, and has suffered great physical pain and mental anguish by reason of his injury, which is permanent, and totally disables him, and which will forever prevent him from following his occupation as ship carpenter, or any other occupation, to his damage in the sum of \$15,000.

There is no averment in the libel tending to show that the ship was not properly equipped with all necessary and appropriate appliances, or that she was not properly manned, or not entirely seaworthy, or that there was any neglect on the part of the defendant in the selection of the officers or crew of the ship; and, although there is a general allegation of negligence on the part of the defendant, the libel undertakes to and does specify the particulars in which it is claimed the defendant was guilty of negligence, consisting only, as has been seen, in the leaving open of the after hatch, through which the libellant fell. As the defendant is alleged to be a corporation, it is, of course, obvious that it could only operate the ship through its agents or servants, so that the negligence with which it is charged must necessarily have been the personal negligence of some one employed by it. Assuming, therefore, that the mere leaving open of the hatch, under the circumstances stated, can be properly held to have been negligence, it must necessarily have been the negligence of some officer or member of the crew of the ship. Assuming, further (for it is not so alleged), that it was the negligence of the captain, it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were engaged. In matters of that kind the maritime law makes no account of mere ordinary negligence. In *Quinn v. Lighterage Co.* (C. C.) 23 Fed. 363, the negligence by which the libellant was injured was the immediate act of the master of the ship, namely, his premature order in setting the winch in motion. In that case the owners were held not liable because that act was not one that the captain had done in his character as the representative of the owners, but was an act that any other co-servant in the same employment might have performed. "The true inquiry," said Judge Wallace, "is whether the character of the act of the captain was one which it was incumbent upon the defendant [the owners] to see properly performed." The owner, who is usually ashore, and in this case was a corporation, cannot, in the nature of things, see to the details of navigation. The officers and crew are employed for that purpose, and it would be quite

as reasonable to hold the owner responsible for the negligent handling of a rope or sail as for the failure to close a hatch. It is undoubtedly true that the master represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, such, for instance, as the maintenance of the ship and her apparel in a safe and seaworthy condition, procuring repairs and supplies, the supplying of the crew with sufficient food and with medical attendance and care in case of injury or sickness, and for his neglect in any of those particulars the owner is liable. The cases of *Gabrielson v. Waydell* (C. C.) 67 Fed. 342; *The A. Heaton* (C. C.) 43 Fed. 592; *Anderson v. The Rence*, 14 Sawy. 476, 46 Fed. 805; and *The Chandos*, 6 Sawy. 546, 4 Fed. 645,—were cases of that character. "The navigation of a ship from one port to another constitutes," as said by Judge Brown in *The City of Alexandria* (D. C.) 17 Fed. 390, "one common undertaking or employment, for which all the ship's company, in their several stations, are alike employed. Each is in some way essential to the other in furtherance of the common object, viz. the prosecution of the voyage." It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employes by reason of the negligence of one of his co-employes, whatever his grade in the common employment. In the recent case of *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. 181, where the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, was finally and squarely overruled, the supreme court announces the true rule to be, both upon principle and authority, "that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exemption if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes; or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end." It is true that the present case is to be determined, not by the common law, but by the rules of the maritime law; but that law, as was shown very clearly, we think, by Judge Brown in the case of *The City of Alexandria*, supra, is, in respect to the facts here presented, the same. See, also, the cases of *The Queen* (D. C.) 40 Fed. 694; *The Frank and Willie* (D. C.) 45 Fed. 494; *The City of Norwalk* (D. C.) 55 Fed. 98; *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656. The judgment is affirmed.

ROBERTS v. PACIFIC & A. RY. & NAV. CO. et al.

(Circuit Court, D. Washington, N. D. November 1, 1900.)

1. REMOVAL OF CAUSES—SUIT AGAINST CITIZEN AND ALIEN.

In a suit by a plaintiff, who is a citizen of the state where it is brought, against two defendants, the fact that one of the defendants is a citizen of a different state, and the other an alien, does not deprive a federal court of jurisdiction, or prevent a removal of the suit from a state court, where either defendant would have a right to remove it if sued alone, and when they unite in petitioning for removal.

2. SAME—AMENDMENT OF PETITION.

A state court may properly permit a petition for removal to be amended, although the time for filing such petition has expired, by inserting an allegation that the citizenship of the petitioner was the same at the time of the commencement of the action as at the time the petition was filed.

3. SAME—PETITION—ALLEGATION OF CITIZENSHIP.

An allegation in a petition for removal that the petitioner is a corporation organized under the laws of a foreign country is a sufficient allegation that it was a citizen of such country at the time the action was commenced against it.

Action at law by a citizen of the state of Washington against two defendants; one being a corporation of the state of West Virginia, and the other an alien corporation. Heard on motion to remand. Motion denied.

Ballinger, Ronald & Battle, for plaintiff.
John P. Hartman, for defendants.

HANFORD, District Judge. The plaintiff has moved to remand this case to the state court in which it was commenced, relying upon some of the newest text-books as authorities for so construing the act of congress defining the jurisdiction of United States circuit courts (1 Supp. Rev. St. [2d Ed.] p. 611) as to exclude this case, for the reason that a citizen and an alien are joined as co-defendants. It is asserted that the statute does not confer upon United States circuit courts jurisdiction on the ground of diverse citizenship of the parties, where the controversy is between a citizen of a state on one side, and a citizen of a different state and an alien on the opposite side. Black, Dill. Rem. Causes, §§ 34, 68. 1 Desty, Fed. Proc. (9th Ed.) p. 472; 18 Enc. Pl. & Prac. p. 238. The only decisions of the federal courts cited in support of the supposed rule are the following: King v. Cornell, 106 U. S. 395-399, 1 Sup. Ct. 312, 27 L. Ed. 60; Merchants' Cotton Press Storage Co. v. North American Ins. Co., 151 U. S. 368-389, 14 Sup. Ct. 367, 38 L. Ed. 195; Fields v. Lamb, Fed. Cas. No. 4,775; Ex parte Girard, Fed. Cas. No. 5,457; Hervey v. Railway Co., Fed. Cas. No. 6,434; Sawyer v. Insurance Co., Fed. Cas. No. 12,408; Ward v. Arredondo, Fed. Cas. No. 17,148; Dannmeyer v. Coleman (C. C.) 11 Fed. 97; Tracy v. Morel (C. C.) 88 Fed. 801. In the case of King v. Cornell the supreme court decided that a suit by a citizen of New York against several defendants, one of whom was an alien, and the others citizens of the state of New York, was not removable on the separate petition of the alien, and

that the particular statute under which the right of removal was claimed in that case had been repealed. Nothing else was decided, and in the opinion, by Chief Justice Waite, there is not even a faint hint or suggestion of the idea that the mere joinder of nonresident citizens with aliens as defendants has the effect to deprive all the defendants of the right of removal, which they would have if sued separately. The other supreme court decision referred to is also entirely innocent of giving any aid or support to this fallacy. In *Tracy v. Morel*, Judge Munger quotes with approval section 34 of Black's *Dillon on Removal of Causes*, and then repeats the author's error, by saying that the same rule which he quoted from that text-book is stated in the case of *King v. Cornell*. This opinion by Judge Munger comes nearer than any of the others in the above list to being an authority in point, but I do not consider it an authority, for the reason that the facts in the case did not warrant a decision of the question. The court did not have jurisdiction of the case, because the record failed to show that each of the defendants was entitled to litigate in the national forum, and it did show affirmatively that one of the defendants was a citizen of Nebraska; that being the state of which the plaintiff was a citizen, and in which the suit was brought. For similar reasons in each of the other cases cited the court did not have jurisdiction, and was not called upon to decide this question. In the argument it has not been claimed that there is any reason for a rule denying to several defendants, when they are sued jointly, a privilege which the law gives to each of them, except that the case does not come within the letter of the law. It is said that:

"When a plaintiff, citizen of the state where the suit is brought, sues two defendants, one of whom is a citizen of another state, and the other an alien, * * * the cause is not removable, because it does not come within any of the provisions of the statute. It is *casus omissus*. It cannot be said to be a controversy 'between citizens of different states,' because one of the parties is not a citizen; and it cannot be described as a controversy 'between citizens of a state and foreign citizens or subjects,' because one of the defendants is not a foreigner."

It is certainly true that the rule of strict construction must be applied to the acts of congress defining the jurisdiction of courts, but it is possible to be too narrow and literal in construing these laws. See the opinion of the supreme court, by Mr. Justice Gray, in the case of *Koenigsberger v. Mining Co.*, 158 U. S. 41-53, 15 Sup. Ct. 751, 39 L. Ed. 889. In that case the supreme court affirmed a decision of the United States circuit court for the district of South Dakota maintaining its jurisdiction, on the ground of diverse citizenship, of a case which was pending in one of the territorial courts of Dakota territory at the time of the admission of South Dakota into the Union as a state. The circuit court of appeals for the Ninth circuit maintained the jurisdiction of this court in a similar case. *Blackburn v. Wooding*, 6 C. C. A. 6, 56 Fed. 545. All statutes—even those which impose penalties and declare forfeitures—must be given a sensible interpretation, consonant with the intention and purpose of the legislature in enacting them. *U. S. v. Kirby*, 7 Wall. 482-487, 19 L. Ed. 278; *Heydenfeldt v. Mining Co.*, 93

U. S. 634-641, 23 L. Ed. 995; U. S. v. Stowell, 133 U. S. 1-20, 10 Sup. Ct. 244, 33 L. Ed. 555; *Lau Ow Bew v. U. S.*, 144 U. S. 47-64, 12 Sup. Ct. 517, 36 L. Ed. 340. The true rule applicable to this case was laid down by the supreme court, in an opinion by Chief Justice Marshall, in the case of *Strawbridge v. Curtiss*, 3 Cranch, 267, 2 L. Ed. 435, as follows: To bring a case in which there is more than one plaintiff or defendant within the jurisdiction of a United States circuit court on the ground of diversity of citizenship of the parties, "each distinct interest should be represented by persons all of whom are entitled to sue, or may be sued, in the federal court; that is, that where the interest is joint each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts." In *Ex parte Girard*, Fed. Cas. No. 5,457, Mr. Justice Grier, in discussing the question in that case as to the right of removal, restated the rule enunciated by Marshall, and adapted it to removable causes in the following words:

"Where there is more than one person, plaintiff or defendant, each must be competent to sue in the courts of the United States. The right to remove must exist in each and all the persons suing, and against whom the opposite party may demand a decree or judgment."

Within the letter and spirit of this rule, the right of the defendants to remove this cause into this court is clear.

The original petition for removal is criticised because it did not allege that the alien defendant was a corporation organized and existing under the laws of the dominion of Canada at the time of the institution of this suit, but merely alleged that it was such corporation, and its citizenship was alleged to be that of a foreign corporation at the time of filing the petition. There was a hearing upon the petition by the superior court, and upon leave granted by that court the petition was amended by inserting the necessary words to show that said defendant was an alien corporation at the time of the institution of the suit, to which amendment the plaintiff objected; and it is now contended that the amendment came too late, the time for filing a petition for removal having elapsed. It is my opinion that the amendment was permissible, notwithstanding the plaintiff's objection thereto. If it had not been made before, and if it were deemed a necessary amendment, leave to make it would be granted by this court now. My views on this subject are set forth in the case of *Tremper v. Schwabacher* (C. C.) 84 Fed. 415. See, also, 18 Enc. Pl. & Prac. pp. 324, 325. But the amendment was unnecessary. The citizenship of a corporation is sufficiently disclosed by the allegation that it is a corporation duly organized under the laws of the state or country named. *Dodge v. Tulleys*, 144 U. S. 456, 12 Sup. Ct. 728, 36 L. Ed. 501. The words of the petition refer to the creation of the corporation, and determine its citizenship every moment of its existence, including the time of commencing this action against it. *Shaw v. Mining Co.*, 145 U. S. 444-453, 12 Sup. Ct. 935, 36 L. Ed. 768. Motion to remand denied.

WESTERN UNION TEL. CO. v. BOSTON SAFE-DEPOSIT & TRUST CO.
BOSTON SAFE-DEPOSIT & TRUST CO. v. WESTERN UNION TEL. CO.

(Circuit Court, S. D. New York. November 9, 1900.)

TRUSTS—EXPENSES OF ADMINISTRATION—SUIT TO DETERMINE RIGHT TO FUND.

A trustee is required to protect diligently and faithfully the interests of the beneficiaries, and all of them; and where he acts with prudence, discretion, and economy he is entitled to be reimbursed for the costs and expenses incurred in the administration of the trust. He is also entitled to the judgment of the court upon the demands of rival claimants to the fund, and, where he has invoked such judgment before paying over the fund, neither he nor the unsuccessful claimant can be required to pay the costs and expenses of the proceeding unless they have been guilty of vexatious conduct or bad faith, but such costs and expenses are a charge upon the general fund.

In Equity. On exceptions to master's report.

For former opinion, see 87 Fed. 788.

Rush Taggart, for complainant.

William G. Wilson, for defendant.

COXE, District Judge. The master was appointed to report the amount due the Western Union Telegraph Company "after allowing to said trustee (the trust company) all its just and proper charges and expenses in the premises." The master reported that the telegraph company should be allowed "in the original litigation for services of attorneys \$3,000 and for nontaxable disbursements \$1.19. In the present suit, for services of attorneys \$1,000 and for disbursements \$159.27." The telegraph company does not dispute the fairness of those charges or the accuracy of the disbursements, but insists that it should not be called upon to pay them. This is the question presented by the exceptions.

The master has done exactly what he was directed to do. He was told to deduct from the amount to be paid the telegraph company all just and proper charges and expenses incurred by the trust company. He has done so. He was not directed to ascertain these amounts and charge them to the beneficiaries for whose benefit it is alleged they were incurred. He was not directed to report the amounts, so that the court could subsequently apportion them as it might then be advised. The decree was mandatory and explicit. It said to the master, "First, find out the aggregate of the charges and expenses; and, second, deduct this amount from the sum total in the hands of the trust company. The balance is the amount due the telegraph company and the other beneficiary." There is force in the suggestion that this question is determined by the decree and cannot be reviewed upon exceptions to the master's report. It is, however, clear that the court has power to alter an interlocutory decree to correct a mistake or prevent injustice and the question may as well, therefore, be determined on the merits.

Is the trustee entitled to deduct the amounts referred to before turning over the fund in its possession to the beneficiaries? The duty of a trustee in such circumstances is clearly defined. He is

required to protect diligently and faithfully the interest of the beneficiaries, and all of them, and he is entitled to be reimbursed for expenses honestly incurred in the administration of the trust. He is not called upon to assume any personal risk and is entitled to the judgment of the court upon the demands of rival claimants to the fund. So long as he acts with prudence, discretion and economy in the management of the estate and in the examination and ascertainment of claims, his expenses should be paid from the general fund. Where he has invoked the sanction of the court before paying over the fund, in the case of contesting claimants, no authority has been cited for the proposition that the costs and expenses of the proceeding should be saddled upon the trustee or the unsuccessful claimant unless they have been guilty of vexatious conduct or bad faith. In the case at bar the expenses allowed are those of securing the fund in the original suit, and, subsequently, the expenses of ascertaining by judicial decree to whom it belonged. There never was a period when the trust company could safely have paid the fund to the telegraph company without the protection of a decree. The court is of the opinion that the trust company acted throughout with wisdom and prudence and is entitled to the allowance of the sums in question which are conceded to be fair and reasonable. The exceptions are overruled and the report of the master is confirmed.

BERWIND v. VAN HORNE.

(Circuit Court, S. D. New York. November 9, 1900.)

CORPORATIONS—ACCOUNTING—PARTIES.

The president of a corporation is a proper party to a suit against such corporation and others to require an accounting for property of a third corporation, which property it is alleged in the bill was delivered to the defendant corporation under an agreement made in its behalf by the president, and was, through fraud and collusion between the defendants, converted to their own use, in violation of such agreement.

In Equity. On demurrer to bill.

Frederick S. Duncan, for complainant.

Shearman & Sterling and John A. Garver, for defendant Van Horne.

COXE, District Judge. The demurrer now under consideration was interposed by the defendant Van Horne. Similar demurrers on behalf of the other defendants were overruled after extended argument. *Berwind v. Railway Co.* (C. C.) 98 Fed. 158. It has, therefore, been judicially determined that the bill states a cause of action against the defendant corporations. The defendant Van Horne had not then filed his demurrer, but the point was urged at the argument and in the briefs of the defendants that he was in no way connected with matters out of which the controversy arises, except as president and agent of the Canadian Pacific Company. In answer to this suggestion the court said:

"The construction company and the new railroad company, as parties interested in the subject-matter, and the president of the Canadian Pacific, as an officer through whom the transactions were had, appear to be proper parties, according to well-known practice in equity pleading."

It is true that, strictly considered, the opinion is not controlling for the reason that this demurrer was not then before the court, but the logic of the decision is wholly inconsistent with the position now asserted by the defendant. It is manifest from the statements of the bill that if the complainant finally succeeds the defendant's presence on the record may be necessary to render the decree effectual. The bill seeks an accounting from the defendants of property alleged to have been fraudulently and collusively diverted by them to their own use. Without attempting to repeat in detail the averments of the bill connecting the defendant Van Horne with the alleged conspiracy it cannot be denied that he is charged with being the prime mover in the various transactions which form the basis of complainant's action. It is averred that the 5,501 shares of the construction company were delivered to him and that he and the other defendants have appropriated to themselves the benefits, advantages, gains and profits formerly enjoyed by the construction company and "have made large profits and are now the holders or owners of securities connected with said enterprises of large value or of property or money resulting from the sale thereof of large value or amount." It is this property which the complainant is endeavoring to reach. Those who were engaged in the alleged fraudulent scheme and are now enjoying its fruits are properly made defendants. The demurrer is overruled, the defendant to answer within 20 days on payment of costs.

IDE v. CROSBY et al.

(Circuit Court, N. D. Alabama, S. D. November 7, 1900.)

No. 120.

INJUNCTIONS—MOTION TO DISSOLVE—INTERLOCUTORY ORDER MADE BY JUDGE OF EQUAL AUTHORITY.

A circuit judge will not grant a motion to dissolve an interlocutory injunction granted by a district judge sitting in a circuit court, where it can be made before the same judge who made the order.

At Chambers. On motion to dissolve temporary injunction.

S. J. Bowie (John B. Knox and Fred L. Blackmon, on the brief), for plaintiff.

W. A. Gunter (Gaston Gunter, on the brief), for defendants.

SHELBY, Circuit Judge. This cause is submitted on a motion "to discharge and dissolve" an injunction issued out of the circuit court of the United States for the Southern division of the Northern district of Alabama by order of the Honorable John Bruce, district judge. The grounds of the motion are that the injunction was granted without notice, that the bill is without equity, and that the court is without jurisdiction, because indispensable parties cannot be made parties to the bill, they being nonresidents.

The preliminary question raised by the plaintiff, resisting the motion to dissolve the injunction, is whether a circuit judge should dissolve an injunction granted by a district judge holding a circuit court. A district judge presiding in the circuit court has the same powers and jurisdiction that are possessed by a circuit judge holding the court. It would lead to unseemly conflict of opinion and decision if one judge, having in the matter in question the same jurisdiction, should review and reverse the opinion and decision of another. And, where there are several judges having the same powers and jurisdiction, the conflict and uncertainty could be increased by applications to each of them. Except in cases where the urgency is such that timely relief cannot be obtained by application to the judge who granted the writ, or by appeal, it appears to be the better practice, and the one sustained by authority, to require the defendant to apply for its discharge or dissolution to the judge who granted the injunction. The defendant complaining of the order granting the injunction now has the right, also, of appeal to the United States circuit court of appeals. Act June 6, 1900 (Acts Cong. 1899-1900, p. 650).

In *Westerly Waterworks v. Town of Westerly* (C. C.) 77 Fed. 783, 785, Colt, Circuit Judge, held that a circuit judge should not review an interlocutory order granting an injunction made by a district judge sitting in the circuit court. Judge Colt said:

"It is quite true, as the complainant contends, that by the practice which prevails in the federal courts a motion to dissolve an injunction should always, when practicable, be addressed to the judge who granted the order, and no other judge will consent to review such order on the same state of facts. But, in case of the death of the judge who made the original order, it is clear that no such rule of comity can exist, because otherwise it might be impossible to modify or dissolve such injunction order until final decree. Under such circumstances, however, it would seem advisable that two judges should hear any motion to vacate or modify."

In *Klein v. Fleetford* (C. C.) 35 Fed. 98, an injunction had been granted by a district judge, and a motion to dissolve it was made before Brewer, Circuit Judge. In overruling the motion, and giving leave to renew it before the district judge, Judge Brewer said:

"I had occasion last term, in deciding a case, to say to counsel that, as a rule, injunctions issued by one judge would remain, unless modified, changed, or set aside by the same judge."

I think it may be stated as a general rule that, where two judges possess equal authority, one will not review or reverse the rulings of the other in the same case. *Giant Powder Co. v. California Vigor Powder Co.* (C. C.) 5 Fed. 197; *Cole Silver-Min. Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 685, 689, Fed. Cas. No. 2,990; *Oglesby v. Attrill* (C. C.) 14 Fed. 214; *Preston v. Walsh* (C. C.) 10 Fed. 315; *Appleton v. Smith*, 1 Dill. 202, Fed. Cas. No. 498; *Reynolds v. Mining Co.* (C. C.) 33 Fed. 354. An order will be entered overruling the motion, with leave to renew it, if desired, before the district judge.

LINTON et al. v. NATIONAL LIFE INS. CO. OF VERMONT.

(Circuit Court of Appeals, Eighth Circuit. October 22, 1900.)

No. 1,409.

1. RES ADJUDICATA—JUDGMENT ON SAME CAUSE OF ACTION.

The rule of estoppel by judgment is that, when the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.

2. SAME—JUDGMENT ON DIFFERENT CAUSE OF ACTION.

When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been, but were not, litigated or decided.

3. SAME—QUESTIONS ACTUALLY DECIDED.

Where, in an action on a coupon note for interest, the question whether the terms of a power of attorney were broad enough to warrant the attorney in fact, who, on behalf of the makers, executed the note for the principal, the coupon notes for the interest, and a mortgage securing them, to borrow money, and to execute these instruments for his principal, and the question whether or not the certificate of acknowledgment on the letter of attorney was in legal form, were actually litigated and decided, and a judgment was rendered against the grantors in the letter of attorney, *held*, that in a subsequent action between the same parties on the note for the principal, or on other coupon notes for interest, and on the mortgage, these questions were res adjudicata, and could not be again litigated.

4. DEED—ACKNOWLEDGMENT—NECESSITY—RECORD AND ADMISSION IN EVIDENCE.

An acknowledgment of the execution of an instrument affecting the title to real estate in Nebraska is not essential to the validity of the instrument between the parties to it. The acknowledgment is not a part of the conveyance under the statutes of Nebraska, but its purpose and effect are to authorize the record of the instrument, and to qualify it for admission in evidence without further proof.

5. MARRIED WOMEN—CONVEYANCES—RELEASE OF DOWER AND HOMESTEAD.

The conveyances of married women are governed by this rule, except in cases which involve the release of dower or of rights in their homesteads.

6. ESTOPPEL.

One who by his acts or representations, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial.

7. ACKNOWLEDGMENT—ESTOPPEL TO IMPEACH—BONA FIDE PURCHASER.

As against a bona fide purchaser or mortgagee who is not a party to the instrument, and who has paid his money in reliance upon the certificate of the acknowledgment of a deed or other instrument affecting the title to real estate, which is duly signed and delivered, the grantors are conclusively estopped from denying the existence of the facts which the officer taking the acknowledgment had jurisdiction to, and did, evince by his certificate.

8. SAME—CONSUL GENERAL MAY TAKE.

A consul general is a "consul of the United States," within the meaning of Comp. St. Neb. 1890, c. 73, § 6, and has authority to take and

certify the acknowledgment of instruments affecting the title to real estate situated in the state of Nebraska.

9. SAME—ESTOPPEL TO IMPEACH.

A husband and wife signed and delivered to F. a letter of attorney empowering him to mortgage or convey the property of the wife. The consul general of the United States at London affixed to this letter of attorney his certificate that the grantors of the power had duly acknowledged its execution, and the letter of attorney and this certificate were properly recorded in the state of Nebraska. Thereafter F., as attorney in fact for the grantors in the power, borrowed \$25,000 of the National Life Insurance Company, which made the loan, and paid the proceeds to F., in reliance upon the letter of attorney and certificate, and F., as such attorney in fact, gave to it notes and a mortgage of the grantors in the power upon the separate estate of the wife. *Held*, that the grantors in the letter of attorney were estopped by these facts from denying that the execution of the power of attorney was acknowledged by them as stated in the certificate of the consul general.

10. SAME—IMPEACHMENT BETWEEN PARTIES—EVIDENCE.

A certificate of acknowledgment of an instrument affecting the title to real estate is presumed to be true, and, even in a controversy between the parties to the instrument, that presumption cannot be overcome without evidence that is so plain and convincing that the issue is not doubtful. A mere preponderance of evidence is not enough. The evidence in this case considered, and *held* to be insufficient to impeach the certificate of the officer even between the parties to the letter of attorney.

11. MARRIED WOMEN MAY ACT THROUGH AN ATTORNEY IN FACT.

A married woman may lease, mortgage, convey, manage, and control her real estate in the state of Nebraska by means of an attorney in fact. Comp. St. c. 73, §§ 42, 56.

12. LETTER OF ATTORNEY—CONVEYANCE OF SEPARATE ESTATE OF WIFE.

A letter of attorney executed by husband and wife, which by its terms empowers the attorney in fact to convey, lease, or mortgage any parcels of real estate which have descended to, or been acquired by, the wife, Phoebe, or either of the grantors named in the power of attorney, is the letter of attorney of the wife as well as that of the husband, and it authorizes the attorney in fact to convey, lease, or mortgage the separate estate of the wife.

13. DEED—EXECUTION ABROAD—NECESSITY OF REVENUE STAMP.

A letter of attorney to convey and mortgage lands in the United States and in England, executed in the latter country, where the revenue laws require it to be stamped, and make it inadmissible in evidence until it is stamped, but do not avoid it for lack of a stamp, is not invalid for the want of such a stamp, nor is it inadmissible in the courts of the United States on that account, since the revenue laws of England do not prescribe the rules of practice or evidence in the courts of the United States.

14. INTEREST—CONTRACT FOR HIGHER RATE AFTER MATURITY.

A contract in a promissory note for a lawful rate of interest from date to maturity, and for a higher, but lawful, rate after maturity, is valid and enforceable.

15. DECREE—RATE OF INTEREST.

The decree or judgment upon such a contract lawfully draws interest at the higher rate until it is paid, because this was the agreement of the parties.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Nebraska.

John T. Cathers, for appellants.

Frank H. Gaines (E. R. Duffie and J. E. Kelby, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of foreclosure of a mortgage upon real estate situated in the city of Omaha, in the state of Nebraska. The appellant Phoebe R. E. E. Linton was the owner of a large amount of real estate in the United States which she had inherited, and John P. Finlay was her father. In June, 1892, Finlay, as the attorney in fact of Phoebe R. E. E. Linton and of Adolphus F. Linton, her husband, the appellants, borrowed of the National Life Insurance Company of Vermont, a corporation, the appellee, \$25,000, and gave to it a promissory note for that amount, dated June 1, 1892, due June 1, 1897, eight coupons for \$750 each for interest, and a mortgage on improved real estate of Mrs. Linton situated in Omaha to secure the payment of these notes. The notes and the mortgage were signed with the names of the appellants, and executed on their behalf by Finlay as their attorney in fact, and the proceeds of the loan were paid to him. The four coupon notes which fell due on December 1, 1895, June 1, 1896, December 1, 1896, and June 1, 1897, respectively, and the note for \$25,000 principal, have not been paid, and this suit was brought to foreclose the mortgage which secured their payment. The authority of Finlay to borrow the money and to make the notes and mortgage was a letter of attorney signed by the appellants and delivered to Finlay in London, England, on July 24, 1891. This letter of attorney bore a certificate of acknowledgment of its execution by the appellants signed and sealed by the consul general of the United States at the consulate in London, and it had been recorded in the proper office in the state of Nebraska before the loan was made. The defense to the foreclosure was that for various reasons the letter of attorney did not authorize Finlay to borrow the money or to make the notes or mortgage on behalf of the appellants. Testimony was taken, and at the final hearing upon the merits the court below overruled this defense, and rendered a decree of foreclosure of the mortgage. This decree of foreclosure is challenged by counsel for the appellants on the grounds (1) that the letter of attorney did not by its terms empower Finlay to borrow money or to make promissory notes or other obligations on behalf of the appellants to repay borrowed money, or to mortgage lands to secure the payment of a new debt; (2) that the certificate of acknowledgment upon the letter of attorney was not in the form required by the law; (3) that the execution of the letter of attorney was not in fact acknowledged by the appellants; (4) that a married woman cannot lawfully convey or mortgage her real estate in Nebraska by an attorney in fact; (5) that the notes and mortgage did not bind Mrs. Linton or charge her real estate, because she never received any consideration for them; (6) that the letter of attorney is that of Mr. Linton alone, and does not empower Finlay to act for Mrs. Linton, or to convey, mortgage, or charge her property; and (7) that the letter of attorney was not stamped as required by the law of England, where it was executed.

An examination of the record discloses the fact that the first two objections of counsel to this decree are not open to consideration in this suit. On July 8, 1895, the appellee brought an action against the appellants in the county court of Douglas county, Neb., upon one of the coupon notes secured by this mortgage which became due on June 1, 1895. The complaint upon which that action went to trial set forth the letter of attorney here in question, and alleged that the note sued on in that action was executed by Finlay on behalf of the appellants by virtue of the authority granted to him by this letter of attorney, and for the purpose of enabling him to borrow for the appellants the \$25,000 which he obtained from the appellee. Mr. and Mrs. Linton answered this complaint that Finlay was not authorized, by this letter of attorney or otherwise, to borrow any money, or to make any note or mortgage, on their behalf, and that the letter of attorney had not been executed according to law, and was not binding upon them. The issues thus made were tried upon their merits, and a judgment was rendered by the county court of Douglas county in favor of the insurance company for the full amount claimed in its complaint. That judgment was never reversed or modified, but was paid. At the trial which resulted in that judgment the question whether or not the terms of the letter of attorney were sufficient to authorize Finlay to borrow money for the appellants, and to execute notes therefor in their names, and the question whether or not the certificate of acknowledgment was in accordance with the statutes, were raised, litigated, argued, and decided by the court against the appellants. The court of Douglas county held that the power vested by the terms of the letter of attorney was ample to enable Finlay to borrow the money and to make the notes, and that the certificate of the acknowledgment of the execution of the letter of attorney was in due and legal form. The judgment in that action conclusively estops the appellants from again litigating those questions. The rule of estoppel by judgment is that, when the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former. When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive as to other matters which might have been, but were not, litigated or decided. *Cromwell v. Sac Co.*, 94 U. S. 351, 352, 24 L. Ed. 195; *Nesbitt v. District*, 144 U. S. 610, 618, 12 Sup. Ct. 746, 36 L. Ed. 562; *Commissioners v. Platt*, 79 Fed. 567, 571, 25 C. C. A. 87, 91, 49 U. S. App. 216, 223; *Commissioners v. Sutliff*, 38 C. C. A. 167, 97 Fed. 270, 274. This is a suit between the same parties who were involved in the action upon the coupon note due on June 1, 1895, but upon a cause of action different from that there in controversy, and every point and question which was actually and necessarily litigated and decided in that action is *res adjudicata* in this. The question whether or not the terms of the letter of attorney were

broad enough to empower Finlay to borrow money for the appellants and to execute their notes to secure a new debt, and the question whether or not the certificate of acknowledgment was in accordance with the law, were raised, litigated, and decided in that action, and the appellants are conclusively estopped by the judgment therein from again presenting or litigating them here. In this suit the letter of attorney and the form of the certificate of acknowledgment must be conclusively presumed to have authorized Finlay to borrow the money and to execute the notes and mortgage in controversy on behalf of the appellants.

The third reason why the decree should be reversed which is urged upon our consideration is that the execution of the letter of attorney never was in fact acknowledged by the appellants. The force of this contention must be determined by the statutes of the state of Nebraska,—by the law of the situs of the real estate mortgaged,—and there are several fatal objections to it.

In the first place, an acknowledgment of the execution of an instrument affecting the title to real estate is not essential to the validity of the instrument between the parties to it and their privies under the statutes of that state. The execution of a deed, mortgage, or letter of attorney may be proved by competent testimony, and full force and effect may be given to it without any acknowledgment. The acknowledgment prescribed by the statutes of Nebraska is not a part of the conveyance or instrument, and its purpose and effect is not to condition the validity of the mortgage or power of attorney, but to entitle it to record, and to authorize its admission in evidence without other proof. *Comp. St. 1899, c. 73, § 1; Burbank v. Ellis, 7 Neb. 156, 163; Horbach v. Tyrrell, 48 Neb. 514, 516, 67 N. W. 485, 489, 37 L. R. A. 434.*

Nor is a married woman exempt from these rules in any case except where the instrument in question involves her dower (*Comp. St. 1899, c. 23, § 12*), or her homestead (*Comp. St. 1899, c. 36, § 4*). In all other cases an acknowledgment by a married woman of the execution of an instrument affecting her title to real estate is not essential to its validity in the state of Nebraska. If, therefore, as the appellants claim, they never acknowledged the letter of attorney, it was still valid and effective, because their signatures to it and its delivery to the attorney in fact, Finlay, are established by the evidence. *Linton v. Cooper, 53 Neb. 406, 408, 73 N. W. 731.*

In the second place, this record discloses the facts that this letter of attorney was signed and delivered to the attorney in fact by the appellants; that Mr. John C. New, the consul general of the United States at London, placed upon it his official certificate, to the effect that the appellants had properly acknowledged its execution before him; that the power of attorney and this certificate were recorded in the proper office in the state of Nebraska; and that in reliance upon this record the appellee loaned to the attorney in fact, Finlay, the \$25,000 in controversy. In this state of the facts the appellants are estopped, both on general principles and under the technical rule applicable to certificates of acknowledgment, from denying the fact stated in the certificate to the injury of the appellee. By sign-

ing the letter of attorney, and placing it in the possession and under the control of Finlay, they gave him the opportunity and the means to present to innocent purchasers the appearance of an instrument duly acknowledged by the appellants, and the record of an instrument apparently so acknowledged. In reliance upon this apparent state of facts, the appellee loaned its money, and the appellants are thereby estopped from denying that the appearance which they negligently permitted their agent to make did not correspond with the reality. One who by his acts or representations, or by his silence when he ought to speak out, intentionally, or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial. *Butler v. Cockrill*, 73 Fed. 945, 951, 20 C. C. A. 122, 128, 36 U. S. App. 702, 712, and cases there cited. The same result follows under the rule applicable to the impeachment of the certificate of acknowledgment. That certificate was an official act of the consul general. It carried with it the strong legal presumption that the officer who had signed it faithfully discharged his duty, and that he had certified to the truth, and not to a falsehood. There was no claim or pretense that this certificate had been procured by the fraud or collusion of the appellee, or that it ever knew there was any claim that the certificate was false until after it had loaned its money in reliance upon its truth. The appellee was not a party to the letter of attorney, but an innocent mortgagee, that loaned its money in good faith, in the belief that the certificate was true. In *Drury v. Foster*, 2 Wall. 24, 34, 17 L. Ed. 782, Mr. Justice Nelson, in delivering the opinion of the supreme court, said:

"There is authority for saying that, where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the feme covert, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that the acts of the officer for this purpose are judicial and conclusive."

In *Young v. Duvall*, 109 U. S. 573, 577, 3 Sup. Ct. 416, 27 L. Ed. 1038, the supreme court said that if the officer's certificate "can be contradicted, to the injury of those who in good faith have acted upon it, the proof to that end must be such as will clearly and fully show the certificate to be false or fraudulent. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity of titles to real estate, which would inevitably follow from one less rigorous." In *Hitz v. Jenks*, 123 U. S. 298, 304, 8 Sup. Ct. 147, 31 L. Ed. 159, Mr. Justice Gray, in delivering the opinion of the court, after quoting from the opinions just cited, said:

"It would be inconsistent with the reasons above stated, as well as with a great weight of authority, to hold that, in the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, can afterwards, except for fraud,

be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate."

These opinions, the general principles of the law, and the great weight of authority throughout the land establish this just and equitable rule: As against a bona fide purchaser or mortgagee, who is not a party to the instrument, and who has paid his money in reliance upon the record of a certificate of the acknowledgment of a deed or instrument duly signed and delivered which affects the title to real estate, the grantors are conclusively estopped from denying the existence of the facts stated in the certificate which the officer had jurisdiction to ascertain and to certify. Whart. Ev. § 1052; note to *Smith v. Ward*, 1 Am. Dec. 81 (s. c. 2 Root, 374); *Fitzgerald v. Fitzgerald*, 12 Reporter, 720; *Williams v. Baker*, 71 Pa. St. 476, 482; *Hall v. Patterson*, 51 Pa. St. 289; *Miller v. Wentworth*, 82 Pa. St. 280, 285.

Moreover, if the issue whether or not the execution of this letter of attorney was acknowledged by the appellants had arisen between the parties to it, and it had been necessary to determine that question upon the evidence in this record, regardless of the rules of law to which reference has been made, the result could not have been different. The certificate carries with it the legal presumption that the officer who made it faithfully discharged his duty. That officer testified that, while he could not remember the particular act, he had never taken or certified an acknowledgment which did not truthfully state the facts contained therein, and that from the custom of his office he should say that the appellants appeared and acknowledged the execution of the letter of attorney. This evidence is opposed by the positive testimony of the appellants and by that alone. The testimony of Mrs. Linton disclosed the fact that she did not remember that she had appeared at the consulate and acknowledged the execution of other instruments which she had undoubtedly signed and acknowledged, and, while the testimony of Mr. Linton was positive and circumstantial, it was not, in our opinion, sufficient, either alone or with the corroboration to be derived from the testimony of his wife, to overcome the force of the certificate and the testimony of the officer. The officer was disinterested, and the appellants were interested. The burden rested on them of overcoming the testimony of Mr. New and the strong presumption that the certificate made at the time was true. A mere preponderance of testimony was not sufficient for this purpose. If the proofs were doubtful or unsatisfactory, if the presumption of the truth of the certificate was not overcome by testimony plain and convincing beyond reasonable controversy, the issue should be found for the certificate. *Pereau v. Frederick*, 17 Neb. 117, 119, 22 N. W. 235; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Marston v. Brittenham*, 76 Ill. 611, 614; *Lickmon v. Harding*, 65 Ill. 505; *Graham v. Anderson*, 42 Ill. 514, 519; *Monroe v. Poorman*, 62 Ill. 523, 527. The testimony that the certificate of acknowledgment was false is not of this clear and convincing character, and, if the issue had arisen between the parties to the letter of attorney, it must have been found in favor of its truth. The objection to this decree that the letter of

attorney was never acknowledged cannot be sustained. In reaching this conclusion, the argument of counsel for the appellants that the consul general at London was not authorized to take and certify acknowledgments of instruments affecting real estate in Nebraska, although the statutes of that state authorize a "consul of the United States" to do so, has not escaped attention. Comp. St. Neb. c. 73, § 6. But that position has not seemed worthy of discussion, because no reason occurs to us why the legislature of Nebraska could have intended to give the power to take and certify acknowledgments to a consul, and to withhold it from a consul general. One is a consul as much as the other, and the natural presumption is that the legislature intended to give the consul of higher rank as much power as the consul of lower grade.

It is said that the decree should be reversed because a married woman was not authorized to act, contract, convey, or mortgage her real estate by or through an attorney in fact; that, therefore, the letter of attorney and mortgage from Mrs. Linton were void, and her land was free from the incumbrance. This contention, and the authorities cited to sustain it, rest upon the disability of a feme covert under the common law to act by an attorney in fact. *Miller v. Ruble*, 107 Pa. St. 395; *Banking Co. v. Wright* (Neb.) 74 N. W. 82; *Devl. Deeds*, § 548. But the right and power of Mrs. Linton to convey and mortgage her lands in the state of Nebraska must be measured by the law of that state. The chapter of the statutes of that state which relates to conveyances of real estate provides: "Any real estate belonging to a married woman, may be managed, controlled, leased, devised, or conveyed by her by deed, or by will, in the same manner and with like effect as if she were single." Comp. St. 1899, c. 73, § 42. And "every instrument required by any of the provisions of this chapter to be subscribed by any party, may be subscribed by his agent thereunto authorized by writing." Comp. St. 1899, c. 73, § 56. A married woman may therefore act or contract concerning, convey, or mortgage her real estate in the state of Nebraska by or through her attorney in fact.

Another position of counsel for the appellants is that the notes and the mortgage did not bind Mrs. Linton or charge her real estate, because she never received any consideration for them. This proposition is based upon an alleged fact which the testimony does not establish to our satisfaction. The attorney in fact, Finlay, died before the testimony in this case was taken, and his books and accounts were not produced. He received the proceeds of the loan which was secured by this mortgage as the attorney in fact of his daughter and her husband. He was collecting a large portion of the income of his daughter, and expending it as his judgment and discretion dictated. There is evidence that he received and paid over or expended more than \$200,000 in this way. Shortly after this loan was made he caused \$4,891.50 to be remitted from Omaha, Neb., where he received the proceeds of the loan, to the Union Bank of London, to the credit of Mrs. Linton, and he paid state, county, and city taxes upon her property to the amount of about \$5,500. In one place Mr. Linton testifies that the money remitted to the Union

Bank for Mrs. Linton was used to pay a note made by Finlay for furniture which he had purchased of Linton for his daughter, Mrs. Linton, and that they supposed that this remittance was a payment out of the moneys belonging to Finlay. In other places in the record may be found his testimony to the effect that he never knew anything about the receipt of this remittance, either by himself or by his wife. If it was true that Finlay purchased of Mr. Linton a large amount of furniture for which he gave his note, and that he paid him for this furniture with a portion of the moneys which he derived from the loan, it is not true that Mrs. Linton's estate derived no benefit from these proceeds because she obtained the furniture, and the testimony is undisputed that the taxes upon her property were paid by Finlay out of the moneys received from the appellee on account of this mortgage. It is true that Mr. and Mrs. Linton both testify that neither she nor her estate ever derived any benefit or received any consideration for the notes and mortgage in suit. But it is also true that the testimony of Mrs. Linton shows that she gave her father, Finlay, almost unlimited power as her agent to collect and dispose of her income, and that she knew little or nothing about his accounts or his acts. The evidence is conclusive that he paid the taxes upon her property from the proceeds of this loan. It is persuasive that the remittance which he made to the Union Bank of London to her credit did not fail to reach its intended destination. We are satisfied that she received some consideration and her estate derived some benefit from this mortgage.

It is next insisted that the letter of attorney is that of the husband alone, and that it does not empower the attorney in fact to act for Mrs. Linton, or to convey, mortgage, or charge her property. The position is without foundation or plausibility. It is best answered by the terms of the early portion of the power of attorney itself, which expressly authorize the attorney in fact to convey and mortgage the property of Mrs. Linton. They are:

"Know all men by these presents that we, Adolphus Frederick Linton and Phebe Rebecca Elizabeth Elwina Linton, his wife, of Brighton, England, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, John Borland Finlay, of the commonwealth of Pennsylvania, in the United States of America, our true and lawful attorney, for us, or either of us, and in our or either of our names, places, and steads, to grant, bargain, and sell, convey, exchange, assign, transfer, lease, mortgage, or confirm any or all tracts, pieces, parcels, or lots of real estate, as well as of coal, ore, petroleum, or other valuable minerals, claims, rights, interests, or hereditaments which have descended to or been or may be acquired by or for the said Phebe, or either of us," and to make deeds, bonds, mortgages, obligations, or instruments requisite or necessary therefor, or in any manner connected therewith.

The remaining objection to the letter of attorney is that it was signed and acknowledged in England, and does not bear the revenue stamp required by the law of that country. But the penalty for a failure to properly stamp an instrument of this character under the law of England is not the avoidance of the instrument, but its inadmissibility in the courts of that country until it is properly stamped. The omission of the stamp did not, therefore, affect the validity of

the power of attorney, or its admissibility in evidence in the courts of the United States, whose practice is not prescribed by the revenue laws of England.

The reasons urged for a reversal of this decree have now been considered, and but one objection to it remains, and that is that the amount found to be due upon the notes is too large. Counsel for appellants stated in argument and they assert in their brief that there is included in the amount adjudged due by the decree a penalty for the failure of the mortgagors to pay their notes at maturity, which consists of interest on the amount of the principal note at the rate of 10 per cent. per annum from its date, June 1, 1892, to the date of the decree. A careful computation of the interest according to the terms of the contract has demonstrated the fact, however, that the mathematics of counsel is as much at sea in this case as are their views of the law and the facts. The note for the \$25,000 contained contracts (1) that the makers would pay interest at 6 per cent. per annum according to the terms of coupons attached, until June 1, 1897, when the note fell due, and interest semiannually at 10 per cent. per annum thereafter; and (2) that, in case of default of payment according to the terms of the note, the makers would pay interest at the rate of 10 per cent. per annum from the date of the note until it was paid. Each coupon note contained a contract that it should draw interest at 10 per cent. per annum after its maturity. The contention of counsel for appellants is that the agreement to pay interest at 10 per cent. per annum from the date of the note in case of default was a contract to pay a penalty, was illegal, and that the decree is erroneous, because the amount of this penalty is included in the amount found due therein. It is not material in this case whether the position of counsel relative to the character of this contract concerning the default is or is not tenable, and that question will not be considered, because the fact necessary to its presentation does not exist. Ten per centum per annum is a lawful contract rate of interest in the state of Nebraska. The makers of these notes had the right to agree to pay a higher rate of interest after the maturity of their notes than they contracted to pay before their maturity. They did agree that after the maturity of the note for \$25,000 they would pay interest on that sum semiannually at the rate of 10 per cent. per annum, and that they would pay interest from the date of their maturity upon the amount of each of the coupon notes at the rate of 10 per cent. per annum. The decree includes interest on the amount of these notes after their maturity at this rate, the amount of interest evidenced by the face of the coupon notes, and no other interest. It lawfully provides that the amount found to be due thereon shall draw interest at the rate of 10 per cent. per annum from the date of the decree until its amount is paid, because that was the agreement of the parties evidenced by the notes. There is therefore no error in the amount or in the terms of the decree. A contract for a lawful rate of interest before the maturity of a promissory note, and for a higher, but lawful, rate after maturity, is valid and enforceable, and it entitles the holder of the note to the higher rate, both before and after the judgment or de-

cree thereon, and until the debt is paid: *Havemeyer v. Paul*, 45 Neb. 373, 389, 63 N. W. 932; *Hallam v. Telleren* (Neb.) 75 N. W. 560; *Insurance Co. v. Westerhoff* (Neb.) 78 N. W. 724. The decree below is affirmed.

JOHNSON et al. v. MUNDAY.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,840.

EQUITY—JURISDICTION—MINING CLAIM—SUIT TO ESTABLISH ADVERSE CLAIM.

A suit in equity cannot be maintained in support of an adverse claim filed against the patenting of a mining claim to defendant, where complainant bases his claim upon a purely legal title acquired by a purchase of the property at sheriff's sale, the appropriate action being one at law.

Appeal from the Circuit Court of the United States for the District of Colorado.

Albert Smith (Charles J. Hughes, Jr., on the brief), for appellants.
Charles M. Brown, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. M. B. Johnson and others filed an adverse claim against Daniel Munday to enter the Claire Maire and Maggie M. lode-mining claims in the land office at Denver, Colo., and brought an action at law in the United States circuit court in support of their adverse claim. A demurrer to the complaint in the action at law was sustained, whereupon the court, for some reason not disclosed by the record, ordered that the plaintiffs have "leave to file a bill in equity asserting title to the premises in controversy." Thereupon, the plaintiffs filed their bill in equity in this suit. The defendant demurred to the bill upon the ground, among others, that: "The matters and things set out in said bill of complaint, and for which relief is sought, are not cognizable in a court of equity." This demurrer was overruled, and the question raised by it is the only one we find it necessary to consider. The bill sets up and counts on a purely legal title to the premises in controversy acquired by the purchase of the same at sheriff's sale. No ground of equitable cognizance is alleged or shown. It is an ejectment bill pure and simple. It states a good cause of action at law, but not one within the jurisdiction of a court of equity. The bill rests the jurisdiction of the court in the action upon the diverse citizenship of the parties, and also upon the ground that an action in support of an adverse claim is one arising under the laws of the United States, of which the federal court has jurisdiction regardless of the citizenship of the parties; but since the decisions of the supreme court in the cases of *Blackburn v. Mining Co.*, 175 U. S. 571, 20 Sup. Ct. 222, 44 L. Ed. 276, and *Mining Co. v. Rutter*, 177 U. S. 505, 20 Sup. Ct. 726, 44 L. Ed. 864, the last ground upon which the jurisdiction is claimed is untenable. The decree of the circuit court is

reversed, and the cause remanded, with instructions to that court to dismiss the bill for want of jurisdiction in equity, without prejudice to the complainants' right to assert their claim at law.

DENISON & N. RY. CO. v. RANNEY-ALTON MERCANTILE CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,401.

1. CONTRACT OF CORPORATION—DEFAULTING CONTRACTORS—LIABILITIES.

A corporation is not legally or equitably bound to pay the creditors of its defaulting contractors for work, materials, or supplies which creditors furnished to such contractors, and the latter used to improve the property of the corporation, when the contractors have so utterly failed to perform their agreement with the corporation that it owes them nothing.

2. SAME—EQUITABLE LIEN.

In the absence of a statute creating them, such creditors of defaulting contractors have no equitable liens upon the property of such a corporation.

3. SAME—LIABILITY TO CREDITORS OF DEFAULTING CONTRACTORS.

A corporation is not legally or equitably bound to pay the creditors of defaulting contractors with a receiver of its property for work, materials, or supplies which such creditors furnished to such contractors, and which the latter used to improve the property of the corporation, when the contractors have so utterly failed to perform their agreement that the receiver owes them nothing.

4. SAME—EQUITABLE LIEN ON PROPERTY IN HANDS OF RECEIVER.

In the absence of a statute, or an order of court, made before such work, materials, or supplies were furnished, establishing them, such creditors have no equitable liens for the amounts due them from the defaulting contractors upon the property of the corporation in the hands of the receiver.

5. RAILROADS—RECEIVERS—CONTRACTS FOR CONSTRUCTION—LIENS.

Orders of court authorizing the receiver of the property of a railroad corporation to make an agreement with specified contractors for the construction, completion, and equipment of a railroad in consideration of receiver's certificates to the amount of \$11,000 for every mile of completed and equipped railroad, and making such certificates liens upon the property of the railroad company, give no liens upon such property to the creditors of such contractors for work, materials, or supplies which they furnished to the contractors to enable them to perform their agreement, but conclusively negative the inference that any such liens were created, and demonstrate the fact that the court contemplated and intended that the contractors should pay their own creditors, that the amount which became due from the receiver to the contractors under the agreement should be the limit of the liability of the property of the railway company under the contract, and that this liability should be evidenced by receiver's certificates.

6. APPEAL—FINAL DECREE.

A decree of foreclosure and sale, which leaves the amount of the claims of the complainants undetermined, and the amount of the liability of the defendants and their property unfixed, is not a final decree.

(Syllabus by the Court.)

Appeal from the United States Court of Appeals in the Indian Territory.

In 1895 the Denison & Northern Railway Company, the appellant, was a corporation authorized to construct railroads in the Indian Territory. The United States court in that territory for the Southern division appointed a receiver of its property, and authorized that receiver to issue certificates of indebtedness, and to make a contract with the Mineral Belt Construction Company, a co-partnership, for the construction and equipment of 104 miles of railroad in consideration that the receiver would pay to these contractors receiver's certificates to the amount of \$11,000 per mile of completed and equipped railroad. These contractors employed men, bought supplies and materials, and caused some grading to be done, but never completed or equipped a mile of railroad, or complied with any condition of their contract. The Ranney-Alton Mercantile Company, a corporation, sold groceries of the value of \$16,500 to these contractors, for which they did not pay, and thereupon it filed a bill against the construction company and the railway company, and prayed that the amount of its claim against the construction company should be decreed to constitute a lien upon all the property of the railway company, and that this property should be sold to pay this claim. Other creditors of the defaulting contractors brought like suits, which were consolidated with that of the mercantile company, and upon final hearing the court decreed that all these creditors were entitled to liens upon the property of the railway company to the amount of the value of the improvements which the contractors had made upon the line of the railroad. This decree was affirmed by the United States court of appeals in the Indian Territory (53 S. W. 496), and the railway company appeals from that decree of affirmation.

William J. Scott and W. B. Sanders (Henry M. Furman, C. S. Herbert, C. B. Stuart, Yancey Lewis, J. H. Gordon, Andrew Squire, and J. H. Dempsey, on the brief), for appellant.

W. A. Ledbetter and S. T. Bledsoe, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This was a suit in equity, and the appeal presented to this court all the evidence, and imposed upon it the duty of finding the facts proved, of considering the entire case upon its merits, and of deciding it according to the law and the very right of the matter. The only difficulty which it has presented has been to extract from a confused mass of relevant and irrelevant evidence in a printed record of 529 pages and from 306 printed pages of argument the few material facts and elementary principles of law which condition its disposition. When these had been discovered, the questions presented in argument had been answered by these axiomatic rules of law and of reason: A corporation is not legally or equitably bound to pay the creditors of its defaulting contractors for work, materials, or supplies which creditors furnished to such contractors, and the latter used to improve the property of the corporation, when the contractors have so utterly failed to perform their agreement with the corporation that it owes them nothing. In the absence of a statute creating them, such creditors of defaulting contractors have no equitable liens upon the property of such a corporation. A corporation is not legally or equitably bound to pay the creditors of defaulting contractors with a receiver of its property for work, materials, or supplies which such creditors furnished to such contractors, and which the latter used to improve the property of the corporation,

when the contractors have so utterly failed to perform their agreement that the receiver owes them nothing. In the absence of a statute, or an order of court, made before such work, materials, or supplies were furnished, establishing them, such creditors have no equitable liens for the amounts due them from the defaulting contractors upon the property of the corporation in the hands of the receiver. Orders of court authorizing the receiver of the property of a railroad corporation to make an agreement with specified contractors for the construction, completion, and equipment of a railroad in consideration of receiver's certificates to the amount of \$11,000 for every mile of completed and equipped railroad, and making such certificates liens upon the property of the railroad company, give no liens upon such property to the creditors of such contractors for work, materials, or supplies which they furnished to the contractors to enable them to perform their agreement, but conclusively negative the inference that any such liens were created, and demonstrate the fact that the court contemplated and intended that the contractors should pay their own creditors, that the amount which became due from the receiver to the contractors under the agreement should be the limit of the liability of the property of the railway company under the contract, and that this liability should be evidenced by receiver's certificates.

The facts established by the evidence which are material to a decision of the merits of this suit are few and simple. They are these: A receiver of the property of the appellant, the railway company, was ordered by the court to make, and did make, a contract with a co-partnership that they should construct and equip 104 miles of railroad in consideration of receiver's certificates to the amount of \$11,000 for each mile of completed and equipped railroad. After these orders had been made, the appellee, the mercantile company, sold to these contractors groceries worth \$16,500, in reliance upon them. The contractors employed some men, and caused some grading and bridging to be done on the line of the railroad, but utterly failed to complete or equip any part of it, or to comply with any stipulation of their contract. The mercantile company filed a bill to establish and enforce a lien upon the property of the railway company for the amount which the defaulting contractors owed them. In their bill they alleged other facts, which they failed to prove, and others still the proof of which was immaterial. The record is full of demurrers, pleas, objections, reports of masters, rulings, and exceptions. It bristles with amusing facts and interesting legal conundrums, but, when all is said, the few plain facts which have been recited and the elementary principles already announced dispose of the entire case upon its merits, and render it impossible to sustain any lien upon the property of this railway company for the debts of the defaulting contractors of its receiver, either at law or in equity. The rules which render this result imperative are proverbial. They warrant neither discussion nor citation of authority. The facts are so simple that no argument can strengthen the conviction which their statement carries. This decision of the case upon its merits renders the discussion of other questions in the suit

unnecessary, and we might well leave the case here were it not for the fact that counsel for the appellees have so earnestly contended that other material facts were proved, and other principles of law were applicable, that we hesitate to close our opinion without a brief statement of the reasons which have led us to the conclusion that their positions cannot be sustained. To this end the facts out of which this suit arose will be stated more at length, and then the claims of counsel for the appellees will be considered.

In 1895 the Denison & Northern Railway Company was a corporation with a charter, and nothing else. On April 18, 1895, it made a contract with a co-partnership styled Bracey, Lampson & Chapman for the construction of 71 miles of railroad in the Indian Territory. These contractors caused some surveys to be made, and some work to be done clearing the right of way for the railroad. But they utterly failed to comply with the terms of their contract, and there is no proof that the railway company ever became indebted to them in any amount whatever. On September 7, 1895, W. S. Crockett, one of the creditors of Bracey, Lampson & Chapman, filed a bill in the United States court in the Indian Territory on behalf of himself and other creditors of these defaulting contractors against the railway company, and prayed for the appointment of a receiver of its property, and for its sale. This bill stated no cause of action in equity, and no ground for the appointment of a receiver, and on March 14, 1898, after a receiver had been appointed, had been authorized to issue certificates of indebtedness, and to make a contract to construct 104 miles of railroad, and after the property of the company had been held in the clutches of the court for more than two years, that court dismissed the entire proceeding for want of jurisdiction, discharged the receiver, and vacated and set aside all the orders it had made. On November 5, 1895, that court appointed one Moran Scott a receiver of all the property of the railway company upon the bill in Crockett's suit. The railway company appeared, and submitted to the jurisdiction of the court, and on March 2, 1895, on the application of Crockett, the receiver, and the railway company, the court made orders that the debts of the defaulting contractors, Bracey, Lampson & Chapman, constituted a first lien upon all the property of the railway company; that the receiver should make a contract with the Mineral Belt Construction Company, a co-partnership, for the construction, completion, and equipment of 104 miles of railroad in consideration that they would accept in payment therefor "eleven thousand dollars (\$11,000) a mile of receiver's certificates for each mile of road actually constructed and equipped." These orders authorized the receiver to issue \$1,140,000 of certificates to pay for the construction and equipment of this railroad. They required the contractors to give a bond in the sum of \$100,000 for the faithful performance of the contract. On April 6, 1896, the railway company filed a written motion to set aside the orders authorizing the receiver to issue these certificates and to enter into this contract. This motion called attention to the facts that the bill stated no cause of action in equity; that the complainant was not a creditor of the railway company, but of contractors who had defaulted in the per-

formance of their agreement with the railway company; that the construction company was incapable of performing the proposed contract; that their proposed bond was insufficient; and that the orders to issue the certificates and to make the contract were unwarranted in law and in fact. The complainant, Crockett, made a motion for an order requiring the construction company to strengthen the bond, and prayed that the order directing the receiver to make the contract be rescinded. The court denied these motions, and on April 21, 1896, made an order that the receiver be authorized to issue the certificates; that they should be a lien upon all the property of the railway company; that the receiver should make a contract with the construction company to the effect that they should agree (1) to pay into court on or before June 15, 1897, such sum as should be found due by the master on the claims outstanding against the railway company, (2) to pay all expenses of the receivership, (3) to pay for the right of way of the railway company, and (4) to construct and equip a railroad 104 miles in length on or before January 1, 1897. On April 25, 1896, the Ranney-Alton Mercantile Company made a written contract with the construction company to furnish it groceries, for which the construction company agreed to pay cash within 90 days from delivery, and to give an order on the receiver for receiver's certificates to the amount of the purchases once in 30 days. On the same day the construction company gave to the appellee a bond in the sum of \$30,000 for the faithful performance of this contract. Between April 27, 1896, and August 7, 1896, the mercantile company furnished groceries to the construction company, under this contract, to the amount of \$16,500. The construction company caused some grading to be done, and some materials to be placed upon the right of way of the railway company, but it failed to completely perform any of the stipulations of its contract. It did not pay the outstanding debts of the railway company. It did not pay the expenses of the receivership. It did not complete and equip a rod of railroad, and there is no allegation or proof that the railway company ever became indebted to it in any amount whatever. On March 14, 1898, the mercantile company commenced this suit by filing a bill in equity against the railway company and the construction company, in which it sought to charge the property of the railway company with a lien for the debt due to it from the construction company. Other creditors of the construction company and creditors of Bracey, Lampson & Chapman brought like suits, which were consolidated with that of the mercantile company, and proceeded to decree. The suit of the mercantile company presents the strongest case upon the record for the complainants, and it will be unnecessary to state or consider the facts in any of the others. This suit was heard on an amended complaint and an answer of the railway company which denied all its averments except those which stated the proceedings in the Crockett case. All the allegations of the amended bill that were material to the right of the mercantile company to a lien upon the property of the railway company were that it sold groceries worth \$16,500 to the construction company; that before it made this sale the court had appointed the

receiver of the property of the railway company in the Crockett case, and had authorized him to issue certificates of indebtedness which were to constitute a lien upon the property of the railway company, and to make the contract with the construction company for the construction and equipment of the 104 miles of railroad in the manner already recited; that there was an understanding and agreement at the time these orders were made between the railway company and the construction company that the latter should pledge the certificates to its creditors to procure supplies; that it was agreed and understood between the receiver, the construction company, and the railway company that the construction company should have a lien upon the property of the railway company; that the construction company should pledge its lien to the parties from whom it obtained credit for supplies; that thereby a lien was created in favor of the mercantile company; that the construction company obtained the goods from the mercantile company upon the express representation and agreement that the appellee should have a lien upon the property of the railway company; and that at the time all the orders were made in the Crockett case, and at the time the alleged representations were made to the mercantile company, the railway company was a party to the Crockett case, was aware of the orders, procured them to be made, knew that the construction company was procuring goods on the faith of these orders, that a lien had been created in favor of the mercantile company, and that thereupon the railway company became bound to pay for the goods, and consented and agreed that the mercantile company should have a lien upon its property for their value. There was no averment in the bill that any receiver's certificates were ever issued, assigned to or held by the mercantile company, and no prayer for the enforcement of any lien evidenced by any such certificates. The case went to final hearing upon these pleadings, and on June 2, 1898, the court entered a decree that the mercantile company, and every other creditor of the construction company, and every creditor of the defaulting contractors, Bracey, Lampson & Chapman, who established the indebtedness of either of these contracting firms to him before the master for work or supplies furnished the contractors to enable them to build the railroad, had a lien upon all the property of the railway to the amount of the value of the improvements upon the right of way of the company made by the contractors. After the entry of this decree the case was referred to a master to ascertain the amounts due from the contractors to their respective creditors, and appraisers were appointed by the court to ascertain and report the value of the improvements upon the right of way, and the master and the appraisers in due time made reports, which were confirmed. Thereupon, on October 29, 1898, a decree was rendered that the various creditors of these contractors had liens upon all the property of the railway company for the sum of \$41,335, the appraised value of the improvements plus the cost of making the appraisal, in proportion to the sums which the master had found to be due to these creditors, respectively, which amounted in the aggregate to \$47,923.67.

It is conceded that the orders of the court to issue the receiver's certificates and to make the contract with the construction company provided that the latter company should completely build and equip the railroad, that all the certificates should be delivered to that company, that those certificates should pay in full for the railroad and equipment, and that they should constitute a lien upon all the property of the railway company. The claim of the mercantile company is that the acts of the parties to the receivership proceeding were such that, in addition to the certificates and the lien which they were to evidence, other liens were created to the amount of the debts of the construction company for groceries, supplies, and materials in favor of the parties who furnished the latter. In other words, the claim is that, if the entire \$1,140,000 of certificates had been issued to the construction company, and if the railroad and equipment had thus been fully paid for by the receiver, the property of the railway company would still have been charged with additional liens to secure all the debts of the construction company for supplies, labor, and materials furnished to the contractors. The evidence in this record shows that the value of the improvements made by all the defaulting contractors was about \$40,000, that certificates to the amount of \$35,000 were issued, and that the unpaid obligations of the construction company which have been charged upon the property of the railway company by this decree aggregate more than \$45,000. If the certificates had created a lien, the amount of this lien, added to the liens of the creditors of the defaulting contractors, would have made double the value of the improvements. Under the theory of the counsel for the construction company, if this railroad had been constructed and equipped, it would have been charged with the lien for \$1,140,000 evidenced by receiver's certificates, and perhaps for as much more on account of the debts of the contractors for work, materials, and supplies furnished to them in the construction and equipment. This is the absurd theory of the creditors of the contractors. The burden of proof to establish it was upon them. One who employs a contractor to make an improvement upon his property does not ordinarily give to him the full value of the improvement, and also charge his property with all the debts which the contractor may incur in the performance of his agreement. If such a plan was adopted by the railway company, the receiver, or the court, its adoption was unwise, improvident, and contrary to the usual course of business affairs; and its absurdity and improvidence imposed upon those who alleged it the burden of proving it by clear and convincing evidence. Have they successfully borne this burden? A careful analysis of the bill of the mercantile company discloses the suggestion of four, and only four, possible grounds upon which a lien upon the property of the railway company for the debt of the defaulting contractors could be maintained. These grounds are: (1) That, before the mercantile company sold its groceries, the railway company understood and agreed that the creditors of the contractors should have liens upon its property for the work, supplies, and materials which they furnished to the construction company;

(2) that at this time the railway company understood and agreed that the construction company should have a lien upon its property, and that it should pledge this lien to those who furnished the contractors with work, materials, and supplies; (3) that the railway company represented at this time that the creditors of the contractors should have such liens upon its property; and (4) that the orders of the court and the contract it authorized established liens in favor of the creditors of the contractors, and the railway company procured and acquiesced in these orders and this contract. The mercantile company alleged that it relied upon this acquiescence and upon all these agreements, representations, and acts of the railway company when it sold its goods, and that the railway company was estopped thereby from defeating its lien. The sufficiency in law of the averments of this bill which set forth these various grounds of relief was challenged and argued in the courts below and in this court. But the question becomes immaterial, because the allegations of the facts on which the claims of the mercantile company were based were denied in the answer, and they were not proved by the evidence.

1. There is no evidence in this record that either the railway company or the receiver ever at any time either understood or agreed with this mercantile company, or any other creditor of the contractors, that any of these creditors should have any lien whatever upon its property on account of any work, supplies, or materials furnished to the contractors.

2. It is alleged that the railway company understood and agreed that the construction company should have a lien upon its property, and that they should pledge this lien to their creditors. There are two insuperable obstacles to the maintenance of this theory. In the first place, there is no evidence that the railway company or the receiver understood or agreed that the construction company should have any lien upon its property except that which was to be evidenced by the receiver's certificates, and the mercantile company neither alleged any claim nor prayed for any relief on account of any lien based upon these certificates. In the second place, if there had been such an agreement, the mercantile company could have established no lien until it proved that the construction company had acquired such a lien upon the property of the railway company for an indebtedness which the railway company justly owed it, and that this lien had been pledged to the mercantile company. There was no proof that the railway company ever became justly indebted to the construction company, or that it ever acquired any lien upon the property of the railway company. There was no allegation of this essential fact in the bill, no issue joined upon it, and no trial of any such issue. The mercantile company therefore acquired no lien through the assignment of the lien of the contractors, because it was not shown that those contractors ever had such a lien.

3. It was averred that the railway company represented that the creditors of the contractors should have liens upon its property. There is no evidence that either the railway company or the re-

ceiver ever made any such representation. It does appear that the members of the construction company so stated to the agents of the mercantile company, but the representations and agreements of the construction company did not charge the railway company.

4. Finally, it is claimed that the orders of the court, and the contract which it authorized, established liens in favor of the creditors of the contractors, and that, because the railway company procured and acquiesced in these orders, it is estopped from defeating these liens. The fatal objection to this contention is that the orders and the contract not only establish no such liens, but industriously provide against their existence. The theory of those orders and that contract was that the construction company should not only pay all the claims against the prior defaulting contractors, Bracey, Lampson & Chapman, but that they should deliver to the railway company a railroad completed, equipped, free from all liens, charges, and claims, for the \$11,000 of receiver's certificates per mile of completed and equipped railroad. The fact that it was the intention and purpose of the court, the receiver, and the railway company to prevent the creation of any lien or charge upon the property of the latter company, except the lien of the receiver's certificates, conclusively appears from the absurdity of any other theory which would necessarily compel the railway company to pay more than once for the improvement; from the fundamental provision of the orders and the contract that the construction company should build and equip the railroad, which could not mean less than that it should pay for the construction and equipment; from the provision that the construction company should pay into court the amount that should be found due from the prior defaulting contractors; from the provision that it should pay all the expenses of the receivership, and should pay for the right of way; and from the provision that the construction company should give a bond conditioned for the faithful performance of its contract. The evident purpose and the clear legal effect of these orders and of this contract were to provide for a completed and equipped railroad of 104 miles in length, free of all liens and claims, except those evidenced by the receiver's certificates to be issued thereunder; and every one who dealt with the construction company in the face of these orders and this contract was compelled to do so with complete notice of these facts and of this law. There was neither agreement, representation, suggestion, nor intimation in any of these legal proceedings that any creditor of the contractors would be permitted to acquire a lien upon the property of the railway company. That theory was negated by every provision of the orders and of the contract; and, if the railway company had procured and acquiesced in them, it was not thereby estopped to deny the absurd claim of the creditors of these contractors, because it never admitted, represented, or agreed that any such claim would be valid. The result is that the orders in the Crockett case did not contemplate or establish any liens upon the property of the railway company in favor of the claims of the creditors of the contractors of the receiver for supplies, work, or materials furnished to the latter in the construction of the railroad. Those claims were not se-

cured by any statutory or equitable liens, and the decree below must be reversed.

Counsel for the railway company insist that the court had no jurisdiction of the parties to or the subject-matter of the Crockett case, that the orders made and certificates issued in that case were void, and that the proceedings therein gave notice of their invalidity to all who acted on or dealt in them. We have reached a decision of this case in their favor without determining the questions presented by these contentions, and, as it is unnecessary to consider them here, we do not determine in this case either that these contentions are or that they are not well founded.

It is suggested in the brief of counsel for the appellees that, even if the claims of the creditors of the construction company cannot be sustained, yet the railway company is bound by the order of March 2, 1896, which charged its property with liens in favor of the creditors of Bracey, Lampson & Chapman, for the reason that the railway company joined in an application for that order. The argument is unworthy of serious consideration. The creditors of Bracey, Lampson & Chapman were not entitled to any such liens on the merits of their claims, because they were creditors of the defaulting contractors, to whom the railway company was not proved to be indebted. Conceding that the company applied for the order establishing their liens, it was not estopped from vacating that order, because they expended no money, incurred no liability, and sustained no damage on the faith of it. Their claims had arisen months before the order was made. They had arisen before the receiver was appointed. On April 6, 1896, the railway company moved to vacate this order. The order had been erroneously made, and it was finally vacated by the court which made it in the decree which dismissed the Crockett case in 1898. The result is that the creditors of Bracey, Lampson & Chapman are not entitled to any liens either by virtue of the orders in the Crockett case or on account of the merits of their claims.

A single question remains. On June 2, 1898, the trial court entered a decree to the effect that the creditors of the defaulting contractors had a lien upon all the property of the railway company to the amount of the value of the improvements upon the right of way of the company made by the contractors. That decree did not fix the amount of the lien nor the amounts of the claims of the creditors. After it was entered, the amount of the lien was determined by an appraisal of the improvements upon the right of way, made under an order of the court, and the amounts of the claims of the creditors were determined by a master. On October 29, 1898, a decree was rendered that the creditors of the contractors had liens upon the property of the railway company for the sum of \$41,355, the appraised value of the improvements plus the cost of making the appraisal, and that they held these liens in proportion to the sums which the master had found to be due to them, respectively, which amounted in the aggregate to \$47,923.67. An appeal was taken from the latter decree, but none was taken from the former. Counsel for the appellees seek to escape a reversal of the decrees

of the courts in the Indian Territory on the ground that the decree of June 2, 1898, was the final decree, and that, as no appeal was taken therefrom, the merits of this case were not within the jurisdiction of the United States court of appeals in the Indian Territory, or of this court. But a decree of foreclosure and sale which leaves the amount of the claims of the complainants undetermined and the amount of the liability of the defendants and their property unfixed is not a final decree. *Railroad Co. v. Swasey*, 23 Wall. 405, 410, 23 L. Ed. 136; *Chase v. Driver*, 92 Fed. 780, 784, 34 C. C. A. 668, 672. This was the nature of the decree of June 2, 1898. It was an interlocutory decree, which left both the amounts due to the complainants and the amount of the liability of the property of the railway company entirely undetermined. The decree of October 29, 1898, for the first time fixed the limit of the rights of the complainants and of the liabilities of the defendants, and that was the final decree. The appeal from it presented the merits of the entire controversy, and the validity of all the interlocutory orders and decrees in the suit. The decree of the United States court of appeals in the Indian Territory in this case and the decree of the United States court in the Indian Territory are reversed, and the case is remanded, with directions to dismiss the bill upon the merits.

D'ESTERRE v. CITY OF NEW YORK et al.

(Circuit Court of Appeals, Second Circuit. March 7, 1900.)

1. MUNICIPAL BONDS—VALIDITY—FORMAL DEFECTS.

Provisions of statute authorizing the issuance of negotiable municipal bonds, which relate only to the form of the bonds, and serve no purpose in safeguarding the municipality, are directory only, and a departure therefrom in omitting the date and name of payee, or in failing to state the place of registration in bonds issued thereunder, is not a defect of substance, which renders them invalid.

2. SAME—MISRECITAL OF STATUTE.

The fact that municipal bonds erroneously recite the statute under which they were issued is immaterial, and does not affect their validity, where it is not claimed that any condition precedent to their issuance, required by the statute under which they were in fact issued, was omitted.

3. SAME—STATUTE GOVERNING.

Where a special act authorizing the issuance of municipal bonds contains provisions prescribing the form and conditions of such bonds, it supersedes the general statutory provisions on that subject, and is alone to be looked to in determining the formal sufficiency of bonds issued thereunder.

4. SAME—DEFENSES—BONA FIDE PURCHASER.

Where a town issued negotiable bonds in conformity to the requirements of the statute which authorized their issuance, in all substantial respects, and delivered them to a purchaser, by whom they were negotiated for value to a third person, who took them in good faith, the municipality cannot avoid liability thereon on the ground that its officers, without authority, sold them on credit, and the town never received payment therefor.¹

¹ Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.

5. SAME—GREATER NEW YORK CHARTER—BONDS OF CONSTITUENT MUNICIPALITIES.

The town of Gravesend issued bonds, which, in the hands of purchasers, became valid obligations against it. Subsequently the town was annexed to the city of Brooklyn, the act (Laws N. Y. 1894, c. 449) providing that the city should not be liable for any debt of the town, and its property should not be taxed for the payment of such debt, but that the property of the town should remain liable therefor, and the city authorities should levy thereon the taxes necessary to pay the same. By the Greater New York charter the town became a part of the city of New York. Such charter deprived all of the constituent municipalities of the power to levy taxes, and provided that all the valid debts of such municipalities should be a common debt of the new city, and that any taxation to pay the same should extend equally to all property throughout the city. *Held*, that although the town of Gravesend had previously ceased to be a distinct municipality, and was not enumerated as one of those consolidated, such provisions of the charter must be construed to include its valid debts, and the bonds issued by it became a part of the common debt of the city, and could be enforced by an action against it.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

Under chapter 118 of the Laws of 1892, amended by chapter 171 of the Laws of 1893, certain bonds of the town of Gravesend were claimed to have been issued, amounting to \$148,000, to Coffin & Stanton, a firm of bankers or bond dealers, \$24,000 of which were pledged to the complainant by Coffin & Stanton as security for a loan.

The validity of these bonds being disputed, the complainant brought this action in equity, substantially to determine the validity of the bonds.

John Whalen, Corp. Counsel (George L. Sterling, of counsel), for appellants.

Henry B. B. Stapler, for appellee.

Frederick P. Delafield, *amicus curiæ*.

Before WALLACE, SHIPMAN, and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal by the defendants from a decree for the complainant in a suit in equity establishing the validity of certain bonds created by the former town of Gravesend, directing the registration of the bonds by the defendant the comptroller of the city of New York, and adjudging that the city of New York pay the accrued interest upon the bonds in accordance with their terms.

March 10, 1892, the legislature of the state of New York passed an act (chapter 118, Laws 1892) entitled "An act in relation to local improvements in the town of Gravesend, in the county of Kings," and March 22, 1893, passed an act amendatory thereof, and repealing all parts of the earlier act inconsistent therewith (chapter 171, Laws 1893). By these acts it was provided that the cost of all local improvements in the town of Gravesend should be paid in the first instance by the sale of bonds of the said town; and the supervisor of the town was empowered to borrow on its faith and credit the necessary amount, and in its name to execute and issue bonds therefor. The act of 1893 authorized such bonds to be exchanged for similar bonds theretofore issued, or to be sold to the highest bidder, and the proceeds used for the construction and carrying on of such

improvements. In January, 1894, in order to provide for the payment of outstanding bonds of the town then about to mature, the supervisor of the town, assuming to do so under the authority of these acts, issued 148 bonds, of the denomination of \$1,000 each, advertised for bids, sold them to the highest bidder, and delivered them to the purchasers, a banking firm. The bankers, instead of paying cash for the bonds, were allowed by the supervisor to retain the purchase money, \$148,000, and credit the town on their books with the amount, upon the understanding that they were to pay \$30,000 on the 1st day of the next month, and the balance from time to time as required by the town for the payment of its outstanding bonds. February 2, 1893, the bankers pledged the bonds to the complainant as security for a loan from him of \$23,000. The loan had been originally made by the complainant upon other security, but at the date in question these securities were surrendered, and the bonds in question substituted in their places. The bankers failed before paying to the town the purchase price of the bonds.

By an act of the legislature of May 3, 1894 (chapter 449, Laws 1894), the town of Gravesend was annexed to the city of Brooklyn. This act provided that the city of Brooklyn should not be liable to pay any debt, liability, or obligation of the town previously contracted or incurred, and that its property should not be taxed to pay any such liabilities. But it also provided that the property of the town should remain liable therefor, and that the moneys to meet the same should be raised by taxation upon the property of the town; the taxes to be collected and enforced after the act should take effect in the same manner and by the same officers as the taxes of the other wards of the city.

Default having been made in paying the interest upon the bonds, this action was brought. It was originally brought against the city of Brooklyn and its comptroller, but before it was heard the legislature of the state of New York passed the act known as the "Greater New York Charter," annexing to and consolidating with the city of New York the various municipal corporations described therein, including the city of Brooklyn. Chapter 378, Laws 1897. By section 8 of that act all the laws theretofore passed creating any municipal debt of the corporations united and consolidated, or for the payment thereof or respecting the same, remain in full force and effect, except that the same shall be carried out by the corporation of the city of New York. The act also provides (section 1614) that pending actions relating to any of the municipal and public corporations consolidated may be continued without change of name or title, or on motion such change may be made. By an order of the court entered pending the hearing the city of New York and its comptroller were substituted as defendants. The right of the complainant to resort to a court of equity under the circumstances of the case rests upon the authority of *Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699, and has not been challenged by the appellants.

The first question which we are called upon to consider is whether the bonds in suit were, in the hands of the complainant, valid obligations against the town of Gravesend. It is conceded that the super-

visor was duly authorized by the acts mentioned to pledge the credit of the town and issue its bonds for the amount of \$148,000, but it is insisted that in exercising this power some of the statutory requirements in respect to the form of the bonds were not complied with. Under the act of 1893 the bonds to be created may be either coupon or registered bonds, or coupon bonds registered as to principal only. They are to be signed by the supervisor and countersigned by the treasurer of the town, and, if they are registered, bonds are to be made payable to the persons to whom they are issued, the place of registration is to be fixed in the bonds by the officers signing the same, and a certificate showing the registration is to be indorsed thereon. When sold by the payees the bonds may be registered in the names of the new purchasers. The bonds in suit purport to be registered bonds. They are signed and countersigned as the act requires, but they do not contain the name of the payee. They are not dated, and do not on their face contain any designation of the place of registration. They are made payable in blank, and have an indorsement upon the back, "This bond is registered in town treasurer's office, Gravesend." It is objected that these departures from the prescribed form invalidate the bonds.

It was obviously the intention of the statute that the bonds to be created should be negotiable. As it authorized the creation of coupon bonds at the discretion of the supervisor, which were not to be registered even as to the principal sum, it is manifest that the provisions in respect to registration, in respect to the name of the payee, and in respect to all matters merely of form and phraseology, were not designed as limitations of his authority, or to protect the town against his abuse of his functions. They were formalities which could not subserve any essential purpose, except to assure purchasers that they were buying bonds which were literally perfect. If purchasers were willing to accept registered bonds which were not, as to particulars devised for their interests or convenience, in strict conformity with these provisions, the town could not be harmed. The provisions should therefore be considered as directory, and not mandatory, and, in the absence of any language in the act importing that noncompliance would invalidate the bonds, any departure in respect to them should not be deemed a defect of substance. "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requirements of the statute, in order that no such burden may be carelessly imposed, yet such statutes are not of a criminal character, and the proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality." *Town of Andes v. Ely*, 158 U. S. 321, 15 Sup. Ct. 957, 39 L. Ed. 1001. In *Supervisors v. Galbraith*, 99 U. S. 214, 25 L. Ed. 410, the statute under which the municipal bonds were issued provided that they should be "made payable to the president and directors of the company and their successors and assignees," but in lieu of complying with that provision the bonds were made payable to bearer. The court said:

"The statutory requirement in this particular is only directory. The defect is one of form, and not of substance. The irregularity was committed by the servants of the county, and the county is estopped to take advantage of it."

In *Bernards Tp. v. Stebbins*, 109 U. S. 341, 3 Sup. Ct. 252, 27 L. Ed. 956, the statute under which the municipal bonds were issued provided that they should be executed by the commissioners "under their hands and seals, respectively," and they were executed without seals. In affirming that part of the decree of the court below adjudging the bonds "to be held and deemed to be valid and effectual in law as if they had been in fact sealed by the commissioners before being issued," the supreme court quoted the language used in *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812, as follows:

"It is apparent from the law that the substantial thing authorized to be done in behalf of the town was to pledge the credit of the town in aid of the railroad company in the construction of its road, by subscribing to its capital stock, and issuing the obligations of the town in payment thereof. The technical form of the obligations was a matter of form, rather than substance. The issue of bonds under seal, as distinguished from bonds or obligations without a seal, was merely a directory requirement."

In *Town of Solon v. Williamsburg Sav. Bank*, 114 N. Y. 122, 21 N. E. 168, the statute under which municipal bonds were issued provided that the bonds to be made and executed by commissioners should be attested by their individual seals. The court held that this provision had not been complied with, but ruled that noncompliance did not invalidate the bonds. The court said:

"There are no negative words in the statute declaring or necessarily implying such effect of the omission of the seal; and whether or not the requirement was merely directory, as held in *Draper v. Springport*, 104 U. S. 501, 26 L. Ed. 812, inasmuch as they were issued and delivered by the commissioners in the performance of their duty, and upon a consideration, the mistake or failure to affix these seals does not defeat the enforceable validity of the bonds."

In *Bank of Statesville v. Town of Statesville*, 84 N. C. 169, where a statute authorizing the issue of town bonds subject to a vote of the qualified electors provided that they should be signed by the town magistrate, treasurer, and commissioners, it was held that the provisions were directory only, and that bonds issued after a legal vote, but signed by the magistrate and treasurer only, were valid. In *First Nat. Bank of North Bennington v. Town of Arlington*, 16 Blatchf. 57, Fed. Cas. No. 4,806, the statute under which town bonds were created required them to be registered in the clerk's office of the town. The court, in deciding that the omission of the officers of the town to cause the bonds to be registered did not impair their validity, said:

"The requirement of registration seems to be directory merely, and want of compliance was not by the terms of the act, and cannot justly be held, to affect the validity of the bonds themselves."

The objection that the bonds erroneously recited the statute under which they purported to be issued is as untenable as the others which have been considered. If there had been no recital whatever, the validity of the bonds would not have been affected by the omission. A recital is valuable as affording the basis of an estoppel

when it is alleged by the municipality that conditions precedent to the exercise of the power of creating bonds, prescribed by statute, have not been complied with, but otherwise it is of no significance. The erroneous recital was innocuous. *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Board v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966.

The fact that the bonds were not dated and did not contain the name of any payee is of no importance. Neither a date nor a named payee is essential to the validity of negotiable instruments. The date will be computed from the day of delivery, and may be inserted by a bona fide holder, and any such holder is at liberty to insert the name of a payee. 2 Am. & Eng. Enc. Law, p. 320.

The provisions of the General Statutes of the state respecting the form and registration of municipal bonds have no application to the case, because the bonds in suit, having been created under a special act prescribing the formalities to be observed in this respect, are not within the operation of the General Statutes. The special act supplies the exclusive rule by which to determine whether or not the formalities had been complied with. *State v. Stoll*, 17 Wall. 436, 21 L. Ed. 650; *Townsend v. Little*, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012; *In re Murray Hill Bank*, 153 N. Y. 210, 47 N. E. 298.

If the bonds in suit had been sold for cash, we have no doubt that they would have been valid obligations against the town in the hands of the bankers who purchased them from the supervisor. Undoubtedly the statute contemplated such a sale, and the bankers, who were parties to a transaction which contravened the statute, did not acquire a valid title to the bonds; but if they had subsequently paid for the bonds, and the town had received the money, it is unquestionable that the town could not have successfully defeated their title. The complainant, however, acquired the bonds without notice and for value; and, as a bona fide purchaser, his right to recover upon the obligations is precisely as it would be if the bonds had been those of an ordinary corporation, instead of a municipal corporation. If the power exists in the municipality to issue negotiable bonds, the bona fide holder is protected against irregularities on the part of its agents in negotiating them with the public. The complainant, as well as the original purchasers, was bound to know that the supervisor had no authority to sell the bonds on credit; but he was not bound to know that the supervisor had made such a sale, and, when he found that they had been negotiated with the public and delivered, he was entitled to assume, in the absence of notice to the contrary, that the supervisor had negotiated them regularly and legitimately. *Mercer Co. v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Grand Chute v. Winegar*, 15 Wall. 355, 21 L. Ed. 170; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156. The case falls directly within the recent judgment of this court in *Town of Greenburg v. International Trust Co.*, 36 C. C. A. 471, 94 Fed. 755, and the language used in that case is apposite. We there said:

"The bonds in suit were issued and negotiated conformably in all respects to the provisions of the act but one. They were negotiated at par, but not for cash, and under an agreement with the purchaser that, as to a portion of the price, payment might be deferred, and collateral securities substituted meanwhile. Assuming this to have been a departure from the statutory requirement, as the plaintiff was a bona fide holder of the bonds, without notice of the deviation by the agents of the town from the terms of their authority, the fact did not afford any defense to his action."

It remains to be considered whether the bonds were enforceable against the city of New York. Although by the provisions of the act annexing the town of Gravesend to the city of Brooklyn the latter was not to be liable for the previous debts of the town, and the property of the city not acquired by the annexation was exempt from taxation for the payment of such indebtedness, the power and the duty were devolved upon the city by the act to raise the moneys necessary to pay such indebtedness by taxation of the property annexed. This duty it was bound to fulfill, as otherwise the creditors of the town would be remediless. It cannot be doubted that the creditors of the town could, before the enactment of the Greater New York charter, have compelled the authorities of the city of Brooklyn, by mandamus, to assess and collect the necessary tax. Were it not so, the provision exempting the city of Brooklyn from liability for the debts of the town would have been void, because unconstitutional. Where the resource for the payment of the debts of a municipal corporation is the power of taxation existing when the debt was created, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the debt, is forbidden by the constitution of the United States, and is null and void. *Port of Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. 398, 29 L. Ed. 620; *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. Ed. 395; *Ralls Co. Ct. v. U. S.*, 105 U. S. 733, 26 L. Ed. 1220. The power thus devolved upon the city of Brooklyn has been destroyed by the provisions of the Greater New York charter. The remedy by a mandamus has been destroyed, because there is no longer any corporate body or officials to execute the mandate, and section 7 of the charter enacts that no municipal corporation whose territory is thereby annexed to the city of New York shall "levy any tax or assessment upon property within the city of New York as herein constituted." Section 5 of the charter enacts that all the valid debts of the municipal corporations, towns, incorporated villages, and school districts therein united and consolidated, as well as the debts of the city of New York, shall be common debt of the city of New York as thereby constituted, and that, so far as resort to taxation is authorized or necessary to pay such debts, such taxation shall extend equally throughout the territory of the corporation herein constituted; "it being the intent hereof that the obligations and liabilities of the city of New York, as the successor of the municipal and public corporations consolidated in it, shall be the same as and not otherwise or greater than the respective obligations and liabilities of the several constituent corporations; and that the city of

New York shall succeed in all their rights as well as to their obligations and liabilities in respect thereof."

The town of Gravesend was not enumerated as one of the consolidated municipalities, and, as it had become extinct as a municipality, it may be that the literal terms of the section referred to do not describe it. We cannot suppose, however, that it was the legislative intention that the Greater New York charter should impair the obligations of the contract between the town of Gravesend and its creditors, by destroying the remedy for enforcing the contract, or should withhold from the city of New York the power to tax the property of that town for the payment of its debts, while granting to it the power to tax such property for the payment of the debts of all the consolidated municipalities. Yet such would be the effect of the legislation unless section 5 is construed to mean that the valid debts contracted by any town, whether one having a corporate existence at the time of the enactment, or one which had lost its corporate existence by a merger with one of the constituent municipalities, are to be regarded as a part of the common debt of the city of New York. While the phraseology, read literally, may not include the debts of an extinguished municipality whose property has passed to another municipality, and from the latter to the city of New York, a more liberal reading, and one which we think accords with the legislative intention, would include them.

In *Mt. Pleasant v. Beckwith*, before referred to, a municipal corporation had been dissolved, and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred, and the persons residing therein. The court also held that the creditors of the extinguished corporation were entitled to resort to a court of equity, and affirmed a decree adjudging the three corporations liable accordingly.

Upon the conclusions we have reached, the city of New York would be liable in an action at law; but as the defense of an adequate remedy at law has not been raised by the answer, and no assignment of error has challenged the jurisdiction of the court below, we do not deem it necessary to decide that the complainants' bill should not have been entertained.

The decree is affirmed, with interest and costs.

MOOTRY v. GRAYSON.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 593.

1. EQUITY—POWER OF COURT TO MODIFY DECREE—MANNER OF ENFORCEMENT.

While a court of equity is without power to modify a final decree after the term at which it is entered, in so far as it determines the rights of the parties, it retains jurisdiction to make further orders directing the manner of its execution, and to that extent it may modify the provisions of the original decree, as by changing the time or terms of a sale of property necessary to carry a decree of partition into effect.

2. DECREE—JURISDICTION—COLLATERAL ATTACK.

Where no lack of jurisdiction over the subject-matter or the parties appears upon the face of a decree modifying the terms of a former decree as to the conditions of a sale of property to be made thereunder, objections to the jurisdiction of the court to make such modification cannot be raised or considered in a separate suit, by way of collateral attack.

3. SAME—ESTOPPEL TO QUESTION REGULARITY.

Where the plaintiff, in a suit for partition, at a subsequent term obtained a modification of the decree as to the time and manner of sale of the property, neither he nor his successors in interest can question the regularity of the proceedings resulting in such modification.

4. JUDICIAL SALE—IMPEACHMENT—INADEQUACY OF PRICE.

In a suit for partition of mining property, a decree was entered directing the sale of the property, and fixing an upset price of \$200,000. The mine had in former years been a large producer, and was still being worked and paying dividends. No sale having been made, the decree was subsequently modified by reducing the limit to \$75,000, and still later by removing it entirely, and the property was finally sold for \$4,500, and the sale confirmed without objection. At this time the working of the mine had been abandoned as unprofitable, and it was filled with water. It also appeared that all the levels which had been opened had been worked out, and the future value of the property was entirely speculative. *Held* that, under such circumstances, the higher values previously placed on the property by the court were insufficient to show that the price realized was so inadequate as to render the sale invalid, and subject to collateral impeachment for that reason, in the absence of any other evidence showing fraud.

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

The appellee brought suit in equity in the court below on June 2, 1897, to quiet the title to certain mining property commonly known as the "Gold Hill Mines," situated in Boise county, Idaho. The appellant answered the bill of complaint, and filed a cross bill, praying that a decree in a partition suit entered in the district court of the Second judicial district in the state of Idaho, on the 16th day of November, 1895, and the sale of the property pursuant to such decree to the grantor of the appellee, on the 26th day of June, 1896, be declared wholly void and of no effect. The circuit court heard the case upon the merits, and dismissed the action. It appears that on the 22d day of December, 1887, D. E. Coughanour, William A. Coughanour, and Thomas Mootry, Jr., were tenants in common of the property the title of which is in controversy in this action. Thomas Mootry then brought an action in the district court of the Second judicial district, in the county of Boise, in what was at that time the territory of Idaho. The object of the action was a partition of the property, and such proceedings were thereupon had that on the 5th day of May, 1890, a decree was entered in the district court providing for a sale of the property by a referee for a sum not less than \$200,000. The decree also provided that a deed should be

executed and delivered to the purchaser, and, after the payment of costs and expenses, the proceeds should be distributed to the several owners. The limitation of \$200,000 on the selling price of the property was qualified by a provision of the decree that it should not be sold for a less sum without the consent of all the parties to the action, and that, if a sale should not be made before the return of the order of sale, the direction and limitation of the decree should apply to any sale made under any subsequent order of sale issued in the action, unless waived by all the parties, or modified by the court upon notice to all the parties to the action. The territory of Idaho was admitted into the Union as a state on July 3, 1890. By the act of congress of that date and the constitution of the state, all cases pending in the territorial courts at the time of the admission of Idaho into the Union as a state were transferred to the corresponding state courts, to be there proceeded with in due course of law. At the time the state courts succeeded to the jurisdiction of the territorial courts no sale had been made of the property mentioned in the decree just referred to, and nothing further appears to have been done in the matter until August 14, 1894, when Thomas Mootry began a new action in partition in the Third judicial district of the state of Idaho for the county of Boise against his partners, D. E. and W. A. Coughanour. To the complaint in this action the defendants answered, and set up the decree of May 5, 1890, as a judgment in bar to the action. Thereupon the plaintiff filed an amended complaint praying for a partition of the property and for a modification of the decree of May 5, 1890. On July 19, 1895, a decree was entered upon stipulation, and by agreement of counsel in open court, and by consent of the parties to the action, providing that the property should be sold at not less than \$75,000 instead of \$200,000, as provided in the original decree, and providing, also, for the appointment of a new receiver or commissioner to make the sale and carry the judgment or decree into effect. On November 16, 1895, the court, on motion of the plaintiff, modified the order of July 19, 1895, so as to provide that the commissioner and receiver should proceed to sell the property as provided by law without any limitations as to price, it appearing that the property could not be sold for the price named in the order of July 19, 1895. By this decree the sale was fixed for January 11, 1896. On December 1, 1895, the plaintiff, Thomas Mootry, died, leaving his sisters Mary Mootry and Margaret Mootry sole heirs, and on the 17th day of June, 1896, Margaret Mootry died intestate, leaving Mary Mootry her heir at law. On December 27, 1895, the court made an order modifying the decree of November 16, 1895, by changing the date of sale to February 20, 1896, and providing for the publication of the notice of sale. On January 8, 1896, in accordance with the stipulation of the parties, the sale was ordered postponed to June 20, 1896. The stipulation provided, further, for the sale of certain property belonging to the Gold Hill mine, and the application of the proceeds to the payment of the debts of the Gold Hill Mining Company. On June 16, 1896, R. R. Grayson, the appellee herein, telegraphed from San Francisco to the judge of the court in which the suit was pending, as follows: "Has sale of Golden Mine been postponed? If not, I will have an agent on 20th to make bid. Answer immediately, giving full particulars." The answer to this telegram does not appear in the record, but on the following day Grayson sent a second dispatch, as follows: "Your message received too late to leave to-day. I will leave to-morrow for Idaho. Postpone sale, if possible, until June 24th. Answer immediately." On June 18, 1896, the court, on motion of counsel for defendants, made an order reciting that "it appearing to the satisfaction of the court, from two telegrams offered in support of said motion, that it is to the best interests of the parties to this action that said sale be postponed, ordered that the sale heretofore ordered to be made by the receiver in this action on the 20th instant be, and the same is hereby, continued and postponed until the 24th instant, at one o'clock p. m." A notice of the change of the date of sale was ordered published in the Idaho World. In accordance with the terms of the decree as modified and the notice of sale, the receiver offered the property for sale at the time mentioned. The highest bid of the appellee was \$10,000. D. E. Coughanour, one of the defendants in the suit, bid \$15,000, whereupon

the property was declared sold to the latter. The decree for sale, and the receiver's notice of the sale, required that the property should be sold "to the highest and best bidder for cash, lawful money of the United States." The purchaser was not able to pay cash. He testifies that he told the judge that he wanted 48 hours in which to go down to Boise and get the money and pay for it, and that Hawley, his attorney, gave him 15 minutes in which to raise the money. Judge Richards, who was the presiding judge of the district court in which the action was pending, testifies: "The court took a recess pending the time the sale was being made, and when the property was knocked down I walked back into the court room. Mr. Coughanour immediately came in, and stated that he must have thirty days' time in which to make the payment on his bid. I told him I could not consider any application made in that way; that the receiver was ordered to sell the property to the highest bidder for cash. I stated, further, that I had no doubt that, if he would make such a payment as would show his good faith, a proper order could be made for an extension of time on the balance. He said he did not have a dollar. I informed him then that I could do nothing further than to require the receiver to comply with the order, and sell the property, but before anything was done I would send for his counsel, Mr. Hawley, so he could advise Mr. Coughanour as to what his rights were. This ended my conversation with Mr. Coughanour. * * * I sent the sheriff for Mr. Hawley, who was his counsel of record. In a few minutes he came in, and I explained the matter to him as I have previously stated in my conversation with Mr. Coughanour, and informed him that unless he had some good reason to show why the order of sale should not be complied with I would direct the receiver to obey that order at once. Mr. Hawley said that he thought the court was perfectly right, and he had nothing to ask, and thereupon I directed the receiver to comply with the order of sale." The receiver, in his report of the sale to the court, referring to this transaction, says: "Upon demanding the money for the sale, Mr. Coughanour said that he did not have the money, but would try to raise it in a few days." No further action appears to have been taken by Coughanour to complete the purchase of the property, and accordingly, on the same day, and shortly after this attempted sale, the property was again offered for sale, and sold for the sum of \$4,500 to A. H. Boomer, who was the only bidder. On the same day the receiver conveyed the property to Boomer, and on the next day Boomer conveyed the property to Grayson, the appellee. The purchase price of the property was paid to the receiver by R. R. Grayson, the appellee, who thereafter, on the 30th day of December, 1896, made application to the United States government for a United States patent for the several mining claims included in said property, and on July 10, 1897, patents were issued to him accordingly. For the purpose of quieting the title thus acquired by the appellee, the present action was commenced.

Andros & Frank, for appellant.

W. E. Borah, John Garber, and Joseph B. Garber, for appellee.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is contended on behalf of the appellant that the circuit court erred in finding that the district court of the Third judicial district of Idaho had jurisdiction to make and enter the decree and order of sale of November 16, 1895. This contention is based upon the claim that the decree of the district court of May 5, 1890, was a final decree, and before it had been modified in any way the term of the court had expired. It does not appear necessary to determine whether

this decree as a whole was final or interlocutory. It may have been final in determining the right of the plaintiff to have a partition of the property. It may have been final, also, in adjudicating upon the question as to the respective shares of the co-tenants in the property, but it was not final as to the execution of the decree. The interlocutory character of this part of the decree is fully established by its terms. It provides that certain property shall be reserved from sale, and the remainder sold as one lot or parcel, for a sum of not less than \$200,000; but it also expressly provides for a modification of the direction and limitation of the decree upon the order of sale by waiver of such conditions by the parties to the action, or by order of court upon notice to all the parties. The order of the court of July 19, 1895, appointing a receiver and modifying the decree of May 5, 1890, so as to provide for the sale of the property for a sum not less than \$75,000 instead of \$200,000, was made in open court upon stipulation and by agreement of counsel and by consent of the parties to the action. The decree for sale entered by the court on November 16, 1895, modifying the previous decree so as to provide for the sale of the property without any limitation as to price, was made upon the motion of the plaintiff, and the decree recites that the defendants appeared by their counsel; that the parties to the suit may become purchasers at the sale; that certain surface ground be reserved to one of the defendants; and that, all parties consenting thereto, the property and premises described shall be sold together as one lot or parcel.

From these recitals it sufficiently appears that the modifications of the original decree were made by the court upon notice to all the parties to the action, and by a reasonable inference it further appears that the direction and limitation of the original decree with respect to the order of sale were waived by the parties, and the orders of July 19, 1895, and November 16, 1895, entered by consent. But, as the consent of the parties to the action cannot give the court jurisdiction of a case that is otherwise without its jurisdiction, the recitals in the modifying orders or decrees in this behalf are only material with respect to the question of jurisdiction, as showing that the modifying orders were made and entered in conformity with, and in execution of, the original decree.

In *Turner v. Railway Co.*, 8 Biss. 380, 24 Fed. Cas. 367 (No. 14,259), original decrees were entered in a foreclosure suit in the circuit court of the United States for the Southern district of Illinois, and in the circuit court of the district of Indiana, directing the master in chancery in each of the courts to sell the main line of the Indianapolis, Bloomington & Western Railway Company, extending from Indianapolis, in the state of Indiana, to Pekin, on the Illinois river, in the state of Illinois. In May, 1878, these decrees were amended by the circuit court, and the sale of the road made in October, 1878. Among the exceptions taken to the proceedings leading up to the sale of the property was the objection that the court had no authority to amend its decree after the term of the court had expired in which the original decree was entered. The circuit judge disposed of this objection in the following language:

"The facts were that the original decree was entered on the 18th of July, 1877, and the amendment was made in May, 1878. I admit the rule which denies the power of the court over a decree after the term when it was rendered. It cannot change or alter the essential parts of the decree. But what was the order made by the court in May, 1878? It is termed a further direction for the execution of the decree theretofore entered. The original decree provided that the property should be sold on a certain number of days' publication. That was changed by the amendment. The original decree provided for the distribution of the funds arising from the sale in a particular manner. That was changed by the amendment of May, 1878. But these things did not affect the substance of the decree. Of the right of the court to make that order, I cannot doubt."

An appeal from the final order confirming the sale in this case was taken to the supreme court of the United States, where the order of sale, under the directions of the amended decree, was affirmed. Mr. Justice Harlan, in rendering the decision of the court, refers to the questions that may be considered upon such an appeal. He says:

"Appellants elected not to appeal from the final decree, although it necessarily involved every question affecting the jurisdiction of the circuit court. That decree is consequently not before us for any purpose, except to ascertain from an inspection thereof whether the sale was conducted in conformity with its provisions. In such cases, upon an appeal, not from the final decree, but only from one in execution thereof, the court will not examine the record prior to such decree, * * * but will assume that the final decree being passed by a court of general jurisdiction, and not showing upon its face a want of jurisdiction as to subject-matter or parties, was within the power of the court to render. Whether the order confirming the sale would have been erroneous had the decree itself disclosed affirmatively a want of jurisdiction is a question which need not be decided."

The learned judge then refers to the assignments of error, and, among others, to the objection that the circuit court had amended its decree after the expiration of the term in which it was entered. With respect to this and certain other objections, he says:

"We do not stop to consider whether these objections find any support in the record, since it is sufficient to say that, if any such errors exist, they necessarily inhere, some in the final decree of foreclosure and sale, and others in the orders which preceded it. They cannot be examined upon an appeal merely from the order confirming the report of sale. Our authority extends, as we have shown, no further than to an examination of the exceptions filed by appellants to the report of sale, from the order confirming which this appeal is taken. And some of these exceptions plainly have reference, not to the sale itself, but to the final decree of foreclosure, such, for instance, as that the terms of sale were too onerous; that the property was sold subject to various claims, the amount of which was wholly uncertain; and that the court had no jurisdiction in the case." *Turner v. Trust Co.*, 106 U. S. 552, 556, 557, 1 Sup. Ct. 523, 27 L. Ed. 275.

While this decision does not directly determine the question of the jurisdiction of the circuit court to proceed at a subsequent term of the court to modify an original decree by way of an amendment providing further directions for its execution, nevertheless such a jurisdiction is necessarily implied when the court, under the circumstances, declares that a final decree passed by a court of general jurisdiction, and not showing upon its face a want of jurisdiction as to the subject-matter or parties, will be presumed to be within the power of the court to render. In the present case no lack of jurisdiction as to the subject-matter or with respect to the parties to the

action appears upon the face of the original or modified decree. It would therefore be assumed, upon an appeal from an order confirming a sale of property, that the court had the authority to make the decree; and, by analogy, this rule would obtain where the question of jurisdiction is raised by collateral attack. If the supreme court would not, upon an appeal from an order confirming the sale of property, consider an objection touching the jurisdiction of the court to modify an order of sale, but would assume that such jurisdiction existed when the contrary does not appear in the subject-matter of the suit or the citizenship of the parties, it is clear that in another suit such an objection cannot be sustained nor urged in a collateral attack upon the decree of sale.

The case of *Farmers' Loan Co. v. Oregon Pac. R. Co.*, 28 Or. 44, 40 Pac. 1089, was also an appeal from an order confirming a sale of railway franchises and property in proceedings for the foreclosure of a mortgage. A decree entered in the case for the sale of the property on April 27, 1891, was set aside, and a resale ordered. Subsequently, and from time to time, a number of sales were ordered, with modified conditions, and these orders were in turn set aside, until finally, on October 24, 1894, the last order of sale was set aside, and a resale ordered, under terms involving substantial departures from the original decree of April 27, 1891. It was objected, among other things, that the court had no power to change, modify, or vary the original decree after the expiration of the term at which it was rendered. The supreme court held, in affirming the decree of the lower court, that a court, having acquired jurisdiction to enter a final decree, possesses the inherent right to subsequently modify both the time and manner of its enforcement. In further support of this rule, see *Monkhouse v. Corporation of Bedford*, 17 Ves. 380; *Edwards v. Cunliffe*, 1 Madd. 287; *Dawes v. Thomas*, 4 Gill, 333; *Spann v. Spann*, 2 Hill, Eq. 152; *Baird v. Shepherd*, 2 Ohio, 261; *Malone v. Marriott*, 64 Ala. 486; *Cochran v. Miller*, 74 Ala. 50; *Bound v. Railroad Co.* (C. C.) 55 Fed. 186. These cases establish the doctrine that although the court has no power to amend, modify, or alter the principles of a final decree, after the expiration of the term at which it was rendered, it nevertheless retains the inherent right to modify by a subsequent order the time of its enforcement, or the manner in which it shall be enforced. 5 Enc. Pl. & Prac. 1057.

As this was all that was accomplished or intended to be accomplished by the decree of sale of November 16, 1895, it must be held that the decree was within the jurisdiction of the court. The fact that this decree repeated the provisions of the decree of May 5, 1890, determining the right of the plaintiff to have a partition of the property and the shares of the co-tenants therein, did not in any way change the character of the later decree. The decree for sale recites that it is made upon the motion of the plaintiff for a modification of the order and decree previously made. The modification consists in the order of sale, and extends to no other matter. The repetition of other parts of the previous decree must therefore be treated as mere recitals, introducing matter from the former decree upon which the order of sale is based.

The further objection that the modified decree was secured by proceedings in a separate action appears to be without substantial merit. The original decree provided for its modification upon notice to all the parties. The new action in the same court was such a notice, and, while the usual notice in the original action would probably have been sufficient, it does not follow that it was the only notice that would bind the parties to the proceedings. But a conclusive answer to this objection is found in the fact that the plaintiff in the second action, as well as in the first, was Thomas Mootry. He was the moving party in the partition proceedings. He it was who brought his co-tenants into court to answer the second as well as the first cause of action; and it was upon his motion that the decrees of July 19, 1895, and November 16, 1895, were entered. The appellant, who has succeeded to his interests in the property, is therefore not in a position to urge an objection to the method adopted by her predecessor in interest in securing a modification of the decree of May 5, 1890.

It is next contended that the court below should have set aside the sale of the property because of the gross inadequacy of the price for which it was sold, together with circumstances attending the sale which rendered it inequitable for the court to allow the transaction to succeed. In support of the claim that the property was sold for an inadequate price, appellant refers to certain items contained in a statement prepared by, or at the instance of, W. A. Coughanour, and sent to the appellee, Grayson, in March, 1896. The items referred to are that the Gold Hill lode alone produced bullion valued at nearly \$1,125,000, and paid dividends amounting to nearly \$300,000. But appellant omits to mention that this yield was between the years 1869 and 1884. Appellant also states that the Pioneer mine during a period of eight months produced \$48,000. This statement appears to refer to a period between December 26, 1888, and August 3, 1889, when 5,620 tons of ore were extracted from the 250-foot level of the Pioneer mine, yielding \$48,483, or an average of \$8.63 per ton. From the statement of Coughanour, it appears that the last dividend paid from the working of the Pioneer mine was in April, 1892. From 1892 to September, 1895, the mine was worked, but no dividends paid, and the mine was closed in September, 1895. From the testimony of W. A. Coughanour, it appears that both the Gold Hill and Pioneer mines were worked out down to the 400-foot level. He says:

"I was superintendent of the mill and mine nearly fifteen years, and am thoroughly familiar with every foot of the workings of the Gold Hill mine, from the surface to the lowest level, and that every body of ore known to myself, that we considered would pay, was worked out in that 400-foot level, or lowest level. Was not so familiar with the workings of the Pioneer mine, but from frequent visits to the mine, and going through it, from what I could learn from observation and the information I could learn from our foreman, Mr. Frame, and others, there was no other ore bodies in that mine to the 400 or lowest level that would justify working at a profit. Q. What would be necessary in order to determine whether or not there were any ore bodies there of value, yet? A. It would be necessary to procure pumps,—additional pumps,—hoisting cables, hoisting engines, and other material for drying the mine, and sinking another level of at least 200 feet, and the running of from 200 to 300 feet of hard rock tunnel, to ascertain if any ore bodies of

profit existed at that depth, and to meet this it would require an outlay of at least \$30,000. I mean by this that that would be the smallest outlay in labor and the necessary machinery to get to that depth. Q. Was there at the time of the sale any means by which you could determine whether or not there were any ore bodies in those mines of any value, other than the means which you have intimated or suggested in your former answer? A. None known to me. Q. What would you say with reference to placing a value upon that mine at the time of the sale, with reference to any degree of certainty as to the correctness of the value which you would place on it? A. There could be no estimate placed upon the mine with any degree of certainty. Q. Then, as I understand, the value of the mine would be speculative, and dependent upon what future developments would show? A. Entirely, as to the real value."

The fact that the property was productive prior to 1892 does not establish its real value in 1895, after the mine had closed down, because it had then ceased to be productive. The testimony of the superintendent of the mine was that in 1895 the productive veins of the mine had been worked out down to the 400-foot level. There were no ore reserves left in the mine, and, while there may have been some speculative value in the possible discovery of ore bodies at lower depths, this uncertain speculative value was not sufficient to justify a court in setting aside a sale for inadequacy of price.

The appellant further directs attention to the fact that the upset price in the decree of May 5, 1890, was \$200,000. This high limit is explained by the fact that the mine was then a dividend paying property; that is to say, a dividend had recently been paid from or taken from the Pioneer mine. At that time a limit of \$200,000 on the selling price of the property was perhaps justified. The upset price of \$75,000 in the amended decree of July 19, 1895, is also explained by the fact that the mine was at that time still in operation, and, although not paying dividends, some ore was being taken out. But when the mine was sold on June 24, 1896, the mine was closed down and filled with water, and it was estimated that an expenditure of \$10,000 would be required to pump it out. It is evident that, under the circumstances, the limit of price fixed by the decrees of May 5, 1890, and July 19, 1895, furnish no measure of value for the day of sale. But the fact that there was no sale of the property shows that it was overvalued, even under the then existing favorable conditions. The appellant refers to the fact that in the amended complaint the appellee, as complainant, alleges that the value of the mining claims and premises was upwards of \$10,000. The allegation appears to have been made for the purpose of showing that the amount in dispute exceeded \$2,000, exclusive of interest and costs, the amount required to give the court jurisdiction. The original complaint had been defective in this respect, in alleging that the value of the property was upwards of \$1,000. But the amended complaint was filed in July, 1897, or more than a year after the sale, and, whatever may have been the purpose of the allegation, it is evident that it had no reference to the question of value in June, 1896.

The attention of the court is also called to the fact that the appellee declared prior to the sale that he thought that he could buy the property at the sale for \$10,000, and it appears that at the first offer of the property by the receiver on the day of sale the appellee

did in fact bid \$10,000, and that D. E. Coughanour at that time bid \$15,000; that upon the second offer of the property by the receiver one Boomer, acting for the appellee, bought it for \$4,500. The appellee testifies very distinctly that his bid for the mine was a "gamble." The mine had been closed down for some time, and was full of water, and whether the property had any value at all was a matter of speculation. He had, however, secured \$10,000, and was willing to risk that amount in the purchase of the mine, upon the possibility of finding ore deposits below the 400-foot level. This was a speculative opinion, which may have been sufficient to influence a young man who had capital at his command, but it is hardly sufficient to fix the value of the property for judicial purposes. The bid of D. E. Coughanour does not appear to have any greater significance. He was one of the owners of the mine. He had an interest of nearly one-half, or more than that of either of his two partners. He had been an owner since 1867. He and his partners had been seeking a purchaser since 1890, and from November 16, 1895, to June 24, 1896, the property was for sale without any limit as to the price. The sale was postponed a number of times to secure a purchaser. Finally the appellee appeared on the ground, and when the property was offered for sale by the receiver he bid \$5,000. D. E. Coughanour was his only competitive bidder, and after one or two intermediate bids the latter bid \$15,000, and the property was struck off to him. But he was not in a position to pay for the property in cash, although, as one of the parties to the partition proceedings, he must have known that this was a condition of the sale, and he should have been prepared to make his bid good by a cash payment. If the property had been worth the amount of his bid, is there any reasonable doubt but that he would have been ready to comply with the terms of the sale? There can be but one answer to this question. He was the principal owner of the property. He knew its value. He was willing to bid against a prospective purchaser to secure the best price possible, but he was not willing to become a purchaser himself. His testimony that the Gold Hill mine alone was worth \$500,000 on the day of sale discloses his remarkable attitude towards the property. According to this valuation, his own interest in that mine was worth \$220,000, and he would have the court believe that he sacrificed his interest on the day of sale because he was not able to make good his own bid of \$15,000 for the whole property. Manifestly, testimony of this character cannot be relied upon for the purpose of ascertaining the value of the property. Two witnesses testifying on behalf of the appellant valued the machinery and improvements at \$30,000, but the receiver and W. A. Coughanour testified that the machinery was in poor condition, and some parts of it entirely worn out. The fact that the value of a large part of the machinery and improvements was dependent upon the value of the ore in the mine indicates that the value of this property was also uncertain. This testimony certainly does not establish a value for the property which enables the court to say that it was sold for a price so inadequate as to shock the conscience and amount to proof of fraud. But the appellant relies upon alleged irregularity in the proceedings for partition lead-

ing up to the decree for sale, and also irregularity in the proceedings at the sale, as contributing to the claim that fairness of the whole transaction has been impeached, and justifies the interposition of a court of equity. The modifications of the decree are again referred to by the appellant as circumstances connected with the sale, to be considered in this connection, but we find nothing in that aspect of the proceedings requiring further comment, nor do we find anything in the proceedings at the sale to justify the court in determining that the conduct of the appellee was fraudulent, or resulted in the taking of an unfair advantage of the appellant's interests. When D. E. Coughanour failed to make good his bid of \$15,000 for the property, the matter was immediately taken before the court which was in session for the very purpose of carrying the sale to a completion. Coughanour being unable to furnish evidence of his good faith as a purchaser, the court directed that the property should again be offered for sale by the receiver, which was done, when Boomer bid \$4,500, and his bid was accepted. This was a judicial sale, and all these proceedings were taken within an hour, and afterwards confirmed by the court without objection or protest.

This view of the facts of the case renders it unnecessary to discuss the question as to how far the proceedings in partition, and the sale made in pursuance thereof, are open to collateral attack in this action. The decree confirming the sale was rendered by a competent tribunal, having jurisdiction of the parties and the subject-matter, and, upon the facts presented in this record, that decree is binding upon the parties to this action. The decree of the circuit court is reversed, with instructions to dismiss the appellant's cross bill, and enter a decree in favor of the appellee, quieting his title to the property described in the bill of complaint.

WESTINGHOUSE AIR-BRAKE CO. v. CHRISTENSEN ENGINEERING CO.

(Circuit Court of Appeals, Second Circuit. October 24, 1900.)

APPEALABLE ORDERS—REFUSING PRELIMINARY INJUNCTION.

Since the passage of Act June 6, 1900, amending section 7 of Act March 3, 1891, creating the circuit courts of appeals, and by implication repealing the prior amendment of February 18, 1895, there is no statute authorizing an appeal from an order refusing a preliminary injunction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Before LACOMBE and SHIPMAN, Circuit Judges.

PER CURIAM. This is a motion to dismiss an appeal from an order denying a preliminary injunction (103 Fed. 491), which order was entered July 17, 1900, on the ground that the court has no jurisdiction to entertain such an appeal. By section 7 of the act of March 3, 1891, establishing circuit courts of appeals, there was no provision authorizing the taking of an appeal from an order refusing a pre-

liminary injunction. This section was amended, however, by chapter 96 of the Statutes at Large of 1895, approved February 18, 1895, so as to read as follows:

"That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree, granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: and provided further, that the court below may, in its discretion, require as a condition of the appeal, an additional injunction bond."

This section stood as thus amended until June 6, 1900, when, by chapter 803 of the Statutes of 1900, approved June 6, 1900, it was again amended, as follows:

"Sec. 7. That where, upon a hearing in equity, in a district court or in a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver to the circuit court of appeals: provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: provided further, that the court below may in its discretion require as a condition of the appeal, an additional bond."

It will be noted that after this second amendment the section remained with no provision authorizing an appeal from an order refusing or dissolving an injunction. The act of 1900 repealed the act of 1895, and the court no longer has jurisdiction to entertain such an appeal. The motion is granted.

POSTAL TEL. CABLE CO. OF IDAHO v. OREGON SHORT LINE R. CO.

(Circuit Court, D. Idaho, S. D. June 19, 1900.)

No. 58.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—PLEADING.

Under Rev. St. Idaho, § 5216, which provides that in proceedings for condemnation of right of way the complaint must show the location, general route, and termini, and must be accompanied with maps thereof, a complaint by a telegraph company seeking to condemn the right to build its line upon the right of way of a railroad company is sufficiently specific where it describes the railroad right of way in general terms, giving the termini and the counties through which it runs. A more particular description, giving the legal subdivisions of the lands crossed, would be of no benefit in such a case, and will not be required.

2. SAME—RIGHT TO MAINTAIN PROCEEDINGS—LOCAL TELEGRAPH COMPANY.

The fact that a corporation duly organized under the laws of the state to construct and maintain a telegraph line is subordinate or auxiliary to a corporation of another state does not affect its right to maintain proceedings to condemn a right of way for its line under the statutes of Idaho.

3. SAME—TELEGRAPH COMPANIES—USE OF RAILROAD RIGHT OF WAY.

Under Rev. St. Idaho, §§ 5210, 5212, a telegraph company may maintain proceedings to condemn the right to construct and maintain its line upon the right of way of a railroad company, where such use of the property will better subserve the public interests than the use made of it by the railroad company, and especially where the latter acquired most of its right of way by gift from the United States, subject to Rev. St. §§ 5263, 3964, which authorize telegraph companies to construct their lines along all post roads, and make all railroads post roads.

4. SAME—MEASURE OF COMPENSATION.

The compensation which a telegraph company is required to pay for the right to construct and maintain its line upon the right of way of a railroad company is the amount of decrease in the value of the use of such right of way for railroad purposes which will result.

Proceeding by a telegraph company to condemn a right of way for its line over and along the right of way of defendant railroad company.

J. R. McIntosh and O. W. Powers, for plaintiff.

P. L. Williams and F. S. Dietrich, for defendant.

BEATTY, District Judge. By this action the plaintiff seeks the right to erect its telegraph line along the railroad and upon the right of way of defendant. The result contemplated would give two telegraph lines, instead of one, with such possible competition as would give to all the choice of service, and possibly a better service at lower rates. That which leads to such results is not contrary to public policy. So far as concerns the public, the attainment of plaintiff's object would not be contrary to its interests, but would be promotive thereof. The question, however, is whether the law will justify the application by plaintiff to its use of defendant's property.

It is objected that the complaint does not so describe the land or premises which plaintiff asks to have appropriated to its use that it can be definitely described in a judgment. It asks for the right of way upon the railroad right of way between certain named termini, through certain named counties in the state, and describes the amount of ground needed for each pole, the distance of the poles from each other, and their distance from the railroad track. Section 5216, Rev. St. Idaho, says, "If a right of way be sought the complaint must show the location, general route and termini, and must be accompanied with maps thereof." When the object is the condemnation of a right of way through a farm or a legal subdivision, it probably should be described by such subdivision; but this is for a right of way on an established railroad right of way, the locus of which is accurately fixed by survey, of which there are accessible records. It would not seem that there can be any difficulty in so framing a judgment with such description of the land taken that all parties may know where it is. The allegations of the com-

plaint seem to meet the statutory requirements and leave the objection untenable.

The next objection is that plaintiff is not a corporation, and is not organized in good faith. No one will doubt that the organization of plaintiff was for the purpose of co-operation with the Postal Telegraph & Cable Company of New York. It may be said that it is subordinate to the latter, and is to assist it in carrying out its objects,—it may be, nothing more than its agent. This may be said of it more from general circumstances than from the testimony in the case. This, however, is a common procedure with all large corporations. A recent instance is in mind. A railroad company now operating in North Idaho, desiring to add a branch of about five miles, organized an independent company to build the same; and I think this defendant, in building the branch railroad from Nampa to Boise, did the same. It seems no unusual matter for a large corporation to utilize small corporations for its purposes. If the plaintiff, however, is organized for any fraudulent purpose, the court will not lend its aid in the consummation of any fraud; but this I am unable to find against the plaintiff from the evidence. The facts are that it appears by the record to have been organized according to the statutes. It has held corporate meetings and performed corporate acts. It has not built any telegraph line within the territory for which it was organized, but it is for the privilege of doing that in the place it deems most available and best for its use that is now in this forum. Until it is clearly shown that its organization is based upon fraud, or that it is for some fraudulent purpose, the court must regard it as organized and acting in good faith, and accede to it accordingly all the statutory rights allowed it. Moreover, section 2636, Rev. St. Idaho, precludes in this action any examination into its "due incorporation * * * or its right to exercise corporate powers."

Upon the question of the right asked by plaintiff we have section 5210, Rev. St. Idaho, extending to telegraph companies the right of eminent domain. Section 5212 provides that property already dedicated to a public use may be taken, provided it is "for a more necessary public use than that to which it has already been appropriated." So far, then, as the Idaho statutes can grant the right, they give to this plaintiff the right it asks, provided the use to which it proposes to devote what it acquires is more necessary or would better subserve the public interest than the use to which the property is now devoted. It cannot for a moment be doubted that the use to which plaintiff proposes to put that portion of defendant's right of way would be of greater public utility than that for which it is now used. Practically, it is not now used for any purpose. It is simply so much idle property, and the new use promises to be one of public utility. Section 5263, Rev. St. U. S., enacted July 24, 1866, authorizes any telegraph company to construct any telegraph lines over the public lands and along military and post roads, while section 3964, enacted June 8, 1872, makes all railroads post roads. The defendant procured practically all its right of way from the government and built its road subject to the pro-

visions of these statutes. It seems to me that they cut off discussion, and determined the question involved in favor of the plaintiff. Moreover, numerous courts have granted this right to telegraph companies against railroads, and in some cases where the railroad had purchased from citizens, or had condemned the right of way, while here the defendant procured its right of way from the government as a gift. It was, however, granted, not so much as a favor to defendant, but for the benefit of the public; and, bearing this fact in mind, the right of way should still be used for the public good, when it can be without detriment, or even without material detriment, to the defendant in the general use to which it is devoted. I hold that the plaintiff is entitled to the right of way asked, upon the payment of such damages as defendant will suffer.

As to the rule of assessing damages, the adjudications differ; but that fixed by the United States supreme court must be followed, which seems, by *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 38 L. Ed. 819, to be the amount of decrease in the value of the use of the railroad right of way for railroad purposes caused by the use of plaintiff of such right of way for its telegraph poles and lines. The question, then, is, to what extent will the use plaintiff desires to make of this railroad right of way interfere with the use which defendant, up to this time, has made of it? At first view it would appear that the mere placing of poles in the ground along the right of way, as plaintiff proposes, cannot interfere at all with the operation of the railroad, or be any detriment to its use of its property. The railroad officers have, however, testified that it would largely damage the defendant, while, on the contrary, plaintiff's witnesses have testified that it would be a benefit instead of a detriment to defendant. So far as observed, the courts have generally found in such cases but nominal damages. My views are that the damage cannot be great, but it is something. The poles and lines are some incumbrance on the right of way, and do not leave its use to defendant as free as it would be without them. With the telegraph line there, the defendant must exercise more care concerning it than it would were it not there. The supposed benefit that it may be to defendant cannot be considered, but only the detriment, incumbrances, the damage, which I fix at the sum of \$500. While courts have generally allowed in some cases but nominal damages, it must be remembered that for a part of the right of way defendant paid a cash value, and all of it had to be cleared and protected. Should this allowance exceed the actual damages suffered, it at least does not equal the value to plaintiff to have a clear, undisputed right of way for this distance, without negotiation or costs with citizens for a right of way. It is not intimated that the value to plaintiff must be considered, but only that it does not suffer by the payment of these damages beyond the benefits received. The statutes of the state and United States above referred to seem so clearly to give the plaintiff the relief it asks, and which is hereby given, that it is considered unnecessary to enter into any lengthy discussion or citation of the numerous authorities bearing upon the question. To do so would seem an unnecessary effort. If, how-

ever, I am mistaken in supposing this a plain question, I leave the fuller discussion of it to more learned reviewing courts.

It may be added that all the propositions made by plaintiff in its complaint as to the manner of construction, operation, and maintaining its lines are in the nature of a contract, by which it is bound, and with which it must comply, and which may be recited in the judgment. Also, I think its line of poles should be put so far from the railroad track that they would not, in falling, reach within five feet of the track. This however, will not be included in the judgment until further ordered, and after the further suggestion of counsel upon the subject, for this is a matter which was not made an issue in the discussion. Either party will have 30 days from notice of this holding within which to take such steps as desired.

WEBSTER v. BOWERS.

(Circuit Court, D. New Hampshire. October 16, 1900.)

No. 458.

CORPORATIONS—STOCKHOLDER'S LIABILITY—ENFORCEMENT UNDER KANSAS STATUTES.

Laws Kan. 1898, c. 10, which provides for the enforcement of the constitutional liability of stockholders in a corporation by a receiver for the benefit of the corporation and all the creditors alike, does not supersede the provisions of the prior statute, which gave a creditor the right to enforce the liability of any particular stockholder for his own individual benefit, as to contracts made while such statute was in force, since the right thereby given became a part of the contract, which would be materially impaired by the substitution of the restricted remedy given by the subsequent act.

At Law. On demurrer to declaration.

Streeter, Walker & Hollis, for plaintiff.

John M. Mitchell, for defendant.

ALDRICH, District Judge. This is a Kansas statute stockholders' liability case, and the questions on demurrer are whether the remedy provided by the older statute, and existing at the date of the contract, whereby a single creditor may have his action against any stockholder for the amount of his judgment, is superseded by the remedy provided by the corporation act, which took effect January 11, 1899 (Laws Kan. 1898, c. 10), and which contemplates the appointment of a receiver, who shall collect and dispose of assets, and enforce the stockholder liability for the benefit of the corporation and all the creditors alike; and whether the remedy under the later statute becomes the only remedy.

The specific remedy provided by the statute of 1868 for the enforcement of the constitutional liability of the stockholder to the creditor was a part of the contract. A subsequent statute, withdrawing such remedy, and substituting one of a different nature, and one designed to enforce the stockholder liability for the benefit of the corporation and of all the creditors, would, in operation, impair the obliga-

tions of the pre-existing contract and the substantive rights of the plaintiff. The fact that the remedy provided by the later statute is, on general principles, more in harmony with the justice of a situation like the one in question, does not justify the impairment of the plaintiff's contract with the stockholder. To change a remedy, or to invent or provide new procedure for the enforcement of an individual right, without impairment thereof and within a limited time, is one thing, and to this extent the authorities hold that we may go; but to change the remedy, and provide for an enforcement of the right for the benefit of others, is quite another and different thing; and to that extent we may not go. The later statute wisely provides for the appointment of a receiver to enforce all liability and wind up insolvent corporations for the benefit of all the creditors, and may well apply to subsequent contracts made in reliance thereon, but, notwithstanding its just and comprehensive provisions in this respect, it must be held as not operating upon pre-existing contracts. To hold the plaintiff to the later remedy, to the exclusion of the one existing at the time of his contract, would at once impair his rights, and in the event that the view of some authorities should prevail, that a receiver cannot maintain an action extraterritorially for the enforcement of such rights, though appointed under a statute for that purpose, would destroy them altogether. Demurrer overruled, and the defendant has 30 days to answer further.

NYE v. WESTERN UNION TEL. CO.

(Circuit Court, D. Minnesota, Fourth Division. November 9, 1900.)

1. LIBEL.—TELEGRAPH MESSAGE.—LIABILITY FOR TRANSMISSION.

Where a message presented to the receiving clerk of a telegraph company for transmission is in language such that a person of ordinary intelligence, knowing nothing of the parties or circumstances, would not necessarily conclude that its purpose was defamation, it is his duty to send it, and for the performance of such duty the company incurs no liability.

2. SAME.

Defendant received in New York for transmission to plaintiff, in Minneapolis, a message signed by the sender, and stating that a person named had stated in the presence of the sender that plaintiff had been "bought up" by another person named, in a political campaign. Defendant's clerk who received and forwarded the message had no knowledge of any of the parties, or the matters referred to. *Held*, that there was nothing in the language of the message from which the clerk could reasonably have inferred that its purpose was to defame the plaintiff, to whom it was addressed, or to warrant a recovery against the defendant because of its transmission.

On Motion for New Trial.

Fred. H. Boardman and M. H. Boutelle, for plaintiff.
C. M. Ferguson, for defendant.

LOCHREN, District Judge. The petition of the defendant for an order setting aside the verdict and judgment in this action and granting a new trial was duly brought on for hearing on August

31, 1900, in the March, 1900, term of this court, and both parties appeared by their respective counsel. The action is to recover damages alleged to have been sustained by the plaintiff by the publication incident to the transmission over defendant's telegraph from New York to Minneapolis on the night of July 27, 1899, of two telegrams, below quoted, and the delivery of each to the person to whom it was addressed on the following morning, at Minneapolis, by defendant's messengers.

The first count in the complaint is based on the following telegram to M. H. Boutelle, an attorney at law of Minneapolis, having some business association with the plaintiff, who is also a practicing attorney of the same place:

"New York, 27th July, '99.

"Mr. Boutelle, New York Life Building: Judge Vanderburgh told me distinctly that your Mr. Nye was bought off by Pillsbury in 1896.

"9:44 p. m.

W. H. Vanderburgh."

The second count is based upon the following other telegram so delivered to the plaintiff:

"New York, 27th July, '99.

"Frank Nye: Judge Vanderburgh, who was elected district judge, Minneapolis, 1859, 1866, 1873, 1880, elected supreme judge 1881, 1886, stated distinctly in my presence that Charlie Pillsbury bought you up in 1896, otherwise you would have been for Bryan.

"9:11 p. m.

W. H. Vanderburgh."

The complaint sufficiently alleged the meaning and purpose of the telegrams to be to charge the plaintiff with having been bribed to sell his vote and political influence for a money consideration in the year 1896, and as being corrupt and dishonest. Upon the trial it was admitted that the defendant's servants in New York who received and transmitted these telegrams knew nothing of the plaintiff, nor of any facts or circumstances connected with the subject-matter of the telegrams; and it appeared that the telegrams were presented for transmission at different times the same evening, and at different stations of the defendant in the city of New York, by William H. Vanderburgh, and were transmitted in the customary manner.

On the trial the jury were instructed that there was nothing upon the face of the Boutelle telegram to advise the servants of defendant who received and transmitted it that it was defamatory, as the statement that Nye was bought off by Pillsbury in 1896 might well be understood to refer to a purchase of some claim or interest of Nye respecting property or property rights, and that plaintiff could not recover upon said first count. But the court refused to charge the jury, as requested by defendant:

"That there is not sufficient evidence in this case to establish a cause of action against the defendant with respect to the telegram addressed to the plaintiff, set forth in the complaint as the second cause of action, and with respect to such cause of action your verdict must be for the defendant."

The defendant duly excepted to this refusal to charge, and also to that portion of the charge which in effect left the jury to determine whether, upon the face of the message, it appeared that its only pur-

pose was to defame and slander the plaintiff, so that the receiving clerk, if a person of ordinary intelligence, would so understand it, in which case, only, the defendant would be liable in damages for its publication to its own employes who might read it in the transmission, but that if the terms of the dispatch were such that the receiving clerk might properly regard it as an answer to an inquiry by plaintiff, or as a communication for any purpose other than defamation, the defendant would not be responsible. The jury returned a verdict for the plaintiff on this cause of action for the sum of \$500, which establishes the fact that the imputation upon plaintiff mentioned in the message is false and defamatory. The sole question to be considered is whether the court erred in refusing to charge the jury in the language of the above-quoted request, and in submitting, as it did, the consideration of said second cause of action to the jury.

The electric telegraph is so useful and constantly employed in the conduct of human affairs that its lines of wires cover all civilized lands, cross the great oceans, and reach every city, and nearly every hamlet. The law, recognizing the need that every one may have for its services, imposes upon it the duties of common carrier, and by statutes in New York, Minnesota, and most of the states, requires telegraph companies, under penalties, to transmit promptly, and in the order of their reception, all messages presented for transmission, upon payment of reasonable charges. While none of these statutes makes any exception as to the character of the messages which may be offered for transmission, and while it is certain that no telegraph company can assume to act as censor as to the language of messages, or the purpose they are intended to accomplish, yet, as a common carrier of persons, though bound to carry every one who pays the fare, may exclude from his vehicle a person having a loathsome contagious disease, so, equally, it would be the right and duty of a telegraph company to refuse to transmit a message which upon its face is obscene, profane, or clearly libelous, and manifestly intended only for the purpose of defamation. That a message may contain matter which, if false, is libelous, and still be proper to be transmitted, cannot admit of doubt,—as where the object is to secure the arrest of a person charged with crime, or to give information to one having an interest in the matter, or anything of a privileged character. In any such case the telegraph company could not refuse to send the message, and would not be responsible if a message which, for aught that appeared on its face, might be privileged, were in fact sent with a defamatory or mischievous intent. In *Peterson v. Telegraph Co.*, 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302, the court says:

“When a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant cannot be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such a case the operator cannot wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly, and forward the message without delay, if it is a proper one, and for any honest error of judgment in the premises the telegraph company cannot be held responsible. But where

the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is forwarded under such circumstances as to warrant the jury in finding that the operator in sending the message was negligent or wanting in good faith in the premises, the company may be held to have maliciously published the libel. A publication under such circumstances is not privileged."

The receiving clerk scans a message rapidly to see that it is legible, and, from its direction and number of words, to determine the charge of sending. Having no duty of censorship, or right to catechise the sender, if he acts in good faith, and the language of the message is such that a person of ordinary intelligence, knowing nothing of the parties or circumstances, would not necessarily conclude that defamation was the object and purpose of the message, it would be his duty to send it, and for his performance of that duty the telegraph company would incur no responsibility. This telegram had the sender's signature. It was directed to the very person spoken of, and who might have an object in ascertaining exactly what Judge Vanderburgh had said concerning him, and might have sought that information from the sender. If the receiving clerk gave a thought to the purport of the message, he would be much more likely to infer this than that it was intended to defame the very person to whom it was sent, and who by simply casting it into the fire could effectually prevent its publication, save the technical publication to the small number of employes, bound to secrecy, who may have seen it in the transmission, and, knowing nothing of the parties or of the matter, would be unlikely to give it a thought. A purpose on the part of the sender of a message like the one under consideration to thereby defame and injure the very person to whom it was sent would be too improbable to be apparent and manifest to the receiver of the message for transmission, whatever may have been the actual purpose of the sender. Any rule imposing a stricter responsibility upon telegraph companies in respect to the character of messages transmitted than is above indicated would be productive of such embarrassment and delays, and make necessary such annoying inquiries, as to greatly diminish the efficiency of the service, and subject telegraph companies on the one hand to danger of prosecutions and suits for refusal to transmit messages or to transmit them promptly, and on the other to vexatious actions for fancied injuries, and even to conspiracies between senders and addressees to mulct these supposedly wealthy corporations. The experience of the half century since telegraphs have come into general use discloses no reason for requiring of telegraph companies more than such ordinary care and good faith as can be exercised in view of the necessity for prompt action, admitting of neither inquiry nor delay. On more careful consideration than could be given to the subject in the hurry of the trial, I am satisfied that there is nothing in the language of this message likely to cause the receiving clerk to infer that the purpose was to defame the plaintiff, to whom the message was sent. He might as fairly infer that it was sent either in answer to an inquiry, or for the friendly purpose of informing the plaintiff of injurious statements made concerning him by another.

It was error, therefore, to refuse the above-quoted instruction to the jury, who should have been directed to return their verdict for the defendant. Ordered, that the judgment and verdict in this case be vacated and set aside, and a new trial granted.

STATE TRUST CO. OF NEW YORK v. CITY OF DULUTH.

(Circuit Court, D. Minnesota, Fifth Division. November 8, 1900.)

No. 333.

1. MUNICIPAL CORPORATIONS—CONTRACTS—CONSTRUCTION BY PARTIES.

By a contract between a water company and a city, the company was required to sluice the gutters in the city without charge. The city subsequently constructed on some streets what were termed "sanitary sewers," which to some extent, at least, served the purpose of gutters; and the company, on its request, flushed such sewers without charge for a period of nine years, and until a change in its management. *Held*, that such action constituted a practical construction of the contract by the parties as including such sewers under the term "gutters," and precluded any recovery by the company for flushing the same.

2. SAME—REQUISITES OF CONTRACT TO BIND CITY.

A water company cannot recover against a city on a claim for flushing sewers, amounting to a considerable sum, in the absence of some contract entered into on behalf of the city, by somebody authorized to bind it, to pay for such service.

On Motion by Defendant for Judgment after Plaintiff had Rested Its Case.

Washburn, Lewis & Bailey, for plaintiff.

J. B. Richards, for defendant.

LOCHREN, District Judge (orally). I am inclined to think that the plaintiff cannot recover. The ordinance constitutes a contract between the parties, and requires that the water company shall sluice the gutters without charge. The purpose is to cleanse the gutters, and gather and discharge therefrom whatever offensive matter may be deposited on the streets, or come through drains from the adjoining houses, stores, and establishments, which would make the gutters, unless washed out and cleansed, dangerous to the public health and offensive to sight and smell. It is not simply the rainfall running in the gutters in a rainstorm that makes them dangerous to health, but it is what they gather from buildings and human industries. A sewer does the same work, and performs a more extended service, by carrying off matter, also, which would be too offensive to be allowed to pass into open gutters; and sewers, also, must be cleansed, for the safety of the public health. They may be called covered gutters. Though they are in the earth, they serve a like purpose, and I think they are ordinarily so constructed that they act in connection with the gutters; the latter being discharged into the sewers through catch-basins at street crossings. I do not know how it is done in this city, but that is the way it is done in Minneapolis, with ordinary

sewers. I do not exactly know what these sanitary sewers are, but they serve for carrying off offensive matter, and it is necessary that they should be cleansed. They serve the purpose of gutters, by carrying off the matter which would be carried off by the gutters if the sewers were not there, and also a large amount of other offensive matter. So I think it would not be too great a stretch of construction to hold that they come under the terms of the word "gutter," for the purposes for which, under the ordinance, the company contracts to cleanse the gutters. But the evidence shows, further, that such was the construction acted upon by the parties for a considerable time, and it seems to me that the company is foreclosed by such construction. The evidence is that the construction of the sewers commenced in 1886, though they were not, aside from Superior street, perhaps, constructed to a very large extent immediately; but from 1890 to 1891 they were constructed in other places, and this service of flushing them was performed without any claim for compensation being made until 1896. In 1894 the company began to keep an account or record of the amount of water that was used, or at least of the hydrants which were opened, and the length of time that they severally remained open. That would not indicate, I think, that the company regarded itself as being entitled to compensation for that service, for the reason that there might be very many other considerations which would move the company to keep account or to have some knowledge of the amount of water which was running through its works, or the amount that was used in that manner. So it does not appear that this was a matter which even the company regarded as giving it title to compensation, until the change of management in 1896. After that the bills were presented. I think that up to that time it may be fairly considered both parties acted upon the supposition that the flooding of the sewers was included in the obligation to do the same thing to the gutters. This was so for a considerable length of time, commencing perhaps with a small beginning, but running through nine years of time; and it seems to me that where the construction of the terms of the contract is one which might be reasonably assumed by either party, and was acted upon by both parties for such a length of time, it may be regarded as the construction which was acted upon by both parties at the time that the service was performed, without any anticipation of payment for it.

Again, I think there is considerable force in the other position taken by counsel for defendant,—that, if this is something which is beyond the terms of the contract contained in the ordinance, then there is not any evidence showing any contract by which the city would be bound to pay for the flooding of these sewers, which is a considerable and not a trifling matter, and that, if the city is to be bound, there must be some contract shown on the part of the city. The city would not be bound simply by the order of some employé about a municipal office. As important a matter as this would require consideration by a body authorized to obligate the city. But there does not appear to have been any action taken by the city council, or any contract entered into on the part of the

city. It was simply a calling upon the waterworks for the flushing of these sewers, as they might have been called upon to flush the gutters. I do not think there is any chance of recovery in this case. Judgment is ordered for the defendant.

AMERICAN SURETY CO. OF NEW YORK v. BALLMAN et al.

(Circuit Court, E. D. Missouri, E. D. November 8, 1900.)

No. 4,272.

INDEMNITY—DISCHARGE OF INDEMNITORS—RIGHT TO DEFEND ACTION AGAINST INDEMNITEE.

A notice to an indemnitor to appear and defend an action on which his liability depends gives him the right to use all means of defense which would be open to him had he been made a party, including the right to prosecute an appeal or writ of error; and where indemnitors served with such notice employed counsel and contested the case, and after an adverse judgment sued out a writ of error and prepared the case for hearing in the appellate court, the action of the defendant in paying the judgment on the day set for such hearing, without the knowledge or consent of the indemnitors, not only rendered it ineffective as an adjudication against them, but, under the circumstances, which showed bad faith on the part of the defendant, operated to discharge them from liability on their undertaking.

Action at Law on Bond of Indemnity.

Eben Richards and Thomas W. Bullitt, for plaintiff.
Clinton Rowell and J. S. Laurie, for defendants.

ADAMS, District Judge. On August 5, 1895, a firm known as Tromanhauser Bros. entered into a contract with the Burlington Elevator Company to construct its elevator. Pursuant to the requirements of that contract, the American Surety Company, the plaintiff in this action, executed and delivered its bond in the penal sum of \$50,000 to the elevator company, to secure the faithful performance of that contract. On or about the same day the defendants, Henry W. Ballman and Joseph Durfee, executed and delivered their bond to the American Surety Company to indemnify it against loss and damage by reason of its bond to the elevator company. Subsequently, on September 18, 1896, an action was brought in this court by the elevator company against the surety company to recover damages alleged to have been sustained by it by reason of a failure on the part of Tromanhauser Bros. to faithfully perform the obligations of their contract. Upon the institution of that action the American Surety Company, defendant therein, notified the defendants in this case thereof, and called upon them, as its indemnitors, to appear and defend the same. They did appear, and, by and with the consent and co-operation and in the name of the surety company, made a vigorous defense. That litigation resulted on January 16, 1899, in a judgment against the surety company for the sum of \$45,969.41. Pursuant to the expressed desire of the indemnitors, a writ of error was sued out from the court of appeals for this circuit, and a transcript was in due

course lodged in the clerk's office of that court. The indemnitors prepared to present the case to the circuit court of appeals on that transcript, and the case was ultimately set down for a hearing in that court for a day certain. On that day, without the knowledge or consent of the indemnitors, the surety company paid the judgment in full, with interest and costs.

In addition to the rights which the notice and consequent participation in the litigation gave to the indemnitors, as a matter of law, it cannot be denied, in my opinion, that the surety company, as a matter of fact, at the outset gave the indemnitors to understand and believe that they might rely upon such action by the surety company as would secure to them a full opportunity to make all defenses in the trial court, and in case of defeat to have the case reviewed by the court of appeals. The case, from the outset, throughout its entire progress to judgment, was proceeded with on this understanding. Divers exceptions were saved, and great care manifested to so conduct the proceedings and make the record that every adverse ruling might be reviewed by the appellate court. Counsel for the indemnitors were permitted to and did sign all pleadings for the defendant surety company, in conjunction with counsel for that company; and I think the evidence in this case shows that counsel for the indemnitors took the leading and controlling part in the long and tedious trial which followed in this court, and also in the preparation of the bill of exceptions, in suing out a writ of error, and in preparing for the trial in the court of appeals. All this was done by them at the expense of the indemnitors, and with the distinct understanding that the surety company should be under no obligation to them therefor.

The question for determination in this case is whether the payment of the judgment by the surety company, plaintiff herein, and the dismissal of its appeal, under the circumstances detailed, discharge the indemnitors, the defendants herein, from the obligations of their indemnifying bond. In reaching a solution of this question, it is important to have clearly in mind the rights conferred by operation of law upon the indemnitors by the notice to appear and defend the action. The object and purpose of this notice undoubtedly were to make any judgment which might be rendered in that case conclusive of the liability of the indemnitors under their bond. It is well settled that to accomplish that purpose the indemnitors must not only have the notice, but must be afforded a full opportunity to defend the action. A brief review of the cases on this proposition may not be amiss:

In *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 569, 40 L. Ed. 719, it is said:

"As a deduction from the recognized right to recover over, it is settled that, where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be given him to defend the action."

When such notice is given, the supreme court of Massachusetts, in *City of Boston v. Worthington*, 10 Gray, 496, says, the indemnitor is "no longer regarded as a stranger, because he has the right to ap-

pear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record."

In *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 666, 39 N. E. 360, the rule is stated as follows:

"It is sufficient that the surety against whom ultimate liability is claimed is fully and fairly informed of the claim, and that the action is pending, with full opportunity to defend or to participate in the defense."

These last two statements of the rights of indemnitors are quoted with approval by the supreme court of the United States in its case last cited.

In *Eaton v. Lyman*, 26 Wis. 61, the court, in considering a case where the defendant was sued to contest his title to land, and where he brought in his grantor to bind him by the judgment, says that "it should appear not only that the grantor was notified of the suit, and requested to defend it, but that he was allowed to do so, to the uttermost extent of the law, if he desired to. Otherwise," as said by the court, "a defendant in ejectment might acquiesce in an erroneous result of a trial, and refuse his grantor an opportunity to correct it by appeal, and still conclude him by the judgment in an action on his covenants. This," as the court said, "would be clearly unjust."

In *Freem. Judgm.* (4th Ed.) § 181, it is said:

"In order to bind the indemnitor to a judgment rendered against the indemnitee, the covenantor must be tendered a full, fair, and previous opportunity to meet the controversy. * * * He should be allowed all the means of defense open to him had he been made a party."

In the case of *Strong v. Insurance Co.*, 62 Mo. 289, it was said to be the rule that, "where one is bound to protect another from a liability, he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation, and opportunity to control and manage it." See, also, *Garrison v. Transportation Co.*, 94 Mo. 130, 6 S. W. 701; *City of St. Joseph v. Union Ry. Co.*, 116 Mo. 636, 22 S. W. 794; *Kansas City, M. & B. R. Co. v. Southern Ry. News Co.*, 151 Mo. 373, 52 S. W. 205.

In the case of *Ladd v. Kuhn*, decided by the supreme court of Indiana in 1900, and reported in 56 N. E. 671, it was held that an indemnitor brought in by notice to defend an action on which his liability depended had such substantial rights as entitled him to prosecute an appeal taken from an alleged erroneous judgment, and as prevented the nominal defendant from dismissing the appeal without his consent.

From a careful consideration of all these and many other authorities, it is observed, notably in the Missouri cases, that the right in question involves the control and management of the litigation; in others, it involves the right of prosecuting an appeal or writ of error from the judgment of the trial court; and in all it involves the right to a full and satisfactory opportunity to present all defenses. The case at bar discloses the fact that the defendants were deprived of this right by the action of the plaintiff—First, in paying the judgment; and, second, in the actual dismissal of the appeal. It cannot be successfully contended that the defendants were at fault in

failing to intervene in the court of appeals to prevent the dismissal of the writ of error. The case shows that neither they nor their counsel had an opportunity to do so. Notwithstanding some intimations of negotiations on the part of the surety company looking towards a disposition of the case, the defendants were distinctly advised that they were not to regard such intimations as a notice of a purpose to dismiss the writ of error. Their first knowledge of the action of the plaintiff was after it had actually paid the amount of the judgment, with interest and costs, to the elevator company. The facts show that a few minutes only elapsed between the payment of the judgment and the actual dismissal of the writ of error by the plaintiff; but, whether that time was short or long, the payment of the judgment, with interest and costs, was equivalent to a release of errors, and thereby, irrespective of the time of the actual dismissal of the writ of error, the defendants' right to review the case in the circuit court of appeals was cut off. Not only is this so, but in my opinion it cannot lie in plaintiff's mouth to say that defendants should have anticipated their purpose and prevented its accomplishment. As well might an assassin plead in his defense that his victim might have dodged the fatal blow.

Again, it is plain, and the evidence undoubtedly shows, that the defendants never offered to pay the costs incident to the prosecution of the writ of error, and never offered to otherwise indemnify the plaintiff against expenses attending the same. This fact might be material under some circumstances, but the evidence in this case shows that the plaintiff and the defendants had for three years and more been working harmoniously towards the same object, namely, the defense of the suit of the elevator company, and the preparation of a record, and argument on the same, in the court of appeals. The surety company, of its own accord, and without assertion of any claim to the contrary, had provided a supersedeas bond, and had assumed to give the defendants a full opportunity to be heard in the court of appeals. It is too late to assert now, for the first time, and without any previous request upon the defendants, that they failed to pay the expenses incident to the writ of error, or failed to offer a guaranty to the plaintiff against loss or injury to be occasioned thereby.

Assuming now that the plaintiff, by its act in paying the judgment and dismissing the writ of error, deprived the defendants of a valuable right, the question of its effect upon the plaintiff's rights in this action is next to be considered. After a careful reading of the authorities, and more mature consideration of the case than the exigencies of the trial permitted, I am satisfied that the effect of plaintiff's wrongful act not only destroyed the efficacy of the notice to appear and defend (for that efficacy, as already seen, is conditioned upon indemnitors having a full opportunity to do so), but also destroyed the plaintiff's cause of action against the defendants, or, more appropriately speaking, discharged the defendants from their obligations as indemnitors to the plaintiff. The evidence satisfies me that the plaintiff not only failed to exercise good faith towards the defendants, but, on the contrary, was guilty of bad faith towards

them. After calling them in to defend the case, securing valuable aid from their counsel, giving them to understand in divers and many ways that they should have an opportunity in that action to demonstrate the nonliability of the surety company to the elevator company, and thereby their own nonliability to the surety company on the bond in suit, and after much valuable time had been expended by them, and large expenses had necessarily been incurred for their attorney's services, the surety company, by suddenly and unexpectedly paying the judgment and dismissing the writ of error, rendered all that work, all that expenditure, and all that trouble nugatory and of no avail to the defendants. In my opinion, the plaintiff, on clear equitable principles, is estopped from compelling the defendants to again take upon themselves the burden of making the defense which, apart from its own wrongful act, they would have had fully considered in the court of last resort on the record once at great expense and trouble made by them; in other words, that the payment of the judgment by the surety company to the elevator company, and the dismissal of the writ of error, under the circumstances attending the acts in question, fully discharged the defendants from the obligations of the bond sued on in this case. If authority be needed for this conclusion, it can be found in the case of *Stark v. Fuller*, 42 Pa. St. 320. Judgment will be entered in favor of defendants.

KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY CO. v. JARMAN.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,347.

1. LIFE INSURANCE—DEFENSE OF SUICIDE—MISSOURI STATUTE.

Rev. St. Mo. 1889, § 5855, which provides that, in suits on policies of life insurance issued by any company doing business in the state, it shall be no defense that the insured committed suicide, unless it is shown that he contemplated suicide at the time he made application for such policy, and that "any stipulation in a life insurance policy to the contrary shall be void," was applicable, as has been judicially determined, to policies or certificates of assessment companies issued and delivered in that state to a citizen thereof prior to the taking effect of Act March 30, 1887, for the regulation of assessment companies (Rev. St. 1889, §§ 5860-5872). This act applied to foreign assessment companies doing business in the state, and contained a proviso that nothing contained therein should subject companies doing business thereunder to the provisions or requirements of the general insurance laws of the state, except as distinctly therein set forth. *Held* that, conceding that under said act the provisions of section 5855 did not apply to certificates of assessment companies thereafter issued, yet, as to a certificate previously issued, said section was a part of the contract, and by its terms rendered void a provision therein exempting the company from liability in case of the death of the insured by suicide, and that the subsequent act of March 30, 1887, could not be construed as bringing such provision into effect, since, if given such effect, it would be unconstitutional, as impairing the obligation of the contract made by the parties, and in consideration of which the insured had paid his assessments.

2. SAME—CONSTRUCTION OF STATUTE.

In Rev. St. Mo. 1889, § 5855, which excludes a defense to an action on a life insurance policy on the ground that the insured committed suicide,

the words "committed suicide" are used in their popular sense as comprehending all cases where the insured took his own life, whether while sane or insane. Sanborn, Circuit Judge, dissenting.

3. SAME—AMENDMENT OF CONSTITUTION OF COMPANY—RETROSPECTIVE EFFECT.

The legislative acts of a private corporation, like those of a public body, are presumed to be intended to operate prospectively only; and amendments to its constitution adopted by an assessment insurance corporation, which, if given a retrospective operation, would change the contracts made by its outstanding certificates or policies by reducing the amounts payable thereunder by their plain terms, will be construed as intended to affect only policies subsequently issued, unless there are imperative reasons which forbid such construction.

4. SAME—ASSENT OF POLICY HOLDER TO FUTURE AMENDMENTS.

A clause in an application for a policy of life insurance in a mutual assessment company, that the applicant agrees, if accepted, "to abide by the constitution, rules, and regulations of the company, as they now are, or may be constitutionally changed hereafter," cannot be reasonably construed as giving his assent in advance to any change which the company may see fit to make in its constitution or laws in the future which materially lessens the value of his policy, by reducing the amount of indemnity which by its terms the company promised to pay; nor will it have the effect of rendering such action binding upon him or the beneficiary in his policy.

Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Missouri.

H. B. Hicks and Samuel P. Huston, for plaintiff in error.

F. H. Bacon (E. M. Harber and A. G. Knight, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action is founded on a certificate of membership issued by the Knights Templars' & Masons' Life Indemnity Company, the plaintiff in error, to John P. Jarman, by the terms of which a certain sum of money, hereafter mentioned, was payable to Rosa B. Jarman, the wife of John P. Jarman, on the death of the latter. The plaintiff in error will be hereafter designated as the "defendant" or the "defendant company." The certificate was issued and delivered on October 25, 1885. When it was issued the constitution or by-laws of the defendant company, which were indorsed on the back of the certificate, provided "that a policy of membership for \$5,000 shall be good for all money in the death fund arising from one assessment, provided it shall not exceed \$5,000, and all the money paid on the policy in assessments"; and Jarman's certificate declared on its face that the defendant company would pay "to Rosa B. Jarman, wife, the children or heirs of said member, and in the order named, * * * the sum of five thousand dollars, and all the money paid on the policy in assessments, subject to the limitation as to the amount of such payment as is provided in section one (1) of article seven (7) of the constitution, on the back of this policy." By an amendment to the constitution or by-laws which was adopted on January 8, 1889, the company limited its liability to refund all assessments that might have been paid to such as were paid "for the first five years" of membership; and by later

amendments, which were made, respectively, on February 20, 1894, and January 14, 1896, it exempted itself from liability to refund any assessments, or to pay any greater sum than the principal sum specified on the face of its certificates. The certificate of membership, when issued, contained a provision that the policy should become null and void "in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane or insane"; and it was stipulated that John P. Jarman, the deceased member, committed suicide on September 12, 1898, "while insane to such an extent as to be incapable of understanding the nature or consequences of his act, * * * by a gunshot wound inflicted by himself." When sued upon its policy, the defendant company interposed two defenses: First, it asserted that it was not liable on its policy for any amount, because Jarman took his own life; second, it contended that even if it was liable for the face of its policy, to wit, for the sum of \$5,000, it was not liable for the amount of assessments which the deceased member had paid, and which it had originally agreed to refund, because of the aforesaid amendments made to its constitution on February 20, 1894, and January 14, 1896. Both of these contentions were overruled by the trial court (95 Fed. 70), and the case is now before this court for review.

In the case of *Indemnity Co. v. Berry*, 4 U. S. App. 353, 1 C. C. A. 561, 50 Fed. 511, it was held by this court, affirming the decision of Judge Caldwell on the circuit (*Berry v. Indemnity Co.*, 46 Fed. 439), that a certificate or policy of insurance which was executed by the defendant company and delivered in the state of Missouri to a citizen of that state prior to 1887, and was in the same form, substantially, as the policy now under consideration, was a Missouri contract, and a policy of insurance, and that, being such, it was subject to the provisions of section 5855 of the Revised Statutes of Missouri of 1889, which declares, in substance, that, in suits on policies of insurance on life issued by any company doing business in the state of Missouri, it shall be no defense that the insured committed suicide, unless it is shown to the satisfaction of the court or jury trying the case that the insured contemplated committing suicide at the time he made his application for the policy, and that any stipulation in a life insurance policy to the contrary shall be void. The correctness of that view is not challenged on the present occasion, and as the policy in suit was issued to a citizen of Missouri, and delivered to him in that state, and the initial assessment there paid, it follows that when the policy was delivered it covered the risk of suicide, by virtue of the local statute. On March 30, 1887, nearly two years after the policy in suit was issued, the legislature of the state of Missouri enacted a law with reference to insurance companies doing business on the assessment plan, which now appears in the Revised Statutes of that state for the year 1889, as article 3, c. 89 (being sections 5860 to 5872, both inclusive). This act placed foreign insurance companies doing business in the state on the assessment plan under the supervision of the insurance department of the state, and one section thereof (being section 5869) subjected such foreign assessment companies to all the provisions of section

5912 of the Revised Statutes of Missouri for 1889, which was then in force, but concluded with the following proviso:

"Provided, always, that nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth."

Section 5912, to which reference was thus made, related wholly to the mode of obtaining service on foreign insurance companies doing business within the state of Missouri; and it is accordingly claimed that the operation of the proviso was to relieve insurance companies doing business on the assessment plan, as distinguished from companies doing business in other ways, from the disability imposed by section 5855, to plead suicide as a defense, inasmuch as section 5855 forms a part of the general insurance laws of the state, and was not incorporated into the act of March 30, 1887, relating to assessment companies. It is by no means certain that the proviso in question was intended by the lawmaker to except assessment companies from the operation of section 5855. The legislature did not see fit to repeal that section, but left it standing and in full force as a part of the statute law of the state,—at least, in so far as it affected ordinary life companies; and it is difficult to assign any reason for prohibiting companies of the latter kind from pleading the defense of suicide which does not apply with equal force to assessment companies. It has been held, however, in *Haynie v. Indemnity Co.*, 139 Mo. 416, 41 S. W. 461, that from the date of its adoption the proviso did exempt assessment companies from the operation of section 5855, and enable them to plead suicide as a defense to policies thereafter issued which by their terms excluded the risk of death by suicide. Accepting that as an interpretation of a local law by the highest court of the state, which this court is required to adopt, we pass to the inquiry whether it was competent for the legislature, by the proviso in the act of March 30, 1887, to relieve the defendant company from the operation of section 5855, as respects policies theretofore issued and then outstanding, which were clearly subject to its provisions when they were issued. In considering this question, it must be borne in mind that section 5855 not only provides that, in suits on life insurance policies issued by companies doing business in the state of Missouri, it shall be no defense that the insured committed suicide, but also declares that "any stipulation in the policy to the contrary shall be void." The effect of this statute upon the policy in controversy was to expunge the provision which is found therein, in substance, that it should become null and void if Jarman took his own life, either sane or insane. The contract, by force of the statute, took effect as it would have done if no such clause as that last referred to had been inserted, and embraced the risk of death by suicide as well as from other causes. Moreover, in legal contemplation, the first and all subsequent premiums or assessments were paid by the insured in consideration of the assumption by the insurer of the risk of death by suicide, as well as from other causes, since the statute rendered the agreement to the contrary utterly meaningless and nugatory. In

this way the statute was worked into the contract, and became a part of it, and determined its meaning, scope, and effect. In the light of the statute, the parties must be presumed to have agreed that the insurer would assume the risk of death by suicide, because the law would not permit them to agree otherwise. We are of opinion, therefore, that it was not within the power of the legislature to declare in 1887, with respect to the policy in suit, and others of a like character, that self-destruction might be pleaded as a defense, which was tantamount to saying that the policy should not comprehend the risk of death by suicide, because a legislative enactment to that effect would impair the obligation evidenced by the policy, contrary to the mandate of the federal and the state constitutions. Const. Mo. § 15, art. 2; Rev. St. Mo. 1889, p. 59. In so holding we have not overlooked the decision in *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, upon which much reliance is placed by the defendant company, but we are of the opinion that the doctrine of that case is not applicable to the one at bar. In *Ewell v. Daggs* a purely statutory defense, existing under the usury laws of a state, when a certain contract for the loan of money was entered into, was taken away by a subsequent constitutional amendment; and it was held, in substance, that such repeal did not impair the obligation of the contract. The court in that case regarded the usury law that had been repealed as in the nature of a penal statute inflicting a penalty upon the lender, which any subsequent legislature could repeal, and thereby remit the penalty. It also said, in substance, that the borrower in such case had no right to complain of the remission of the penalty, because it was not imposed for his benefit, but rather for the benefit of the public, and, furthermore, that the usury statute conferred a privilege which belonged to the remedy, and formed no element in the rights that inhered in the contract. This reasoning, we think, is entirely inapplicable to the case in hand, because, as we have heretofore shown, the Missouri statute (section 5855) operated to enlarge the scope of the policy, and make it comprehend risks that but for the statute would not have been within its provisions.

While on this branch of the case another point will be noticed briefly, simply because it is insisted upon in the argument that was made in behalf of the defendant company. It is said that, by a long line of adjudications prior to the adoption of the Missouri statute excluding the defense of suicide, it had been determined that the words "committed suicide," as used in insurance policies, meant "a voluntary act when a person was in the possession of his ordinary reasoning faculties"; that the words "committed suicide" are used in that sense in section 5855, and, being so used, that the statute is not broad enough to cover the present case, because it is stipulated that Jarman took his own life "while insane to such an extent as to be incapable of understanding the nature or consequences of his act." A proper degree of respect for the legislature requires us to overrule this contention, since it is not probable that any legislative body in its right mind would declare that insurance companies shall not be allowed to make the defense of suicide if the insured

takes his life when in the full possession of all his reasoning faculties, but may make it whenever it is claimed that he took his life while insane. In view of the many long and embarrassing trials that had taken place in actions upon insurance policies to determine the mental state of the deceased at the time he took his own life, and the difficulty in many cases of determining that issue with any approach to accuracy, it was deemed best to exclude the defense of suicide altogether in such actions. The statute was doubtless prompted by that view, and, whether it be regarded as wise or unwise, it was competent for the legislature to enact it; and we have no doubt that the words "committed suicide" were used in a popular sense, to comprehend the act of self-destruction, without reference to the mental state of the actor.

We have next to determine whether the amendments to the defendant's constitution of date January 8, 1889, February 20, 1894, and January 14, 1896, whereby it expunged those provisions of its constitution which obligated it, on the death of a member, to refund "all money paid on the policy in assessments," have the effect of depriving the plaintiff of the right to recover the assessments paid on the policy in controversy, and of limiting her right of recovery to the principal sum therein mentioned. The argument in favor of giving the amendments such effect as is last described is based wholly on the concluding paragraph of Jarman's application for the policy, which is as follows:

"I further agree, if accepted, to abide by the constitution, rules, and regulations of the company as they now are, or may be constitutionally changed hereafter."

Conceding, in accordance with the stipulation of the parties, that the amendments in question were adopted legally in the manner prescribed by the defendant's constitution and by-laws, we observe in the first instance that there is nothing to indicate that the amendments were intended to have a retrospective operation, and reduce the amount payable on certificates or policies like the one at bar, which was then outstanding, and, in plain language, obligated the company to refund all assessments that might be paid thereon. The present record contains no evidence which shows affirmatively that the amendments were intended to operate retrospectively and extinguish the obligation to refund assessments that had been expressly assumed, while the fact that outstanding policies were not recalled, and the promise to refund assessments expunged or erased from the face of such policies, fairly indicates, we think, that the amendments were designed to operate prospectively on policies thereafter executed. Aside from this view of the case, it is a well-established rule for the construction of statutes that they should be so interpreted as to give them a prospective operation only, unless it is manifest that they were intended to operate retrospectively, and no reason is perceived why the same rule of construction should not apply to the legislative acts of a private corporation. If it assumes to amend its constitution or by-laws, and the amendment is in such form that, if given a retrospective effect, it will alter obligations which the company has assumed by existing contracts, it should

be presumed, unless there are imperative reasons to the contrary, that it was not intended to have such effect, but was only intended to prescribe a rule of action for the future. *Carnes v. Association (Iowa)* 76 N. W. 683; *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610; *End. Interp. St.* § 273; *Suth. St. Const.* § 464. In the second place, we observe that it is not a reasonable interpretation of the clause above quoted from the application that the applicant intended to assent in advance to any changes in its constitution and by-laws which the company saw fit to make, even if they reduced the amount of indemnity which the company had promised to pay in the event of his death, and thereby lessened the value of his policy. He was to occupy a dual relation to the company—First, as one of its members; and, second, as any other individual having a contract with it. In the former relation he was willing to be bound by any lawful amendment to the company's constitution and by-laws that the members collectively saw fit to adopt, which concerned the government of the corporation or the mode of transacting its business, and did not impair any of the essential provisions of his contract. He probably foresaw that in course of time the company might find it expedient to make some changes in its method of corporate government, or in the mode of transacting its business, or in its rules of discipline; and he doubtless intended to assent to all amendments of the constitution and by-laws which were framed for that purpose, and would not deprive him of any substantial right or benefit secured by his policy. It is not reasonable, however, to suppose that he intended to agree in advance that the company might at any time reduce the promised indemnity to any sum which it found it convenient to pay. The liberal indemnity that was promised by the policy as first drawn may have been, and probably was, the inducing cause which led Jarman to become a member of the defendant company; and it would be unreasonable to infer that he intended to agree that, after he had paid assessments upon his policy for a period of years, the consideration that had induced him to pay the same might be withdrawn in whole or in part without his consent. The record contains no evidence that the deceased member voted for any of the amendments now in question, or was aware of their adoption during his lifetime. And, even if it did appear that he voted for the amendments and was aware of their adoption, the presumption would be that he did so in the belief that the amendments operated prospectively, and not retrospectively upon antecedent contracts. All contracts, notwithstanding the general words or phrases which they may contain, should receive an interpretation which will accord with the presumed intention of the contracting parties, and will not work an injustice or lead to absurd consequences. *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 461, 12 Sup. Ct. 511, 36 L. Ed. 226; *Insurance Co. v. Kearney*, 36 C. C. A. 265, 94 Fed. 314. Applying that rule of interpretation, we are unable to give to the clause found in Jarman's application a construction that would enable the defendant company, by a simple amendment to its constitution or by-laws, to repudiate a stipulation contained in the policy, which, in

the estimation of the policy holder, most likely gave to it its chief value.

The views which we have expressed are in accordance with the conclusion heretofore reached by several other courts, including the trial court, with respect to the same or kindred questions. *Hale v. Union*, 168 Pa. St. 377, 31 Atl. 1066; *Wist v. Grand Lodge*, 22 Or. 271, 29 Pac. 610; *Weiler v. Union*, 92 Hun, 277, 36 N. Y. Supp. 734; *Grand Lodge v. Sater*, 44 Mo. App. 445, 452, 453; *Voigt v. Kersten*, 164 Ill. 314, 45 N. E. 543; *Startling v. Supreme Council*, 108 Mich. 140, 66 N. W. 340; *Smith v. Supreme Lodge*, 83 Mo. App. — (not yet reported), and cases there cited. The judgment below, awarding the plaintiff the full amount of the indemnity promised by the policy, is accordingly affirmed.

SANBORN, Circuit Judge (dissenting). Section 5855 of the Revised Statutes of Missouri of 1889 provides that "in all suits upon policies of insurance on life hereafter issued by any company doing business in this state it shall be no defense that the insured committed suicide unless" a state of facts not claimed to exist in this case conditioned the making of the application for insurance. The parties to this suit have stipulated that the insured, "while insane to such an extent as to be incapable of understanding the nature or consequences of his act, took his own life," and that, if section 5855 did "not operate against the defendant company as to this action, the defendant company is relieved from the payment of the policy aforesaid by the self-destruction of John P. Jarman," except to the extent of the repayment of his assessments, which amount to \$811.83. Section 5855 prohibited the defense that the insured committed suicide, but it left all other legal and equitable defenses unaffected. Is the defense that the insured, "while insane to such an extent as to be incapable of understanding the nature or consequences of his act, took his own life," a defense that he committed suicide? If it is, it is prohibited by the statute. If it is not, the statute does not operate upon it, and under the express stipulation of the parties the amount of the plaintiff's recovery should be limited to \$811.83. The statutes of the state of Missouri provide that "words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Rev. St. Mo. 1889, § 6570. What is the plain, ordinary, and usual meaning of the words "committed suicide?" Does suicide here include, or does it exclude, the taking by a person of his own life while he is so insane that he is incapable of understanding the nature or consequences of his act? The definition of the word "suicide" in Webster's Dictionary reads in this way: "Suicide. The act of designedly destroying one's own life committed by a person of years of discretion and sound mind." In Worcester's Dictionary it is thus defined: "Suicide. The slayer or slaying of one's self; self-murder; a self-murderer." And the definition in the Century Dictionary is: "Suicide. The act of designedly destroying one's own life." The plain, ordinary, and usual sense of a word or phrase

cannot always be safely evolved from the inner consciousness of any one, and perhaps no better evidence of this meaning of the word "suicide" could be presented than the definitions of these standard and popular dictionaries. Not one of these definitions includes the act of one who is so insane that he is incapable of understanding the nature or consequences of the thing he is doing. In all of them the intent and design of the sound mind is an indispensable element. Under these interpretations a taking of one's life without the design of a sound mind is not suicide, and one who is so insane that he does not understand the nature or consequences of his act cannot be said to designedly or intentionally do that act. The plain or ordinary sense of the words "committed suicide," therefore, does not include the taking of his life by one who is so insane that he does not understand the nature or consequences of his act. Moreover, in the statute under consideration the words "committed suicide" were legal, technical terms, used to describe and define the basis of a defense to an action at law, and having an appropriate meaning in the law. It is a settled rule of construction that in interpreting the statutes of a state the federal courts follow the rules of construction enacted by its legislature or announced by its courts; and, if this rule is to be observed in the interpretation of section 5855, the words "committed suicide," in that section, must be understood according to their legal, technical import. In the year 1872 the supreme court of the United States declared, and the consensus of judicial opinion in England and America, while differing on other questions, always has been and is, that "suicide" or "death by one's own hand" (and the two terms are declared by the supreme court to be interchangeable, in *Bigelow v. Insurance Co.*, 93 U. S. 284, 286, 23 L. Ed. 918), does not include or describe the taking of his life by one who is insane to such an extent that he does not understand the nature or consequences of his act. *Insurance Co. v. Terry*, 82 U. S. 580, 591, 21 L. Ed. 236; *Insurance Co. v. Rodel*, 95 U. S. 232, 24 L. Ed. 433; *Scheffer v. Insurance Co.*, 25 Minn. 534, 537; *Breasted v. Trust Co.*, 4 Hill, 73; *Newton v. Insurance Co.*, 76 N. Y. 426; *Eastabrook v. Insurance Co.*, 54 Me. 224; *Phadenhauer v. Insurance Co.*, 7 Heisk. 567; *Insurance Co. v. Isett's Adm'r*, 74 Pa. St. 176; *Insurance Co. v. Groom*, 86 Pa. St. 92, 96; *Merritt v. Insurance Co.*, 55 Ga. 103; *Association v. Waller*, 57 Ga. 533; *Phillips v. Insurance Co.*, 26 La. Ann. 404; *Cook, Life Ins.* § 42. Many other authorities to like effect might be cited, and none have been found which hold that the taking of his life by one who is so insane that he is incapable of understanding the nature and consequences of his act is the commission of suicide. These decisions establish the proposition that the word "suicide," in its technical, legal meaning, does not include the taking of his life by one who is insane to the extent stipulated in this action. The result is that the words "committed suicide" do not, either in their plain, usual, ordinary sense, or in their technical, legal import, include or cover the taking of his life by one who is insane to such an extent that he is incapable of understanding the nature or consequences of his act. From these premises the logical conclusion is to my mind irresistible that the defense that, "while insane to such an extent as to be incapable of

understanding the nature or consequences of his act," the insured took his life, is not a defense that he committed suicide. For this reason section 5855 does not operate upon or affect this action, and under the stipulation of the parties the amount of the plaintiff's recovery should be limited to \$811.83. The presumption of fact and of law is that the legislature of the state of Missouri, when it enacted this section we have been considering, knew the plain, ordinary sense of the words "committed suicide"; that they knew the technical, legal meaning which repeated judicial decisions had given to these words; and that they were familiar with the established rule of law and of the statute of their state,—that the words must be interpreted in accordance with this plain meaning and this technical import. The imputation to the members of this body of ignorance or of disregard of the meaning of these words and of this settled rule of construction is forbidden by a proper degree of respect for that legislative body. The defense of the company that the insured took his own life while insane should be sustained, and the recovery should be limited to the amount of the assessments which the insured paid to the company

HALEY v. KILPATRICK.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,373.

1. QUESTIONS REVIEWABLE.

A second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question, either of law or fact, which was considered and determined on the first appeal or writ of error, notwithstanding a contrary decision of such question in the meantime by a state court in a different case.

2. PLEADING—AIDER BY VERDICT.

Where the evidence supports the verdict, the pleadings, if defective, will be treated as amended to conform to the proofs.

3. SAME—VARIANCE—ESTOPPEL.

A plaintiff cannot raise the objection of variance because of the absence of an allegation which was stricken from defendant's answer on his own motion.

In Error to the Circuit Court of the United States for the District of Colorado.

W. T. Hughes, for plaintiff in error.

Thomas H. Hood, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This is the second appearance of this case in this court. 13 C. C. A. 480, 66 Fed. 133, 27 U. S. App. 752. For a statement of the case and the questions involved we refer to our former opinion. The law of the case was settled in the opinion of the court when the case was first here. It remains the law of the case in this court, the decree of the state court in another and different case to the contrary notwithstanding. *Mathews v. Bank,*

40 C. C. A. 444, 100 Fed. 393. It is well settled that a second appeal or writ of error in the same case only brings up for review the proceedings of the trial court subsequent to the mandate, and does not authorize a reconsideration of any question either of law or fact which was considered and determined on the first appeal or writ of error. *Bridge Co. v. Stewart*, 3 How. 413, 425, 11 L. Ed. 658; *Sizer v. Many*, 16 How. 98, 14 L. Ed. 861; *Tyler v. Magwire*, 17 Wall. 253, 283, 21 L. Ed. 576; *Phelan v. City & County of San Francisco*, 20 Cal. 39, 44; *Leese v. Clark*, Id. 388. In the last case cited Mr. Justice Field, then chief justice of the supreme court of California, delivering the unanimous judgment of that court, said:

"The decision of this court on the first appeal became the law of the case, and fixed the right of the parties in this action under their respective grants. 'A previous ruling of the appellate court,' as we held in *Phelan v. City & County of San Francisco*, 'upon a point distinctly made, may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits; but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves.' 20 Cal. 39. Such has been the uniform doctrine of this court for years, and, after repeated examinations and affirmations, it cannot be considered as open to further discussion. See *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; and *Davidson v. Dallas*, 15 Cal. 82. Nor is the doctrine peculiar to this court. It is the established doctrine of the supreme court of the United States and of the supreme courts of several of the states. *Sibbald v. U. S.*, 12 Pet. 491, 9 L. Ed. 1167; *Bridge Co. v. Stewart*, 3 How. 413, 11 L. Ed. 658; *Russell v. La Roque*, 13 Ala. 151. And the reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This will not be controverted. So, on the other hand, if, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone; and, if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below. *Young v. Frost*, 1 Md. 394; *McClellan v. Crook*, 7 Gill, 333."

No new questions going to the merits of the case were raised on the second trial.

Complaint is made that there was a variance between the proof and the pleadings; but where the proof supports the verdict the pleadings will be treated as amended to conform to the proof. *Keener v. Baker*, 93 Fed. 377, 35 C. C. A. 350. Moreover, the answer which set up the defense or plea in mitigation was stricken out on the plaintiff's motion, and he will not now be heard to object that the evidence which the lower court admitted—and rightly so, we think, on the pleadings as they stood—was not admissible, because of the absence of a plea which he himself had procured to be stricken out. He will not be permitted to take advantage of his own wrong.

New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 10 Sup. Ct. 743, 34 L. Ed. 231; Railway Co. v. Harris, 12 C. C. A. 598, 63 Fed. 800, 27 U. S. App. 450. The judgment of the circuit court is affirmed.

WESTERN ASSUR. CO. OF TORONTO v. POLK.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,350.

1. APPEAL—AFFIRMANCE—FAILURE TO OBSERVE RULES.

The circuit court of appeals may disregard all assignments of error, and affirm the judgment below, where the brief of the plaintiff in error fails to conform to its rules by specifying the errors relied on.

2. SAME—REVIEW—EXCEPTIONS TO INSTRUCTIONS.

A general exception to a charge, "and each and every part thereof," is unavailing, if any part of the charge is correct.

3. TRIAL—EXCLUSION OF TESTIMONY—HEARSAY.

It is not error to exclude testimony contained in a deposition, although direct and to a material point, where the cross-examination showed that the only knowledge the witness had of the matter was derived from letters in his possession, which the party taking his testimony refused to permit him to produce.

In Error to the Circuit Court of the United States for the District of Nebraska.

Ed. E. Yates and R. W. Richardson, for plaintiff in error.

Harry C. Brome and Jesse L. Root, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Western Assurance Company of Toronto, the plaintiff in error and plaintiff below, is an insurance company. It was sued on one of its policies in a state court in Nebraska. The complaint alleges, in substance, that it retained the defendant in error, who is a practicing lawyer, to defend the suit brought against it in Nebraska, and that, by reason of his negligence, judgment was rendered against it by default on a demand which it did not owe, but which it was compelled to pay by reason of the judgment obtained thereon through the defendant's negligence as its attorney. The answer of the defendant denied (1) all allegations of negligence; denied (2) that "he ever contracted with the plaintiff, or entered into its employ as its attorney in said suit"; (3) averred the policy upon which the suit was brought and judgment rendered against the company was a valid policy, and that the company had no defense to the action thereon; and (4) pleaded the Nebraska statute of limitations of four years. The case was tried to a jury, who found the issues for the defendant, and judgment was rendered accordingly. The brief for the plaintiff in error does not comply with the twenty-fourth rule of this court (32 C. C. A. clxv., 89 Fed. xcvi.), and we would be justified in disregarding all the alleged errors and affirming the judgment below on that ground. *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 8

C. C. A. 253, 254, 59 Fed. 756, 758; *Oswego Tp. v. Travelers' Insurance Co.*, 36 U. S. App. 13, 17 C. C. A. 77, 70 Fed. 225; *Van Gunden v. Iron Co.*, 8 U. S. App. 229, 248, 3 C. C. A. 294, 296, 52 Fed. 838, 841; *Grape Creek Coal Co. v. Farmers' Loan & Trust Co.*, 24 U. S. App. 38, 45, 12 C. C. A. 350, 353, 63 Fed. 891, 894; *Doe v. Mining Co.*, 44 U. S. App. 204, 214, 17 C. C. A. 190, 196, 70 Fed. 455, 461; *Woodmen of the World v. Jackson*, 97 Fed. 382, 38 C. C. A. 208. We prefer, however, to rest our decision on the merits of the case.

The case in the circuit court turned upon hotly contested issues of fact. The charge of the court was very full, and covered all the issues in the case. At the conclusion of the charge the plaintiff in error had this exception noted: "To which charge of the court, and each and every part thereof, plaintiff at the time excepted." It is common learning that such a general exception as this to the entire charge of the court is of no avail if any part of the charge is good law. *Railroad Co. v. Ehret*, 34 C. C. A. 369, 92 Fed. 321; *New England Furniture & Carpet Co. v. Catholicon Co.*, 49 U. S. App. 78, 24 C. C. A. 595, 79 Fed. 294; *Price v. Pankhurst*, 10 U. S. App. 497, 3 C. C. A. 551, 53 Fed. 312. We have read the charge, and are very clear that it is not all bad law. On the contrary, we think it correctly states the law applicable to every issue in the case. The plaintiff preferred several requests for instructions, all of which we have read carefully and compared with the charge of the court, and we find that, so far as they were good law and applicable to the issues, they were fully covered by the charge. The court very properly refused to give special requests upon points fully and fairly covered by its charge in chief.

Fyke & Hamilton, of Kansas City, Mo., were the attorneys of the insurance company, and they employed the defendant to appear in the action brought against the insurance company. The contention of the insurance company was that Fyke & Hamilton had authority to employ other attorneys to appear for and represent it in any suits brought against it, and that the defendant was employed by them, as agents of the company, to appear for and represent the company. The contention of the defendant was that he was employed by Fyke & Hamilton to represent them in the suit, and that he was not retained or employed by the company to appear for and represent it, and had no contractual relations whatever with it, either directly or through Fyke & Hamilton. The plaintiff, to support the contention that Fyke & Hamilton had authority to employ counsel to represent the company, and that they had authority from the company to employ the defendant to represent it in the action in which the judgment by default was rendered against it, took the deposition of R. J. Mahoney. The following is a part of the examination in chief of this witness:

"Q. Do you know, Mr. Mahoney, if the firm of Messrs. Fyke & Hamilton had any authority to employ an attorney in Plattsmouth to act for the Western Assurance Company in the Klein case? A. Yes. Q. And were they authorized to engage Mr. Polk in this particular case? A. Yes."

On motion of the defendant, the plaintiff was not permitted to read this part of the witness' testimony, and this ruling is assigned

for error, and much insisted upon. This apparent error is quickly exploded when the cross-examination of the witness is read. On his cross-examination the fact was disclosed that the witness, of his own knowledge, knew nothing whatever upon the subject of Fyke & Hamilton's authority to employ counsel for the insurance company generally, or to employ the defendant in this particular suit against the company, but that all he knew about the matter he had learned from perusing the correspondence between the insurance company and Fyke & Hamilton. When that fact was elicited he was asked:

"Q. Well, then, did you personally have anything to do with the retaining of Messrs. Fyke & Hamilton to take charge of the company's defense to the Klein action? A. No. Q. Do you know what instructions were given to Messrs. Fyke & Hamilton in connection with the defense, other than by perusing the correspondence between Fyke & Hamilton and your company? A. No. Q. Is that correspondence in your possession now? A. Yes, sir. Q. Will you produce it? Mr. Creelman: We decline to produce on this cross-examination the correspondence with Fyke & Hamilton."

The testimony of the witness on this point was clearly hearsay, and rightly ruled out. Moreover, if the contents of the letters between the insurance company and Fyke & Hamilton were admissible in evidence, the letters themselves would have been the best evidence of their contents; and these the counsel for the insurance company refused to permit the witness to produce, although he testified that he had them in his possession at the time of his examination.

The court was asked to charge the jury as matter of law that, upon the facts proved, the defendant was guilty of negligence. This request was properly refused. Upon the evidence in the case, it was clearly the province of the jury to determine the issue of negligence. The plaintiff itself seemed to have taken this view of the case at the trial, as it preferred a request to that effect, which was, in substance, embodied in the court's charge.

Other errors are assigned, but none of them are of importance enough to justify their separate statement and consideration. We have carefully considered all of them, and find them without merit. The judgment of the circuit court is affirmed.

CAMDEN & S. RY. CO. v. STETSON.

(Circuit Court of Appeals, Third Circuit. October 15, 1900.)

FEDERAL COURTS—STATE LAWS AS RULES OF DECISION—SURGICAL EXAMINATION OF PARTY.

Under Rev. St. § 721, providing that the laws of the several states shall be rules of decision in trials at common law in the courts of the United States in cases to which they apply, except where the constitution, treaties, or statutes of the United States otherwise provide, in an action for a personal injury in a federal court in New Jersey the defendant is entitled to an order requiring the plaintiff to submit to a surgical examination, as provided by the laws of the state (Laws 1896, p. 344).¹

¹ State laws as rules of decision in federal courts, see notes to *Griffen v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; and *Hill v. Hite*, 29 C. C. A. 553.

In Error to the Circuit Court of the United States for the District of New Jersey.

E. A. Armstrong and D. J. Pancoast, for plaintiff in error.

Howard Carrow, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

PER CURIAM. In this case this court certified to the supreme court of the United States three questions of law arising upon the facts of the case, which facts, as stated in our certificate, are as follows:

"This cause is in this court upon a writ of error to the circuit court of the United States for the district of New Jersey. The suit was brought in the court below by David S. Stetson, a citizen of the state of Pennsylvania, against the Camden & Suburban Railway Company, a corporation of the state of New Jersey, to recover damages for an alleged injury to the person of the plaintiff, caused by the negligence of the defendant while the plaintiff was a passenger on one of the defendant's cars. The alleged negligence and injury occurred on the 13th day of July, 1896, in the city of Camden, in the state of New Jersey. At that time the plaintiff was a citizen of the state of New Jersey. On the 12th day of May, 1896, the legislature of the state of New Jersey passed, and the governor approved, the following act (Laws 1896, p. 344):

"Chapter 202.

"A supplement to an act entitled 'An act concerning evidence' (Revision), approved March twenty-seventh, one thousand eight hundred and seventy-four.

"Be it enacted by the senate and general assembly of the state of New Jersey:

"1. On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may, from time to time on application of any party therein, order and direct an examination of the person injured as to the injury complained of by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination to testify in the said cause as to the nature, extent, and probable duration of the injury complained of; and the court may in such order direct and determine the time and place of such examination: provided, this act shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore.

"Approved May 12, 1896."

"This cause being called for trial in the court below on the 31st day of March, 1898, and a jury having been impaneled, before the case was opened to the jury the following proceeding took place upon the defendant's motion for the surgical examination of the plaintiff under the New Jersey statute, supra: Mr. Armstrong [defendant's counsel]: I gave notice to the counsel for plaintiff of a motion for an order that the plaintiff submit himself to an examination by competent surgeons. This notice was given under the statute which authorizes the court, at or before the trial, to make such an order. I do not know that it was necessary to give the notice, but it was the fair thing to do, and so I gave the notice. I have the physicians here, and make the motion now. The Court: Has the plaintiff his physician in court? Mr. Carrow (plaintiff's counsel): Yes, sir. The Court: Do you assent to the order? Mr. Carrow: No, sir; I do not assent to it. The Court: Consent? Mr. Carrow: No, sir; I do not consent. The Court: If the plaintiff is unwilling to submit himself to an examination, I shall not compel him to do so. I do not think the court has any right, because a man sues for damages, to subject him to an examination by physicians against his will. He ought to be se-

cure in his person, and I will not make the order. If counsel will permit it to be done, I think it is a proper thing to do; but against the plaintiff's consent I will not make any order. Mr. Armstrong: I may file the notice? The Court: Yes, you may file the notice. Mr. Armstrong: And if I can have an exception, I would want one. I do not know that I can. I would make the same motion in the other case when it is called for trial. I ask an exception. The Court: You can have one if you are entitled to it.' Thereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly. Andrew Kirkpatrick [L. S.] Judge."

There was a verdict and judgment in favor of the plaintiff and against the defendant below in the sum of \$3,500.

The first assignment of error is as follows:

"First. That on or before the trial of said cause the court refused and denied the application of the defendant to order and direct an examination of the plaintiff as to the injury complained of by him in his declaration, by competent physicians and surgeons, in order to qualify such physicians and surgeons to testify in such case as to the nature, extent, and probable duration of the injury complained of, on the ground that it was beyond the power of the court to grant such application or make such order."

The three questions propounded to the supreme court were these:

"(1) Is the above-recited statute of the state of New Jersey (Act May 12, 1896) applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey? (2) Is said statute applicable to an action to recover damages for injury to the person brought and tried in the circuit court of the United States for the district of New Jersey, where the injury occurred in the state of New Jersey, and both the plaintiff and the defendant, at the time of the injury, were citizens of that state? (3) Had the circuit court the legal right or power to order a surgical examination of the plaintiff?"

We have received from the supreme court of the United States its mandate directed to this court, and certifying that it is the opinion of the supreme court that the third question certified must be answered in the affirmative. 20 Sup. Ct. 617, Adv. S. U. S. 617, 44 L. Ed. 721. This affirmative answer to that question is decisive of the controversy between the parties to this appeal, and requires a reversal of the judgment of the court below, with direction to that court to grant a new trial. Accordingly, the judgment of the circuit court of the United States for the district of New Jersey is reversed, and the cause is remanded to that court, with direction to grant a new trial, in conformity with the decision of the supreme court of the United States as signified by its affirmative answer to the third question above set forth.

KIMBERLIN v. COMMISSION TO FIVE CIVILIZED TRIBES et al.

(Circuit Court of Appeals, Eighth Circuit. October 15, 1900.)

No. 1,388.

1. MANDAMUS—WHEN ISSUABLE.

Mandamus issues to compel a person or officer to discharge a duty imposed by law.

2. SAME—MAY COMMAND DECISION.

If the duty of the officer involves the exercise of his judgment or discretion, a writ of mandamus may issue to compel him to act and decide, but not to direct in what way or in whose favor he shall decide.

8. SAME—JUDICIAL OFFICER.

While the writ of mandamus may issue to compel a judicial officer to decide a case or question, it may not lawfully command him in what particular way he shall decide it; nor may it be used to review his decision, to correct his errors, or to compel him to again decide the question.

4. SAME—EXECUTIVE OFFICER—MINISTERIAL ACT.

A writ of mandamus may lawfully issue from a court having jurisdiction to compel an executive officer to perform a mere ministerial act, which does not call for the exercise of his judgment or discretion, but which the law gives him the power and imposes upon him the duty to do.

5. SAME—EXECUTIVE OFFICER—DISCRETIONARY ACTS.

It may issue to command an executive officer to act and to decide, even though his act and decision involve the exercise of his judgment and discretion, but in such case it may not direct him in what particular way he shall act or decide. It may not lawfully issue to command or control an executive officer in the discharge of those of his duties which involve the exercise of his judgment or discretion, either in the construction of the law, or in determining the existence or effect of the facts.

6. SAME—EXECUTIVE OFFICER—DISCRETIONARY ACTS NOT REVIEWABLE BY.

It may not lawfully issue to review, reverse, or correct the erroneous decisions of an executive officer in such cases, even though there may be no other method of review or correction provided by law.

7. COMMISSION TO THE FIVE CIVILIZED TRIBES—SPECIAL TRIBUNAL TO DETERMINE TRIBAL CITIZENSHIP—EXEMPT FROM MANDAMUS.

The commission to the Five Civilized Tribes, created by the acts of congress of March 3, 1893 (27 Stat. 645, c. 209, § 16), March 2, 1895 (28 Stat. 939, c. 189), June 10, 1896 (29 Stat. 339, c. 398), June 7, 1897 (30 Stat. 84, c. 3), and June 28, 1898 (30 Stat. 502, c. 517, § 21), is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to it for citizenship in the Five Nations in accordance with the provisions of these acts of congress; and the courts have no jurisdiction, by the use of the writ of mandamus, to correct its errors, control its decisions, review or reverse its judgments, or to compel it to make different decisions upon these questions.

8. SAME.

The claim of an applicant for citizenship in the Chickasaw Nation was heard and denied by the commission to the Five Civilized Tribes. *Held*, the writ of mandamus to compel the commission to enroll the applicant whose claim had been denied was properly refused, because to grant it would be to substitute the judgment of the court for the judgment of the commission to which congress intrusted the determination of the right of the applicant.

(Syllabus by the Court.)

In Error to the United States Court of Appeals in the Indian Territory.

Mary Jane Kimberlin, a white woman, the plaintiff in error, seeks by this writ of error to obtain a writ of mandamus to the commission to the Five Civilized Tribes, commanding it to enroll her as a citizen of the Chickasaw Nation. Her right to the writ rests upon the facts disclosed by her amended complaint, which were admitted by a demurrer. Those facts were these: William G. Kimberlin, a white man, married Lizzie Mitchell, a Chickasaw Indian by blood, in the year 1870, and she died. After her death, and in the year 1890, Kimberlin married the plaintiff in error. Both these marriages were solemnized in conformity with the laws and rules of the Chickasaw Nation. The plaintiff in error's name has been upon the judicial records of that nation as a citizen of the tribe by intermarriage ever since November 19, 1890, through the record of her marriage license and marriage certificate. But the Chickasaw Nation has no official and settled roll of its citizens approved by its legislature. The plaintiff in error presented these facts to the commission to the Five Civilized Tribes by petition on August 28, 1897, and obtained

a hearing thereon on September 21, 1898, in accordance with the published notices, rules, and regulations of the commission. At this hearing the facts relative to the marriages and their records were admitted, but nevertheless the commission refused to enroll the plaintiff in error as a citizen of the Chickasaw Nation; and thereupon she filed her complaint for a mandamus to compel it to do so, in the United States court in the Indian Territory. That court sustained a demurrer to her amended complaint, and denied the application for the writ of mandamus. This decision was removed by writ of error to the United States court of appeals in the Indian Territory, where it was affirmed by the latter court (53 S. W. 467), and that judgment is now here for review. The plaintiff in error insists that it was the clear duty of the commission, under the acts of congress, the treaty with the Chickasaw Nation, and the laws of that nation, to enroll her as a member of that tribe, and that the courts below ought to have enforced the performance of that duty by the issue of the writ of mandamus.

Albert Rennie and John A. McClure, for plaintiff in error.

William B. Johnson, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment or discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision, but it may not command him in what particular way that decision shall be rendered. When a question has been decided by the officer or person to whose judgment or discretion the law has intrusted its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another. It may issue to command judicial officers to hear and to decide a question within their jurisdiction, but courts have no power by writ of mandamus to direct such officers how they shall decide such a question, or in whose favor they shall render their judgment, because such action would result in the substitution of the judgment and opinion of the commanding court for that of the judicial officers to whose judgment and discretion the law intrusted the decision of the issue. For the same reason it cannot be invoked to compel a court or a judicial officer to reverse a decision already rendered, to correct an erroneous conclusion, or to render another decision, even though there may be no other method provided by the law for the review or correction of the error. In *re Harless*, 85 Fed. 177, 180, 29 C. C. A. 78, 81, 56 U. S. App. 33, 37; In *re Rice*, 155 U. S. 396, 403, 15 Sup. Ct. 149, 39 L. Ed. 198; *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 379, 13 Sup. Ct. 758, 37 L. Ed. 486; In *re Parsons*, 150 U. S. 150, 156, 14 Sup. Ct. 50, 37 L. Ed. 1034; *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. 825, 29 L. Ed. 935; *Ex parte Whitney*, 13 Pet. 404, 10 L. Ed. 221; In *re Atlantic City R. Co.*, 164 U. S. 633, 635, 17 Sup. Ct. 208, 41 L. Ed. 579; In *re Westervelt*, 98 Fed. 912, 39 C. C. A. 350. The extent to which this writ is available to control the action of executive officers has been the subject of repeated consideration and decision in this country, until it is no longer doubtful. The leading cases upon the question are *Marbury v. Madison*, 1 Cranch, 137, 158, 161, 2 L.

Ed. 60; *Kendall v. U. S.*, 12 Pet. 524, 613, 9 L. Ed. 1181; *Decatur v. Paulding*, 14 Pet. 497, 514, 516, 10 L. Ed. 559; and *U. S. v. Black*, 128 U. S. 40, 48, 9 Sup. Ct. 12, 32 L. Ed. 354. In *Marbury v. Madison*, 1 Cranch, 137, 158, 161, 2 L. Ed. 60, President Adams had nominated, the senate had confirmed, and the president had commissioned, Marbury as a justice of the peace of the District of Columbia, but his commission remained undelivered in the office of the secretary of state when the government passed under the administration of President Jefferson. Mr. Madison, the new secretary of state, refused to deliver the commission, and Marbury applied to the supreme court for a writ of mandamus to compel him to do so. The court held that the appointment was complete, that Marbury was entitled to his commission, that it was Mr. Madison's duty to deliver it, that its delivery involved the exercise of no discretion or judgment, and that it could be compelled by a writ of mandamus issued by the proper court. In *Kendall v. U. S.*, 12 Pet. 524, 613, 9 L. Ed. 1181, Stockton and Stokes held certain claims against the United States for extra services as contractors for carrying the mails, which they insisted should be credited to their accounts in the post-office department of the government. Thereupon congress passed an act for their relief, which provided that the solicitor of the treasury should examine all the evidence relative to this claim, and should find and determine the amounts of the allowances to which they were equitably entitled, and that the postmaster general should credit them in their account in his department with the sums which the solicitor should find to be due to them. Under this act the solicitor examined the evidence and found the amounts due to the contractors; but Kendall, the postmaster general, refused to credit them with these sums, and a writ of mandamus was sought to compel him to do so. The supreme court held that the act of congress imposed upon the postmaster general the clear duty to credit the contractors with the sums found due to them by the solicitor, that this was a mere ministerial act, that it did not involve the exercise of any judgment or discretion on his part, and that the peremptory writ commanding him to enter this credit was lawfully issued by the court below. In delivering the opinion of the supreme court, Mr. Justice Thompson said:

"The act required by the law to be done by the postmaster general is simply to credit the relators with the full amount of the award of the solicitor. This is a precise, definite act, purely ministerial, and about which the postmaster general has no discretion whatever."

In *Decatur v. Paulding*, 14 Pet. 497, 514, 516, 10 L. Ed. 559, congress passed on the same day a general law giving to the widow of any officer who had died in the naval service a pension equal to half of his monthly pay from the time of his death until her death or marriage; and a resolution granting a pension to Mrs. Decatur, widow of Stephen Decatur, for five years, commencing June 30, 1834, and the arrearages of the half pay of a post captain from Commodore Decatur's death to June 30, 1834. Mrs. Decatur reserved her rights under the resolution, and applied for and received her pension under the general law. Thereafter she applied for her pen-

sion under the resolution, the secretary of the navy refused to allow it, and she sought a writ of mandamus to compel him to do so. The circuit court refused to issue the writ, and the supreme court sustained its action, because the acts of congress had vested the power and imposed the duty upon the secretary of the navy, in the allowance or disallowance of this pension, to exercise his judgment and discretion in the construction of the law and the resolution, and in the decision of the question whether Mrs. Decatur was entitled to her pension under the law only, or under both the law and the resolution. It was strenuously argued in that case, as it is in the case at bar, that the true construction of the legislation constituted the law of the case, that it was the duty of the officer to comply with that law, and that, as the facts were not in dispute, his compliance with the law was a mere ministerial act, and he had no power to exercise his judgment or discretion in the construction of the act and the resolution. This contention, however, was not sustained. Chief Justice Taney, in delivering the opinion of the supreme court, said:

"The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress under which he is from time to time required to act."

And after reviewing the case of *Kendall v. U. S.*, and calling attention to the act of entering the credit in the account which was in question in that case, he further said:

"The court were unanimously of opinion that in its character the act was merely ministerial. In the case before us it is clearly otherwise. The resolution in favor of Mrs. Decatur imposed a duty on the secretary of the navy which required the exercise of judgment and discretion, and in such a case the circuit court had no right, by mandamus, to control his judgment, and guide him in the exercise of a discretion which the law had confided to him."

In *U. S. v. Black*, 128 U. S. 40, 48, 9 Sup. Ct. 12, 32 L. Ed. 354, Oscar Dunlap applied to the supreme court of the District of Columbia for a writ of mandamus commanding the commissioner of pensions to increase his pension. He averred in his petition that the fact was that he was so disabled that he was entitled to this increase under the acts of congress, and that the commissioner had so found the fact to be, but had erroneously held that under the law he was not entitled to it, and for that reason he refused to allow it. The writ was refused, and that judgment was affirmed in the supreme court. Mr. Justice Bradley delivered the opinion. He carefully reviewed the cases of *Kendall v. U. S.* and *Decatur v. Paulding*, and then said:

"The principle of law deducible from these two cases is not difficult to enounce. The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when by special statute, or otherwise, a mere ministerial duty is imposed upon them (that is, a service which they are bound to perform without further question), then, if they refuse, a mandamus may be issued to compel them. Judged by this rule, the present case presents no difficulty. The

commissioner of pensions did not refuse to act or decide. He did act and decide. He adopted an interpretation of the law adverse to the relator, and his decision was confirmed by the secretary of the interior, as evidenced by his signature of the certificate. Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case. We have no appellate power over the commissioner, and no right to review his decision. That decision and his action taken thereon were made and done in the exercise of his official functions. They were by no means merely ministerial acts."

From these four cases, and from the later decisions of the supreme court which have followed and emphasized the limit of the control which courts may exercise by mandamus over the acts of the executive officers of the government, which those decisions clearly fixed, the following established rules may be logically deduced: (1) A writ of mandamus may lawfully issue, from a court having jurisdiction, to compel an executive officer to perform a mere ministerial act, which does not call for the exercise of his judgment or discretion, but which the law gives him the power and imposes upon him the duty to do. *Marbury v. Madison*, 1 Cranch, 137, 158, 161, 2 L. Ed. 60; *Kendall v. U. S.*, 12 Pet. 524, 613, 9 L. Ed. 1181; *U. S. v. Schurz*, 102 U. S. 378, 26 L. Ed. 167; *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. (2) It may issue to command an executive officer to act and to decide, even though his act and decision involve the exercise of his judgment and discretion; but in such a case it may not direct him in what particular way he shall act or decide. It may not lawfully issue to command or control an executive officer in the discharge of those of his duties which involve the exercise of his judgment or discretion either in the construction of the law, or in determining the existence or effect of the facts. (3) It may not lawfully issue to review, reverse, or correct the erroneous decisions of an executive officer in such cases, even though there may be no other method of review or correction provided by law. *Decatur v. Paulding*, 14 Pet. 497, 514, 516, 10 L. Ed. 559; *U. S. v. Black*, 128 U. S. 40, 48, 9 Sup. Ct. 12, 32 L. Ed. 354; *U. S. v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *Commissioner v. Whiteley*, 4 Wall. 522, 18 L. Ed. 335; *Georgia v. Stanton*, 6 Wall. 50, 18 L. Ed. 721; *Gaines v. Thompson*, 7 Wall. 347, 19 L. Ed. 62; *U. S. v. Windom*, 137 U. S. 636, 644, 11 Sup. Ct. 197, 34 L. Ed. 811; *U. S. v. Blaine*, 139 U. S. 306, 319, 11 Sup. Ct. 607, 35 L. Ed. 183; *U. S. v. Lamont*, 155 U. S. 303, 308, 15 Sup. Ct. 97, 39 L. Ed. 160.

Let us apply these rules to the solution of the question which this case presents. The commission to the Five Civilized Tribes was created by the act of March 3, 1893, making appropriations for current and contingent expenses, and for fulfilling treaty obligations with Indian tribes (27 Stat. 645, c. 209, § 16), to negotiate an extinguishment of the tribal title, and an allotment in severalty of the lands of the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muskogee (or Creek) Nation, and the Seminole Nation. Under this act the president appointed three commissioners, and they entered upon the discharge of their duties. By the act of March 2, 1895, making appropriations for sundry civil expenses of the government, the president was authorized to appoint two additional com-

missioners, and a suitable appropriation was made to enable the commission to continue its work. 28 Stat. 939, c. 189. By the act of June 10, 1896 (29 Stat. 339, c. 398), making appropriations for current and contingent expenses of the Indian department, this commission was directed to continue to exercise the authority conferred upon it, and it was charged with the duty of hearing and deciding upon all applications made to it for citizenship in any of the Five Nations, in these words:

"That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: provided, however, that such application shall be made to such commissioners within three months after the passage of this act. The said commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages and customs of each of said nations or tribes: and provided, further, that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship and such court or committee shall determine such application within thirty days from the date thereof. In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: provided, that if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States district court: provided, however, that the appeal shall be taken within sixty days, and the judgment of the court shall be final. That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein."

By the act of June 7, 1897, making appropriations for the current and contingent expenses of the Indian department (30 Stat. 84, c. 3), it was provided:

"That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: provided, that the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth,

eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation; provided, also, that any one whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six."

In 1898, by the act of June 28th, for the protection of the people of the Indian Territory (30 Stat. 502, c. 517, § 21), congress declared that the roll of the Cherokee citizens of 1880 was the roll intended to be confirmed by that and preceding acts of congress, and then made this enactment:

"Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes."

It was under these various provisions of the acts of congress that the commission to the Five Civilized Tribes heard the claim of the plaintiff in error, and decided that it could not enroll her as a citizen of the Chickasaw Nation. In reaching this conclusion this commission was necessarily required to consider these various acts of congress, and to determine in the first instance whether or not it had the power to hear and determine the merits of the application of the plaintiff in error at the late day when she filed it. If it determined this question in the affirmative, it was then compelled to consider and determine the legal effect of articles 26 and 38 of the treaty with the Choctaws and Chickasaws (14 Stat. 777, 779), of section 7 of the general provisions of the Chickasaw constitution, which was adopted in 1867 (Constitution, Treaties, and Laws of the Chickasaw Nation, 1890, p. 19), and of the amendments of the laws of the Chickasaw Nation enacted by its legislature on September 24, 1887 (Constitution, Treaties, and Laws of the Chickasaw Nation, p. 143, § 3), and on October 1, 1890 (Codified Laws of the Chickasaw Nation, 1899, p. 270). These provisions of the treaty, of the constitution, and of the statutes read in this way:

"Art. 26. The right here given to Choctaws and Chickasaws, respectively, shall extend to all persons who have become citizens by adoption or intermarriage of either of said nations, or who may hereafter become such." 14 Stat. 777.

"Art. 38. Every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations

according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws in all respects as though he was a native Choctaw or Chickasaw." 14 Stat. 779.

"Sec. 7. That every white person, who having married a Chickasaw Indian, or who has been adopted by the legislative authorities of said nation shall be entitled to all the rights, privileges and immunities guaranteed to them only by the thirty-eighth article of the treaty of 1866, with the Choctaw and Chickasaw Indians." Constitution, Treaties, and Laws of the Chickasaw Nation, p. 19.

The amendment of 1887 provides:

"That no marriage heretofore solemnized, or which may hereafter be solemnized, between a citizen of the United States and a member of the Chickasaw Nation, shall enable such citizen of the United States, to confer any right or privilege whatever, in this nation, by again marrying another citizen of the United States, or upon such other citizen of the United States or their issue." Constitution, Treaties, and Laws of the Chickasaw Nation, p. 143.

The amendment of 1890 provides:

"That every United States citizen who has heretofore become a citizen of the Chickasaw Nation or who may hereafter become such by intermarriage and be left a widow or widower by the decease of a Chickasaw wife or husband such surviving widow or widower shall continue to enjoy the rights of citizenship unless he or she shall marry another United States citizen, man or woman as the case may be, having no right of Chickasaw citizenship by blood, in that case all his or her rights as citizens shall cease, and shall forfeit all rights of citizenship in this nation." Codified Laws of the Chickasaw Nation, 1899, p. 270.

The question in hand is whether, under the provisions of the acts of congress, of the treaty, and of the constitution and laws of the Chickasaw Nation, it is the province of the courts to control the decisions or correct the errors of the commission to the Five Civilized Tribes in its determination of the questions of tribal citizenship, by the use of the writ of mandamus. If that commission had refused to hear and determine the application of the plaintiff in error, the writ might have issued to compel it to render a decision. But it has decided the question, and has held that the commission cannot lawfully enroll the applicant. The relief sought by this writ is not a decision, but the reversal of a decision already rendered by the commission. Was there any error in the refusal of the courts below to use the writ to accomplish this effect? The act of June 10, 1896, limited the time within which applicants might present their claims for citizenship to three months from its date. It provided for a speedy determination of the questions presented by the various applications, and gave to each applicant a right to a review of the action of the commission by an appeal to the federal court. The plaintiff in error did not file her application within the time limited by this act, and by her laches she lost the right of appeal, if she did not also lose the right to a hearing. There may be grave doubt whether or not at the time she filed her application, in September, 1897, or at any time thereafter, the commission had jurisdiction to hear and determine it, or to enroll her as a citizen. If it had no such power, it goes without saying that the writ of mandamus was properly denied, because no court should command any officer to do an act be-

yond his jurisdiction. Conceding, however, but not deciding, that the application of the plaintiff in error was in time to entitle her to a hearing and decision, that the facts which she alleged were admitted, and that it was the duty of the commission to hear and decide the question of her right to citizenship according to the law and the very right of the matter, the power and duty of the courts below and of this court are no less certain. It is conceded that the commissioners are executive officers. It is not their sole or chief function to hear and determine controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties who apply to them for membership in the Five Nations, they are vested with judicial powers by the acts of congress. They have authority to compel the attendance of witnesses, to send for persons and papers, to hear evidence, "to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship," and above all they are empowered "to hear and determine the application of all persons who apply to them for citizenship." This grant of power is plenary. It vests the authority and imposes the duty upon this commission to hear and to decide every question of law and of fact which is material to the right of the applicant to enrollment as the citizen of a nation. Take the case at bar. The facts are conceded. But do these facts entitle the applicant to be enrolled as a citizen of the Chickasaw Nation? Does the provision of article 38 of the treaty of 1866, that "every white person who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw Nation * * * is to be deemed a member of said nation," apply to those who, like the plaintiff, were married subsequent to the adoption of the treaty? Are the amendments of the laws of the Chickasaw Nation made by its legislature in 1887 and in 1890, which by their terms prohibit the plaintiff from acquiring any rights of citizenship in that nation by her intermarriage with the white widower of a deceased Indian woman, void, in the face of the treaty, or are they consistent with its provisions and with the acts of congress, and fatal to the claim of the plaintiff in error? The consideration and decision of these questions were indispensable to the determination of the plaintiff in error's right to the citizenship she sought, and the acts of congress intrusted their consideration and decision to the judgment and discretion of the commission, and not to those of the courts. Under these acts of congress the commission to the Five Civilized Tribes is a special tribunal, vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refusal to enroll the applicant in each particular case constitutes its judgment in that cause. In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the judicial discretion of the commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled rules to which attention was called in the opening of this opinion, no

court has jurisdiction by the use of the writ of mandamus to substitute its own opinion for that of the tribunal to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors, or to reverse its decision. The judgments of the courts below were right, and they are affirmed.

CHICAGO, R. I. & P. RY. CO. v. WOOD.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,377.

CARRIERS—INJURY OF PASSENGER AT STATION—TERMINATION OF RELATION OF CARRIER AND PASSENGER.

The relation of carrier and passenger between a railroad company and a passenger on one of its trains is not terminated when the passenger alights at a station, until he has had a reasonable time, under all the circumstances, to leave the station; and a woman alighting at a station in the early morning, while it was dark, and who was injured immediately afterwards, by falling from the platform owing to the darkness, there being no one at the station, and no lights in or around it, is not debarred from recovering for the injury because she had formed the intention of remaining at the station until daylight.¹

In Error to the Circuit Court of the United States for the District of Kansas.

J. D. McFarland (M. A. Low and W. F. Evans, on the brief), for plaintiff in error.

J. D. Houston, C. H. Brooks, and E. N. Smith, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Nancy A. Wood, the plaintiff below and defendant in error, was a passenger on one of the regular passenger trains on the Chicago, Rock Island & Pacific Railway Company, the defendant below and plaintiff in error, from Kansas City to Whitewater, a regular station on the defendant's road. The train bearing Mrs. Wood arrived at Whitewater Station about 4 o'clock on a foggy, misty morning, while it was very dark. By the aid of the light afforded by the train she got off of the car and entered the station. There was no station agent at the station, and no light in the station or on the platform or elsewhere, and when the train pulled out she was left in utter darkness. The platform of the station was three feet above the ground, and extended around the building, and had no railing. Immediately after entering the station, Mrs. Wood had occasion to seek a water-closet, and while proceeding cautiously in the dark to find one, and without any negligence on her part, she fell from the platform to the ground, and sustained the injuries complained of. We do not understand that it is controverted that it was the duty of the railway company to have

¹ Continuance of passenger relation, see note to *Railway Co. v. King*, 40 C. C. A. 437.

an agent at its station, and to have its station and platform lighted, and to provide a water-closet accessible to its passengers without risk or danger. The defense in the case is this: Mrs. Wood testified that at or before the time the train arrived at the station she had made up her mind not to leave the station, and go forth in the darkness to find the residence of the friend she had come to visit; and the contention of the railway company is that this mental resolution to remain in the station until daylight terminated the relation of carrier and passenger at once, and that she cannot recover for an injury resulting from the negligence of the railway company, although it occurred immediately after she entered the station, and before she had had a reasonable time to leave it. The refusal of the circuit court to take this view of the law is assigned for error.

Assuming, but not deciding, that Mrs. Wood would have had no right to remain in the station in the character of a passenger until daylight, she did have the right to remain there and enjoy all the privileges and protection due to a passenger for a reasonable time, under all the circumstances, after alighting from the car. Confessedly that time had not elapsed when she received her injury, and it is wholly immaterial to inquire, therefore, whether it might not have elapsed at some later time after she had received her injury. She has a right to stand on her undoubted legal rights as they stood at the time she received her injury. She is not to be deprived of these rights upon a suggestion that she might have remained at the station long enough to dissolve the relation of carrier and passenger. It is enough to say that that relation had not terminated when she received her injury. A formed resolution to remain in a station for an unreasonable length of time after leaving the car does not excuse the company from performing its duty to a passenger during the time the relation of carrier and passenger continues, or, in other words, until the passenger has had a reasonable time, under all the circumstances, to leave the station. That time the plaintiff had not had when she received her injury. It not being necessary to the decision of the case, we express no opinion on the question whether, upon the facts of this case, Mrs. Wood would not have enjoyed the rights of a passenger in the station if she had remained there until daylight. The judgment of the circuit court is affirmed.

ST. LOUIS MIN. & MILL. CO. OF MONTANA v. MONTANA MIN. CO.,
Limited.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1900.)

No. 594.

1. MINING CLAIMS—SIDE AND END LINES—SECONDARY VEINS.

Where the end lines of a mining claim have been established, they remain the end lines as to all veins found within its surface boundaries.

2. SAME—EXTRALATERAL RIGHTS—VEIN CROSSING COMMON SIDE LINE AT ANGLE.

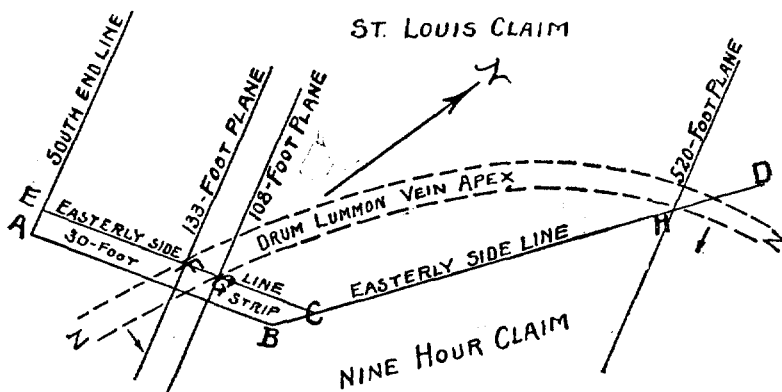
When a secondary or accidental vein crosses a common side line between two mining claims at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly

within the other, inasmuch as neither statute nor authority permits a division of the crossing part of the vein the rights of the parties will be determined by the priority of location, and the entire vein considered as apexing upon the senior location until it has wholly passed beyond its side line, without regard to the direction in which the vein dips.

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Montana.

This is an action originally brought by the St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass, and the value of certain ores alleged to have been wrongfully appropriated and taken by the Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting in a verdict for the plaintiff in error in the sum of \$23,209, plaintiff in error now brings the suit to this court upon certain assignments of error, which, it alleges, deprived it of a larger verdict. There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis mining claim, situated near Marysville, in the state of Montana; and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the Discovery vein and the Drum Lummon vein. The accompanying map gives the general location of the two claims, and all details of description which need be considered in this opinion:



By way of explanation of the map, it may be stated that the line, E, C, D, is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim, and 133 feet southerly from the point, C, on the line, C, E. The line marked "108-foot plane" is a similar plane 108 feet from the said point, C, and the line marked "520-foot plane" is a similar plane 520 feet southerly from the northeasterly corner of the St. Louis claim on the line, D, C. The strip of land included within A, B, C, E, is a strip 30 feet wide, called in the record the 30-foot or compromise strip. The arrows show the direction of the dip of the vein to be eastwardly, and underneath the Nine Hour claim. The Discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a discrepancy between the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point, H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the

north, and that the foot wall does not pass out of the St. Louis claim until a considerable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts. Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into, by which the owners of the St. Louis claim agreed to convey to the owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip; and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim, and further charged the jury that the line, E, C, was a side line common to the two claims, and that, so long as the Drum Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of \$23,209. A writ of error was sued out by the defendant in error to this court, and this court, in *Montana Min. Co. v. St. Louis Min. & Mill. Co.* (C. C. A.) 102 Fed. 430, sustained the lower court upon these propositions as submitted to the jury, holding the line, E, C, D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion the 30-foot strip will not be treated separately, but will be regarded as part and parcel of the Nine Hour claim. Upon the trial, however, the plaintiff in error further offered evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made—First, as to the portion of the vein between said planes underneath the 30-foot strip; and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip. But, for the purpose of applying the principles of law which will control here, these two offers may be considered as one, in accordance with the decision in 102 Fed. 430, *supra*. The court sustained objections to the evidence offered, and, upon assignments of error based upon these rulings, the case is now before this court.

Arthur Brown, H. P. Henderson, E. W. Toole, and T. C. Bach, for plaintiff in error.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error raise but one question which need now be passed upon, all others having been adjudicated, upon the writ of

error of the defendant in error herein, in the case of *Montana Min. Co. v. St. Louis Min. & Mill. Co.* (C. C. A.) 102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But, while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question. Two important elements enter into the consideration of mining rights: First, the surface boundaries, defining the rights acquired by reason of a vein or veins apexing within such boundaries; and, second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line, E, C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line, E, C, is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. *Iron Silver Min. Co. v. Elgin Min. & Smelt. Co.*, 118 U. S. 196, 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; *Walrath v. Champion Min. Co.*, 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. Ed. 170. This court has already determined that the line, E, C, D, is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides:

"The locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part thereof," and that, under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim. For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line, and 25 feet

in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitably be cut by a plane parallel with and midway between the 108 and 133-foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the senior locator (*Argentine Min. Co. v. Terrible Min. Co.*, 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. Ed. 1140), the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule, and its application to the case before the court, should be the same whether the vein dips towards the junior location or towards the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit only remains so long as the entire vein is within the claim, cites the case of *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, the decision in which was affirmed by the supreme court of the United States. 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87. But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply. If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex, or in this case the footwall. It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed, which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the

crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.

ROSS, Circuit Judge. I dissent. The case of *Montana Min. Co. v. St. Louis Min. & Mill. Co.* (C. C. A.) 102 Fed. 430, referred to in the foregoing opinion, affirmed the existence of extralateral rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. 102 Fed. 430. The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should be granted, and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line, only, be discussed by counsel, and fully considered by the court, before final determination.

UNITED STATES v. McCOY et al.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1900.)

No. 599.

1. POST OFFICE—ACTION ON MAIL CONTRACTOR'S BOND—EVIDENCE OF BREACH.

In an action by the United States on the bond of a mail-route contractor, to recover damages resulting from the alleged abandonment of the contract by defendant, where the answer contains a general denial it is incumbent on the plaintiff to prove the alleged abandonment; and a certificate of the postmaster general and correspondence of the post-office department in relation thereto, and a telegram from a postmaster to the department stating the fact of abandonment, are insufficient to make out a prima facie case of entire failure to perform the contract.

2. SAME—FINES FOR VIOLATION OF CONTRACT—EVIDENCE.

A document authenticated by the postmaster general, under the seal of the department, reciting the imposition of a fine upon a mail-route contractor for nonperformance of his contract, as authorized by Rev. St. § 3962, is admissible as evidence of such fact, under section 882, and is sufficient, prima facie, to support a charge against the contractor, in his account with the department, of the amount of the fine.

Appeal from the Circuit Court of the United States for the Southern Division of the District of Washington.

This suit was brought by the United States against C. C. McCoy, as principal, and David W. Small, William O'Donnell, and Thomas Mosgrove, as bondsmen, for \$5,772.99 and interest, alleged to be the amount of actual damages sustained by the United States on account of the failure of McCoy to perform a contract entered into by him with the United States for the transportation of mail matter on route No. 76,475. On the trial of the cause the court below granted a motion for a judgment of nonsuit "because of the legal insufficiency of plaintiff's evidence to make out a prima facie case." The case is now before this court upon the assigned error of this ruling. It appears that on January 10, 1890, the defendant in error C. C. McCoy and his co-defendants, as bondsmen, entered into a contract with the United States for the transportation of mail in the city of San Francisco, Cal., under which the said McCoy was to furnish certain equipment for carrying the mails, and to perform certain service described in the advertisement of the postmaster general of September 16, 1889, inviting proposals for such service, and to perform all new or additional service of the same character which might at any time during the term of said contract be required in said city, for the sum of \$7,700 per year. The term of the contract extended from July 1, 1890, to June 30, 1894. McCoy proceeded with his undertaking, being permitted by the postmaster general to sublet the said contract on two different occasions—First, to A. W. Branner, for the sum of \$7,500 per annum; and, second, on the 1st day of December, 1890, to N. Wines, for the sum of \$9,900 per annum. From November 10, 1890, the postmaster general required the contractor to perform additional service without additional compensation, in accordance with the terms of the contract. From February 16, 1891, a further service was required; and from October 1, 1891, still further service. It is alleged that on the 8th day of May, 1893, the said McCoy and the said subcontractors abandoned the said contract, and failed and refused to perform the same; that on the following day said McCoy was notified by the postoffice department that unless he should promptly put the service into operation he would be declared a failing contractor, that the service would be let at his expense, and that his sureties would be held subject to the penalties of law; also, that the postmaster at San Francisco had been authorized to employ temporary service, pending the resumption of service of the said contractor, at the rate of \$17,500 per annum; and on May 17, 1893, said McCoy having failed to perform the service on route No. 76,475, an order was made by the second assistant postmaster general declaring the said C. C. McCoy a failing contractor. It is further alleged that, by reason of this failure of the said McCoy to carry the mails as agreed, the government was compelled to procure temporary service from May 5 to August 13, 1893, for which service the amount of \$4,827.77 was paid; that in addition to this amount the said McCoy was fined \$5 for failure to perform the agreed service during the third quarter of the year 1893. A contract was awarded to one Max Popper, of San Francisco, for the performance of the service during the remainder of the term, namely, from August 14, 1893, to June 30, 1894, at the rate of \$12,000 per annum, this being the lowest bid obtainable; and in accordance therewith the said Max Popper continued to deliver the mail as the said C. C. McCoy had himself agreed to do. The difference between the amount of the contract to McCoy and that to Popper for the specified time is \$3,785.87, which is claimed to be chargeable to the defendants in error. As an offset to this claim, credit is given for the amount the said McCoy would have been entitled to receive had he complied with his contract to the end of the term, to wit, \$2,845.65, leaving a remainder of \$5,772.99, the actual damage claimed by the plaintiff by reason of the failure of McCoy to perform said contract. The defendants made a general denial to the allegations of the complaint. On the hearing of the case the plaintiff put in evidence certain documents, as follows: A certified copy from the records in the auditor's office of the postoffice department of the account of C. C. McCoy as failing contractor for amount of actual damage to the United States; certified copy of postmaster at Walla Walla, Wash., to the auditor, that said postmaster had made demand on C. C. McCoy and upon two of his sureties for payment of \$30,000; a certified copy of account for amount of bond of C. C. McCoy, failing contractor; copy of proposals and advertisements to bidders for mail transportation service;

copy of contract and bond entered into by the defendants in error with relation to the transportation of mails on route No. 76,475; recognitions by the postmaster general of subcontracts for the service under this contract; requirements of postmaster general for additional service by contractor; two telegrams from postmaster at San Francisco to department at Washington, D. C., regarding abandonment of service by McCoy; communications to the defendants from postoffice department regarding failing contract; orders of postmaster general declaring McCoy a failing contractor, and recognizing contracts for temporary service with J. N. Gorman, and for service for balance of term with Max Popper; contract and bond of Max Popper for this service to completion of term; statements of various fines imposed upon McCoy while acting as contractor. No other evidence was offered by the plaintiff, and its case rested upon this showing.

Wilson R. Gay, U. S. Atty., and Chas. Ethelbert Claypool, Asst. U. S. Atty.

W. T. Dovell, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

A material allegation of the complaint was "that on the 8th day of May, 1893, the said C. C. McCoy and the said subcontractors did abandon the said contract, and did fail and refuse to perform the same." The general denial of the answer placed this allegation of the complaint in issue, and it devolved upon the plaintiff at the trial to establish the fact alleged by competent proof. The statement of McCoy's account by the auditor of the postoffice department; the telegram of the postmaster at San Francisco to the second assistant postmaster general, dated May 8, 1893, stating that the contract had been abandoned; the letter of the second assistant postmaster general, dated May 17, 1893, and addressed to the postmaster at San Francisco, approving the action of the latter in employing temporary service for the route; the certificate of the postmaster general dated May 18, 1893, declaring that McCoy had failed to perform the service, and was a failing contractor,—were all legally insufficient to establish the fact that McCoy had wholly abandoned the performance of his contract. The postmaster at San Francisco appears to have had knowledge of the fact, and all the subsequent proceedings were based upon his statement of the fact in the telegram to the second assistant postmaster general, but his testimony as to the fact was not obtained in this case. Section 3962 of the Revised Statutes provides that the postmaster general may make deductions from the pay of contractors for failures to perform service according to contract, and he is authorized to impose fines upon them for other delinquencies; but this authority does not extend to the making of a certificate that a contractor has wholly abandoned his contract, nor does it provide that, if such a certificate is made, it shall be admitted in evidence as proof of the fact of abandonment, in support of a claim for damages incurred by reason of the increased expense of the service under a new contract. The court was, therefore, right in holding that the documents offered in evidence by the plaintiff were legally insuffi-

cient to make out a prima facie case for damages on account of the alleged entire failure of McCoy to perform the service provided in his contract. But the statement of the account contains a charge of \$5 for a fine imposed by the postmaster general upon the contractor for a delay of 16 hours on July 5, 1893, in dispatching 11 pouches of mail for the S. F. & S. C. R. P. O. The evidence that this fine was imposed is contained in a document authenticated by the postmaster general under the seal of the department, as required by section 882 of the Revised Statutes, which provides that copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. The document reciting the action of the postmaster general in imposing this fine, authenticated in accordance with this section of the Revised Statutes, was offered and admitted in evidence, and was prima facie evidence that the fine had been imposed as authorized by section 3962 of the Revised Statutes. The accounting officers of the postoffice department may certify to facts which come under their official notice. *U. S. v. Jones*, 8 Pet. 375, 384, 8 L. Ed. 979; *Bruce v. U. S.*, 17 How. 437, 441, 15 L. Ed. 129. They had this evidence before them, and it was official information that the fine had been imposed. The statement of account was therefore prima facie evidence of this charge of \$5, and, if this evidence was not overcome by competent proof, entitled the United States to a verdict and judgment for that amount. Judgment reversed, with instructions to the court below to take further action in accordance with this opinion.

In re BEMIS.

(District Court, N. D. New York. November 9, 1900.)

BANKRUPTCY—RIGHT TO DISCHARGE—CONCEALMENT OF PROPERTY.

A bankrupt had for some years been doing a very large and lucrative business as an eye specialist, and had accumulated property, all of which he transferred to his wife; and within a year prior to filing his petition in bankruptcy he also transferred his business to her, claiming thereafter to have been employed by her at a salary. No consideration was shown for the various transfers, there was no visible difference in the conduct of the business, and the bankrupt continued up to the time of filing his petition to keep a bank account in his own name, from which he had checked several thousand dollars within the previous two years, in payment of insurance, repairs, taxes, etc., on property previously transferred to his wife; but he kept no books from which the state of his affairs could be learned, and made no report accounting for the money so paid out or for his salary. *Held*, that he was guilty of a fraudulent concealment of his property, as well as a failure to keep books, which debarred him from the right to a discharge.

In Bankruptcy. On motion to confirm report of referee recommending that a discharge be denied the bankrupt, and on exceptions thereto.

T. D. Trumbull, Jr., for bankrupt.
King & Angell, for objecting creditors.

COXE, District Judge. The specification charging concealment is defective in that the essential averment, that the acts were done "knowingly and fraudulently," is omitted, but as the evidence has been taken upon the theory that the specification was properly drawn, no injury can result from allowing an amendment nunc pro tunc. *In re Pierce* (D. C.) 103 Fed. 64.

The referee recommends that a discharge be refused upon the ground, first, that the bankrupt has concealed property from his trustee; second, that he has failed to keep books of account or records from which his true condition might be ascertained.

The testimony has been examined with care, in the light of the briefs and of the oral argument, with the result that the court concurs in the opinion of the referee that a discharge should be denied. The bankrupt's conduct in transferring to his wife every vestige of property formerly owned by him, and his neglect to keep any satisfactory record by which his property can be traced or his financial condition ascertained, leads to the inevitable conclusion that these acts were committed and omitted knowingly and fraudulently, and with intent to conceal the true condition of his affairs from his trustee and his creditors. The bankrupt was adjudicated upon his own petition December 1, 1899. Prior to January, 1898, he kept no books of any kind, and since that time his books have been of the most crude and unsatisfactory character, although his business, that of an "eye specialist," has been very extensive, aggregating in one year, 1897, from \$40,000 to \$70,000. It is absolutely impossible to arrive at an accurate, or even an approximate, estimate of the extent of this business during the four or five years preceding the filing of the petition. Prior to October, 1897, the bankrupt transferred his real property to his wife, but the consideration for the transfer is not shown. In 1899 it is alleged that the entire business was transferred to the bankrupt's wife and that he was employed by her at an annual salary of \$2,500. That this transfer was made in view of threatened litigation is not denied by the bankrupt. No attempt has been made to account for the salary. So far as external appearances are concerned the business continued after the transfer precisely as it had before. The transfer of property to the wife without apparent consideration, the failure to keep accurate books, the large and lucrative business conducted by the bankrupt, so far as outward appearances were concerned, in his own name, are all admitted by his counsel, but it is asserted that the property and business were actually and in good faith transferred to the wife and that he has no interest in either. The court could not accept this view even if the testimony stopped at this point. The presumptions drawn from such an unusual and wholesale transfer and the failure to keep books by which the value of the property and business can be traced are incompatible with an honest purpose. But it is not

left to presumption. The bankrupt did not observe even the usual precaution in such cases, of acting, so far as outward appearances are concerned, as agent for his wife. He kept an individual bank account and drew his own checks to pay for taxes, repairs, insurance and interest on the property standing in his wife's name, amounting to over \$10,000 in a little over two years. The pretense that this money belonged to the bankrupt's wife has nothing but his testimony to support it, and in no event could she have acquired title to it except by reason of the colorable transfer to her prior to October, 1897. That money earned by the bankrupt in his business, prior to the pretended transfer to his wife, went into this real estate in the form of improvements, taxes, etc., is clearly established by the proof. No part of this money has been accounted for. The testimony further shows that from October, 1897, to January, 1899, the bankrupt paid by his personal checks over \$7,000 on stock of the Glens Falls Savings & Loan Association standing in the name of his wife. No return of this money or any part thereof has been made. The transfer of the personal property to the bankrupt's wife in 1894, as testified to by him, vested in her a title as unique as it is informal. He says:

"I transferred my furniture and materials to my wife in 1894. Q. Did you transfer them by written instrument? A. No. Q. How did you do it? A. I simply gave them to her. Q. What did you say? A. I told her I was going to do it and did it. Q. What did you tell her? A. I cannot remember what I told her then. Q. What is your best recollection? A. I gave her to understand the property was all hers."

The business was transferred to Mrs. Bemis on the 1st of January, 1899, in a similar manner.

"I made a proposition to her at home. Q. In whose presence? A. I could not tell you. Q. What did she say to that? A. She was of course willing. Q. Did she say anything about it? A. She told me I understood the business and to manage it. Q. You said that you would carry on the business for her and keep account; was there anything done in writing? A. No, sir. * * * Q. What purpose did you have? A. I was afraid of Dr. Palmer bringing lawsuits against me."

Regarding his system of bookkeeping or, more accurately speaking, his entire lack of system, the bankrupt says:

"Q. Did you have books in which you made or caused to be made entries of any kind during that time? A. No, sir. Q. What were those books? A. Every man has books, don't they? Q. Did you have books? A. I say I never had any regular line of books; I had books, certainly. I cannot remember anything about them. Q. Don't you remember anything about what those books were? A. I cannot tell you anything about that. Q. Where were they? A. I have seen them. Q. Where? A. At the office. Q. Where are they now? A. Around somewhere. Q. Where do you suppose they are; have you any idea? A. No."

These books were not produced, but subsequently a book containing stubs of checks was produced but in a mutilated condition, the stubs of checks drawn since September 4, 1899, having been torn out. No explanation of the disappearance of this important piece

of evidence appears upon the record and none has been given which the court is at liberty to consider.

Enough has been said to demonstrate the inequitable and disingenuous conduct of the bankrupt. A large and valuable property has been placed beyond the reach of creditors, and nothing which the bankrupt has said or done has aided the trustee in his endeavor to disentangle the inextricable confusion in which the estate is involved. On the contrary the bankrupt has apparently placed every obstacle which his ingenuity could invent in the path of the trustee, and has so mixed up his own and his wife's money that it is impossible to tell how the account between them stands, even assuming that all the transfers to her are valid. The court is convinced that some, at least, of the transfers to the wife were only temporary makeshifts, intended to meet an unusual exigency, to be ignored as soon as the bankrupt could safely resume dominion over his property. No impartial person can, it is thought, read the bankrupt's testimony without being convinced that some part of the large property which he has earned and handled in recent years, and which is now in the name of his wife, belongs to his creditors, and that the bankrupt has not only concealed this property, but the evidence by which its true status can be discovered. The case clearly falls within the rule enunciated in the following cases: *In re Hirschman*, 104 Fed. 69, 4 Am. Bankr. R. 715; *In re Hoffman* (D. C.) 102 Fed. 979, 4 Am. Bankr. R. 331; *In re Quackenbush* (D. C.) 4 Am. Bankr. R. 274, 102 Fed. 282; *In re Walther* (D. C.) 95 Fed. 941, 2 Am. Bankr. R. 702; *In re Mendelsohn* (D. C.) 102 Fed. 119, 4 Am. Bankr. R. 103; *In re Bragasa* (D. C.) 103 Fed. 936, 4 Am. Bankr. R. 519; *In re Welch* (D. C.) 100 Fed. 65; *In re O'Gara* (D. C.) 3 Am. Bankr. R. 349, 97 Fed. 932; *In re Ablowich* (D. C.) 99 Fed. 81. The report of the referee is confirmed and the discharge is refused.

IN RE FINLAY.

(District Court, S. D. New York. November 1, 1900.)

BANKRUPTCY—ADMINISTRATION OF ESTATE—SETTING ASIDE ASSIGNEE'S SALE.

Although it satisfactorily appears that a sale of property of bankrupts by an assignee to the wives of the bankrupts, the proceeds being subsequently turned over to the trustee in bankruptcy, is voidable, yet where the property has been resold, and such time has elapsed that it is doubtful whether the setting aside of the sale and the suit for an accounting thereby rendered necessary would result in any benefit to the estate, it will not be set aside at the instance of creditors, unless upon their giving a bond to indemnify the trustee for any loss which may result to the estate.

In Bankruptcy. On motion to set aside a sale of the bankrupt's property.

Stern, Singer & Barr and Myers, Goldsmith & Bronner, for the motion.

Weed, Henry & Meyers, opposed.

BROWN, District Judge. Had all the facts which appear on this motion been ascertained and made known to the court on the previous application in February last, I should not have hesitated to set aside the sale. Without in any way impeaching the good faith of the assignee, there are too many cumulative circumstances indicative of unfair advantage, if not of positive fraud, in procuring the sale of the assets to the injury of creditors and to the advantage of the bankrupts through their wives, to permit the sale to stand. After the lapse of nearly eight months, the difficulty now is as respects the probability of any practicable relief that would afford any material benefit to the creditors. Assuming, as contended by the creditors, that the money used by the bankrupts' wives to purchase the stock was the money paid them by the bankrupts before the institution of bankruptcy proceedings, still under the decision of the supreme court in the case of *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, 4 Am. Bankr. R. 163, the payment of those moneys by the wives for the stock could not be disregarded, nor could that money be retained by the trustee upon setting aside the sale, but it would have to be returned. The amount realized on the sale was about \$4,800, of which the assignee received net about \$4,500. Since that time the assignee's accounts have been passed, the assignee discharged and the moneys paid over to the trustee in bankruptcy. The actual value of the stock sold is not determined with any certainty. The estimates of the bankrupts upon which the value of \$13,000 is now placed upon the stock, are by no means conclusive, or even satisfactory authority. According to the creditors' affidavits, there are no means of ascertaining how much of the stock was afterwards sold in New York, nor the amount of proceeds received therefor, before the balance was turned into the corporation known as the Finlay Company. For any relief, supposing I were to grant an order setting aside the sale, a bill in equity must be filed in the state court for an accounting as respects the goods or their proceeds, to which all persons concerned in the disposition of the goods subsequent to the sale and against whom relief was sought would be necessary parties. After this lapse of time and the various changes that have occurred, I think the prosecution of such a suit would be attended with much labor and expense, and, looking at all the circumstances, I have so much doubt as respects any beneficial final result, that I think I ought not to set aside the sale except upon security given by the creditors to indemnify the trustee against any loss or expense occasioned thereby, or by the subsequent proceedings to recover assets. An additional reason for this is, that if there is any such fraud as would justify a retention by the trustee of the moneys paid by the wives, that same fraud would enable the trustee to recover from them directly at least the \$4,000 paid to them by their husbands shortly prior to bankruptcy, without the burden

of establishing the further right to an accounting in a plenary suit for the goods or their proceeds. Should a bond as above provided be furnished within 20 days, an order may be entered setting aside the sale; otherwise the motion will be denied.

In re HEYMAN.

(District Court, S. D. New York. November 2, 1900.)

BANKRUPTCY—RIGHT TO DISCHARGE—FICTITIOUS MORTGAGE.

The bankrupt, a woman, scheduled a debt to her sister for \$3,000 for borrowed money, secured by mortgage on the bankrupt's household effects and paintings. The sister did not prove her debt, and on a contested application for discharge the only testimony to support the validity of the mortgage was that of the bankrupt herself, from which it appeared that at the time it was claimed the loans were made the sister was an orphan, unmarried, and but 18 or 20 years of age, who had inherited no property, and had no business or occupation or apparent means, and who lived for the most part with her brothers or sisters. Her testimony was not taken by the bankrupt, although there was full opportunity, and the creditors were unable to obtain service of a subpoena upon her. *Held*, that on such testimony the mortgage must be regarded as fictitious, and a discharge refused.

In Bankruptcy.

Robert L. Turk, for bankrupt.

Charles Strauss, for opposing creditors.

BROWN, District Judge. I must withhold discharge in this case. The bankrupt's testimony presents so improbable a story, and is so destitute of any corroborating circumstance whatever, that I cannot resist the conviction that the alleged debt of \$3,000 for moneys loaned by the sister is largely, if not wholly, fictitious. The schedules state this debt as accruing on February 26, 1898. The bankrupt says that it was made up of sums of \$50 to \$100 loaned at various times during a year or two preceding. The sister was unmarried and at that time was only from 18 to 20 years of age. Her father and mother were dead and left her no property. She had no business and was earning nothing. No apparent means of hers are shown. The bankrupt could give no further particulars. The greatest efforts were made by the creditors to procure the attendance of the sister as a witness—all unsuccessful. Unfortunately she died in July, 1899, but until within a few weeks before that she might have been produced by the bankrupt and would have been subpoenaed by the creditors if she could have been found. She lived at various places, mostly with her brothers and sisters, from time to time. She did not prove the debt in bankruptcy. The mortgage given for it was upon the household furniture, paintings and effects of the bankrupt. I cannot conceive that a jury, upon the testimony given, would credit the bankrupt's story or uphold the mortgage as a bona fide transaction. The necessary inference is that it was given to shield the bankrupt's valuable household effects from creditors.

In re LEE PING.

In re LUM TOW.

(District Court, D. Oregon. October 31, 1900.)

Nos. 4,523, 4,524.

ALIENS—CHINESE EXCLUSION ACT—CONCLUSIVENESS OF DECISION OF COLLECTOR.

The Chinese exclusion act (23 Stat. 117) commits the question of the right of a Chinese person to enter this country to the collector of customs, with a right of appeal to the secretary of the treasury, and makes their decision final; and the fact that the collector disregards the plain provisions of the statute, and refuses the right to land to one having a certificate of his student character, conforming to the requirements of the law, and which is not controverted by the United States, does not give a court jurisdiction to review his decision.

On Petitions by Lee Ping and Lum Tow for Writs of Habeas Corpus.

Raleigh Stott and M. L. Pipes, for petitioners.

John H. Hall, U. S. Atty.

BELLINGER, District Judge. The petitioners are Chinese boys, aged, respectively, 16 and 18 years, who have been refused a landing in this country by the collector of customs at this port. The petitioners have certificates as to their student character, viséd by the American consul at Canton, which conform to the requirements of the act of congress in respect to the admission into the country of persons of that class. The act of congress provides as follows:

"Such certificate viséd as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities." 23 Stat. 117.

The order made by the collector in the case of Lum Tow is as follows:

"Portland, Oregon, September 5, 1900.

"Now at this time comes on for hearing the application of Lum Tow, a subject of the emperor of China, for admission to the United States as a student; and after hearing the evidence of applicant and Yee Mow and Lem Chung, witnesses on behalf of the applicant, and statements of applicant do not agree with those in certificate, and being at this time fully advised in the premises, it is ordered that the said Lum Tow be refused a landing, upon the ground that the evidence produced by said applicant is insufficient and unsatisfactory to prove his right to land."

The order in the case of Lee Ping recites that after hearing the evidence of applicant, which did not agree with statements in the certificate, and being fully advised in the premises, it is ordered that the said Lee Bing (Ping) be refused a landing upon the ground that the evidence produced by said applicant is insufficient and unsatis-

factory to prove his right to land. The name appearing in this certificate is Lee Ping, while the name given by the applicant, as appears in the transcript of his testimony, is Lee Bing; and this is probably the discrepancy referred to in the order, since there is no other disagreement (if such a variance, where both statements are through interpreters, deserves to be called a disagreement) between the statements of the witness and those contained in his certificate.

It is argued that the collector was without jurisdiction to take the testimony of the applicants, or that of other witnesses in their behalf, or to decide thereupon that the evidence produced by them was insufficient. It goes without saying that such testimony was irrelevant; that the certificates are, as the act of congress provides, the sole evidence permissible on the part of the applicants of their right to land. But if, notwithstanding the plain declaration of the statute that such certificates, not being controverted and disproved by the government, establish a right of entry into the United States, the collector of customs refuses to give them that effect, it does not follow that this court has jurisdiction in the premises. It is true, the collector may be said to be bound to give the effect to the certificates that the act of congress provides they shall have; but it is equally true that all courts are required to decide in conformity to the law, and if they do not so decide their jurisdiction is not lost. The jurisdiction to decide does not depend upon the rightfulness or lawfulness of what is decided. Jurisdiction is the power to decide, not merely the right to decide correctly. The fact that the law is clear makes no difference. The law has committed the question of the right of this class of persons to enter the country to the collector of customs, with a right of appeal to the secretary of the treasury. There is no distinction between the jurisdiction of the collector of customs in these cases and that of inspectors of immigration in the case of other aliens. The Case of Nishimura Ekiu, 12 Sup. Ct. 336, 35 L. Ed. 1146, where the conclusiveness of the action of the inspector of immigration in refusing landing to a subject of Japan was affirmed by the supreme court, is repeatedly cited by that and other courts in decisions which give a like effect to the decision of the collector of customs under the Chinese exclusion acts. It is immaterial, so far as the question of jurisdiction is concerned, how the collector decides, or whether he decides with reason or against reason. Much stress is put upon an observation in the opinion of the circuit court of appeals in this circuit in the case of *U. S. v. Gin Fung*, 40 C. C. A. 439, 100 Fed. 389. The court says:

"If it was an excess of power for the collector to deport petitioner without a hearing, jurisdiction to hear and adjudge could not be assumed by the circuit court. Its power might have been properly exerted to arrest the consequences of the collector's illegal act. It could go no further."

This statement has been heretofore cited in another case, where the jurisdiction of this court was invoked to reverse the action of the collector of customs in refusing to land a Chinese person. I say now, as I said in that case, that it is not apparent what jurisdiction this court could have exercised in the case at issue. In other words,

what is meant by the circuit court of appeals in the statement quoted? If the court means to intimate that it was within the power of this court to interpose and prevent the deportation of the petitioner until there could be a hearing or pending a hearing on his appeal to the secretary of the treasury, then it is a sufficient answer to what is claimed for the statement thus quoted to say that in these cases the collector has fully determined the question presented to him, and the petitioners have had their appeal, which has been decided against them by the secretary of the treasury. I am convinced that the court in the case cited meant no more than to say that it was possible that this court might by some process have restrained the deportation of the petitioner until such time as his right of appeal could be exercised and his appeal determined. I am not now advised as to what the court might or could do in such a case to arrest what is called "the consequences of the collector's illegal act," but it is very clear that the consequences to be arrested in that case were merely those which operated to deprive the petitioner of his right to the remedy provided for by the statute, namely, his right to the remedy of an appeal; and, if it is within the power of the court to see that the petitioner has the benefit of the process which the law has allowed him, it does not follow that the court can interfere in any other case. In these cases, as in the other cases cited, the collector, to whom the law has committed the question of the right of these petitioners to land, has determined that question; and the only question now submitted is, not that of the denial of a further hearing, but that of the correctness of the determination so made, and that question, so far as this court is concerned, is not a question at all. So far as the inquiry into the right of the petitioners to enter the country, and all questions relating to that inquiry, are concerned, the collector of customs, and the secretary of the treasury on appeal, constitute the sole tribunal to hear and decide, and they have heard and decided; and as to the correctness and justice of what is decided this court can no more inquire than it can in any case involving the right of a subject of China, under the exclusion acts, to enter the country. In the case of *In re Ota* (D. C.) 96 Fed. 487, where a Japanese, having a domicile and established business in this country, went to Japan, he was refused a landing upon his return to this country, by the immigrant officers of the United States, as an alien immigrant. The court was of the opinion that the applicant, having a domicile here, was not an alien immigrant, within the meaning of the act under which he was excluded, but that, the executive officers of the government having decided otherwise, there was no jurisdiction in the court to interfere in the matter. The court says that the finding of these officers that an alien seeking to land is an immigrant is as conclusive upon the court in a proceeding like this, as their finding in relation to any other fact affecting the alien's right to land. Now, if the finding by these officers of the fact upon which their jurisdiction depends—namely, the fact that the applicant belonged to a class whose right to enter the United States is subject to their decision—is conclusive, there can

be no question in a case like these, where the applicants are admittedly of the class whose right to land is committed to the determination of the collector of the port and the secretary of the treasury.

It is argued that, so far as the question of fact in these cases may be said to be involved, there is no question about it; that where the statute decides there is nothing left for decision. But the collector has decided that there is a question for decision, notwithstanding the statute, and his decision is final. In other words, the law has charged the collector with the duty of enforcing this statute, and the fact that he disregards it does not invest the courts with jurisdiction to enforce it.

Ex parte JACOBI.

(Circuit Court, E. D. Louisiana. August 20, 1900.)

1. APPEAL—HABEAS CORPUS—DECISION IN CHAMBERS.

The decision of a circuit judge in chambers in a habeas corpus proceeding is not a final decision of a court from which an appeal will lie.

2. CIRCUIT COURT OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

An appeal from the decision of a circuit court on an application for a writ of habeas corpus, based on the ground that the applicant is detained in custody in violation of the constitution of the United States, does not lie to the circuit court of appeals, but must be taken to the supreme court.

On Application for Appeal.

R. C. Brickell, A. A. Wiley, and Julius Sternfeld, for petitioner.
Ray Rushton, for respondent.

SHELBY, Circuit Judge. 1. This is an application for an appeal to the United States circuit court of appeals from the decision of a circuit judge at chambers in a habeas corpus case. The decision of a circuit judge at chambers in such case is not the final decision of a court. No appeal lies in such case. *Lambert v. Barrett*, 157 U. S. 697, 15 Sup. Ct. 722, 39 L. Ed. 865; *Carper v. Fitzgerald*, 121 U. S. 87, 7 Sup. Ct. 825, 30 L. Ed. 882; *Ex parte Lennon*, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120; Act March 3, 1891; Rev. St. §§ 763, 764.

2. The traverse of the sheriff's return alleges that Sanford Jacobi is detained in custody in violation of the constitution of the United States. The case, therefore, is one involving "the construction or application of the constitution of the United States." This is also shown by the assignment of errors. In such case, if decided by the circuit court, the appeal could only be taken to the supreme court. It could not be properly taken to the court of appeals. Act March 3, 1891, §§ 5, 6; *Pennsylvania Mut. Life Ins. Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; *Holder v.*

Aultman, Miller & Co., 169 U. S. 88, 18 Sup. Ct. 269, 42 L. Ed. 669; Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522, 36 L. Ed. 266; Railroad Co. v. Adams, 35 C. C. A. 635, 93 Fed. 852; City of Macon v. Georgia Packing Co., 9 C. C. A. 262, 60 Fed. 781; and City of Dawson v. Columbia Ave. Saving-Fund, Safe-Deposit, Title & Trust Co., 42 C. C. A. 258, 102 Fed. 200, and cases cited in last case. The application for appeal is denied.

INGERSOLL et al. v. HOLT et al., Commissioner of Patents.

(Circuit Court, N. D. California. October 29, 1900.)

No. 12,873.

1. PATENTS—SUITS TO OBTAIN ISSUANCE—REISSUES.

Rev. St. § 4915, which provides that, "whenever a patent on application is refused, * * * the applicant may have remedy by bill in equity," applies to applications for a reissue as well as to original applications.

2. SAME—PLEADING—SUFFICIENCY OF BILL.

In a suit brought under Rev. St. § 4915, to obtain the reissue of a patent refused by the patent office, the court exercises original jurisdiction, and the inquiry extends to the invention as an entirety, the right of the complainant to be determined on all competent evidence, and not merely on the record made on the patent office; hence the bill must fully disclose the facts upon which the invention is claimed.

In Equity. On demurrer to bill.

Wheaton & Kalloch, for complainants.

Scrivner & Hopkins, for respondents.

MORROW, Circuit Judge. This is a suit in equity, brought by the complainants under section 4915 of the Revised Statutes of the United States, to obtain the reissue of certain letters patent. The complaint is demurred to by the respondents upon several grounds, presenting the following questions for consideration: Does the remedy provided in section 4915 of the Revised Statutes cover an application for the reissue of a patent? If so, does the bill of complaint herein state with sufficient particularity the facts upon which the reissue of patent is asked?

Section 4915 provides:

"Whenever a patent on application is refused, either by the commissioner of patents or by the supreme court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear."

The respondents contend that the words "patent on application," at the beginning of the section, cannot be construed to include applications for reissue of patents, and that, therefore, the controversy in the present suit arising upon an application for the reissue of a

patent, this court has no jurisdiction in the matter. In support of this contention it is argued: That section 4915 of the Revised Statutes is a substantial re-enactment of section 16 of the patent law of 1836. That in 1837 an additional act was passed, section 8 of which provided the same remedy in the case of the rejection of an application for the reissue of a patent as in the case of the original application, as follows:

"That whenever application shall be made to the commissioner for any addition of a newly-discovered improvement to be made to an existing patent, or whenever a patent shall be returned for correction and re-issue, the specification of claim annexed to every such patent shall be subject to revision and restriction, in the same manner as are original applications for patents; the commissioner shall not add any such improvement to the patent in the one case, nor grant the re-issue in the other case, until the applicant shall have entered a disclaimer, or altered his specification of claim in accordance with the decision of the commissioner; and in all such cases, the applicant, if dissatisfied with such decision, shall have the same remedy and be entitled to the benefit of the same privileges and proceedings as are provided by law in the case of original applications for patents."

—That this section was not incorporated into the Revised Statutes, and therefore the remedy has ceased to exist in cases of applications for reissue of patents.

The first step in construing a statute is to examine the language of the statute itself. The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if congress erred in that revision. Resort may only be had to the prior laws when necessary to construe doubtful language used in expressing the meaning of congress. *U. S. v. Bowen*, 100 U. S. 508, 513, 25 L. Ed. 631. Where is the doubtful language in the section in controversy? It says, "Whenever a patent on application is refused, * * * the applicant may have remedy by bill in equity." Is not this a simple, concise statement of the intention of the legislature to include patents of any nature within the remedy? No specification is made of patents on original application or patents on reissue application, but the general term is used, which will include patents applied for under any conditions that may arise in such proceedings. That a reissued patent has the same standing in the law as an original patent is undoubted. The statutes so provide, and the courts so construe them in innumerable cases. A patent is granted originally to secure certain rights to inventors for a limited time. A reissued patent merely secures those rights more definitely in some particular wherein the original patent was defective. Is it reasonable to suppose that congress intended to limit judicial consideration to the claims for a patent first presented, regardless of their accuracy or completeness? The answer is self-evident, and it is not surprising that no authorities can be cited in this connection. The demurrer will be overruled as to the want of equity in the bill and to the absence of jurisdiction in this court.

The bill is also demurred to as insufficient in not specifically setting forth the reasons why the patent should be amended, and a re-

issue granted. Under the statute (section 4915, Rev. St.) this court has original jurisdiction in controversies of this nature, and does not proceed as an appellate tribunal. *Wheaton v. Kendall* (C. C.) 85 Fed. 666, 671. The original patent having been surrendered for reissue, interference declared, an adverse decision rendered, and a reissue refused, the patent is entirely avoided (*Peck v. Collins*, 103 U. S. 660, 26 L. Ed. 512), and the plaintiff now stands in the position of one applying for an original patent, subject to the ordinary rules of equity practice and procedure. The case is not confined to the record made in the patent office, but is prepared and heard upon all competent evidence adduced, and upon the whole merits. Jurisdiction is conferred by the statute to adjudge whether or not the applicant is entitled, according to law, to receive a patent for his alleged invention. *Butterworth v. Hoe*, 112 U. S. 50, 61, 5 Sup. Ct. 25, 28 L. Ed. 656. As this inquiry will not be confined to the claims of the patent sought to be amended upon application for reissue, or to the claims in controversy in the interference proceedings, but will extend to the invention as an entirety sought by the plaintiff to be secured by letters patent, the bill should fully disclose the facts upon which the invention is claimed, and the particulars of the application for patent. A bill in equity upon an alleged infringement "must contain such a description of the patented invention as will apprise the court of the particulars in which it consists, or it must make profert of the letters patent upon which it is based." *Walk. Pat.* (2d Ed.) § 579. The same requirements apply to a bill for the obtaining of a patent refused by the commissioner. The demurrer upon this point will be sustained.

DOE et al. v. SPRINGFIELD BOILER & MFG. CO.
(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 602.

1. ADMIRALTY—SERVICE OF PROCESS—FOLLOWING STATE STATUTE.

Service of monition in admiralty may be made under the provisions of a state statute regulating the mode of service in actions at law and in equity.

2. FOREIGN CORPORATIONS—SERVICE OF PROCESS—CALIFORNIA STATUTE.

Under Code Civ. Proc. Cal. § 411, which authorizes service of process on foreign corporations "doing business and having a managing or business agent, cashier or secretary within this state," by service on such agent, cashier, or secretary, to render such a service effective, where made on a person as the business agent of a foreign corporation, the corporation must be in fact doing a substantial part of its business within the state, so as to be subject to the statute, and the agent must be one having actual derivative authority bearing a close relation to that of managing agent, cashier, or secretary, and not merely an agency created by construction or implication, contrary to the intention of the parties.

3. SAME—BUSINESS AGENT.

A broker in San Francisco, at his own solicitation, was furnished prices by a machinery manufacturing corporation of Illinois, and occa-

sionally made a sale of articles made by it, to be delivered on board cars at the factory, adding to the price given him a commission for himself. The company declined to appoint him an agent, and paid him nothing. *Held*, that such transactions did not constitute a doing of business by the corporation in California, nor make such broker its business agent in that state, within the meaning of Code Civ. Proc. § 411, so that service of monition upon him in a suit in admiralty would give the court jurisdiction of the corporation.

Appeal from the Circuit Court of the United States for the Northern District of California.

Appellants are the owners of the steamer Weeott. Appellee is a corporation organized under the laws of Illinois, and engaged in business at Springfield, in that state. W. H. M. Smallman is a commission broker having an office in San Francisco, Cal. The libel in this case was filed by appellants June 5, 1899, to recover damages for alleged defects in certain machinery and boilers purchased by appellants from the appellee under a contract made May 13, 1898. Service of monition was returned as having been made "on W. H. M. Smallman, agent of Springfield Boiler & Mfg. Co.," June 7, 1899. Appellee thereafter specially appeared, and moved to set aside the service upon the ground "that Smallman was not at that time, or at any other time, a managing or business agent of the defendant upon whom such or any service could be made that would be binding upon the corporation." From the affidavits, testimony, and exhibits introduced upon said motion, it appears that in December, 1897, Smallman applied to appellee to become its selling agent; that it declined to appoint him, but agreed to quote him bottom prices on the goods manufactured by it; that in pursuance of this agreement he found several persons, including appellants, who bought goods of appellee at the prices quoted by it, with a commission fixed by Smallman added thereto to compensate him for procuring such buyers; that ever since the beginning of such relationship he has maintained an office in San Francisco, Cal., and carried on in his own name the business of commission broker; that appellee never paid him any salary, nor contributed to the payment of any rent for his office, nor paid him anything except the commissions earned by him in his transactions with it; that he procured from the corporation letter paper containing a lithographed letter head of the "Springfield Boiler & Mfg. Co. Office and Works Nos. 308-330 East Grand Ave., Springfield, Ill.," that he devised an addition which was made thereto, viz. "San Francisco Office, 221 Front St. W. H. M. Smallman, Agent." Concerning these letter heads, Smallman testified: "They were furnished by the company, but I paid for them. I was dealing in the goods of various manufacturers besides the Springfield Company, and in my endeavors to do business used the letter heads of those manufacturers, with additions similar to that on the Springfield paper. * * * I designed the additions to the letter heads myself, and received them from the lithographers at St. Louis, who had the original stone. I paid the lithographers' bill for them." The alleged contract was made May 13, 1898, and is evidenced by two letters, one an offer, the other the acceptance. The offer was written on a sheet with the letter head, as above stated, by Smallman, and addressed to Charles P. Doe, managing owner steamship Weeott. The letter states that for a named sum "this company will build and deliver free on board the railroad cars at Springfield, Illinois, two Scotch marine boilers, as per the following specifications. The boilers will be built for the steamship Weeott, and for use on the waters of the Pacific Ocean. [Then follow the items and specifications.] * * * The boilers will be built, in accordance with the attached blue print, and under the supervision of the United States marine inspector for the Springfield district. This company will guaranty you that they will pass the inspection of the United States marine inspector at San Francisco, and that delivery on the railroad cars, at Springfield, Illinois, will be made in seven weeks from the 5th day of the present month. I have already submitted the blue print of the boilers to the

United States marine inspector at this port, and the same has been fully approved by him. [Then follow terms of payment.] If the foregoing is entirely satisfactory to you, will you have the goodness to admit the receipt of this communication, and favor me with your written instructions to go ahead with the work. * * * Yours, very truly, W. H. M. Smallman." The acceptance is as follows: "May 13. W. H. M. Smallman, Agt. Springfield Boiler Mfg. Co.—Dear Sir: Yours of even date at hand, containing details of boilers for the steamer Weeott. Same are hereby accepted, and you are authorized to proceed with the work. Truly yours, Chas. P. Doe, Mg. Owner." The testimony of Mr. Doe is to the effect that Smallman never informed him that he was acting as a broker, and not as agent, for the Springfield Boiler & Manufacturing Company; that he (Doe) at all times during the negotiations understood that Smallman was the agent of said company; that he never paid Smallman any money on account of said corporation without its order. This substantially presents all the material facts contained in the record. The court granted the motion, and set aside the service. Appellants excepted to this ruling of the court, and then stated that they were satisfied with the service of said monition and citation upon Smallman as the agent of the appellee, and that they proposed to rely thereon, and would "not further prosecute the libel herein except the same be based upon said service." The court thereupon entered a final decree "that the said libel be, and the same is hereby, dismissed for want of prosecution." From these orders and decrees this appeal is taken.

Chas. E. Naylor, for appellants.

Morrison & Cope and Walter G. Holmes, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge

HAWLEY, District Judge, after stating the foregoing facts, delivered the opinion of the court.

Was Smallman a business agent of the appellee, upon whom service could be made that would be binding upon it? Service of monition in admiralty may be made under the provisions of a state statute regulating the mode of service in actions at law and in equity. In re Louisville Underwriters, 134 U. S. 488, 493, 10 Sup. Ct. 587, 33 L. Ed. 991. Section 411 of the Code of Civil Procedure of California provides that "the summons must be served by delivering a copy thereof, as follows: * * * (2) If the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state; to such agent, cashier, or secretary." 2 Hitt. Code Civ. Proc. p. 964. The service of process, under the provisions of this statute, is jurisdictional, and must always be such as to constitute "due process of law." The term "business agent," as used in the statute, does not mean every man who is intrusted with a commission or an employment by a foreign corporation. It does not mean every man who does any kind of business for a corporation. It may be said that every employé of a railroad corporation is in a certain sense an agent of the corporation. But it would be absurd to say that a brakeman employed by a corporation was a business agent upon whom service could be made because he performed some business for the corporation, or that an expressman regularly employed by a manufacturing corporation to deliver machinery to its custom

ers is an agent upon whom service could be made under the provisions of the statute. The statute was never intended to include under the term "business agent" every person who might incidentally or occasionally transact some business for a foreign corporation. Its meaning must be drawn from the general context of the language used. The business agent mentioned in the statute means one bearing a close relation to the duties of managing agent, cashier, or secretary of the corporation. It must be an agent who is appointed, designated, or authorized to transact and manage one or more distinct branches of business, which may be, and is, conducted and carried on by the corporation within the state where the service is made,—one who stands in the shoes of the corporation in relation to the particular business managed, conducted, and controlled by him for the corporation. To constitute a managing or business agent upon whom service of summons could be made, the agent must be one having in fact a representative capacity and derivative authority, and not one created by construction or implication, contrary to the intention of the parties. *Mulhearn v. Publishing Co.*, 53 N. J. Law, 150, 20 Atl. 760, 11 L. R. A. 101; *Mikolas v. Walker*, 73 Minn. 305, 307, 76 N. W. 36; *Railway Co. v. Hunt*, 39 Mich. 470; *Kennedy v. Society*, 38 Cal. 151, 153; *Sterett v. Railway Co.*, 17 Hun, 316; *Reddington v. Mining Co.*, 19 Hun, 405, 408; *Gottschalk Co. v. Distilling Co.* (C. C.) 50 Fed. 681, 683; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 4 C. C. A. 403, 54 Fed. 420, 423, 38 L. R. A. 271; *Wall v. Railway Co.*, 37 C. C. A. 129, 95 Fed. 398, 400; *Railway Co. v. Roller*, 41 C. C. A. 22, 100 Fed. 738, 741, 49 L. R. A. 77. Smallman was not such an agent. He was a mere solicitor of business, working for a commission, and not an "officer or agent," within the meaning of those terms as used in the statute.

The appellee herein was not under any restriction from selling its machinery in the state of California. It was not required, in order to transact that kind of business, to appoint an agent in California upon whom service could be made. The facts in this case show that the appellee sold its machinery and delivered it in the state of Illinois. It was not engaged in conducting any branch of its business in the state of California. Legal service of process upon a corporation, which will give a court jurisdiction over it, can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States. The question as to what kind of business by a foreign corporation within a state will justify a finding that it is engaged in business therein, and validate a service upon its agent, has been very thoroughly and elaborately discussed in the circuit and supreme courts of the United States, and the general consensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state. *U. S. v. American Bell Tel. Co.* (C. C.) 29 Fed. 17, 37, et seq.; *St. Louis Wire-Mill Co. v.*

Consolidated Barb-Wire Co. (C. C.) 32 Fed. 802; *Gilchrist v. Railroad Co.* (C. C.) 47 Fed. 593; *N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 4 C. C. A. 403, 54 Fed. 420, 423, 38 L. R. A. 271; *Evansville Courier Co. v. United Press* (C. C.) 74 Fed. 918, 920; *Swann v. Association* (C. C.) 100 Fed. 922, 928; *St. Clair v. Cox*, 106 U. S. 350, 359, 1 Sup. Ct. 154, 27 L. Ed. 222; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Construction Co. v. Fitzgerald*, 137 U. S. 98, 106, 11 Sup. Ct. 36, 34 L. Ed. 608; *Steamship Co. v. Kane*, 170 U. S. 100, 111, 18 Sup. Ct. 526, 42 L. Ed. 964; *Insurance Co. v. Spratley*, 172 U. S. 602, 610, 19 Sup. Ct. 308, 43 L. Ed. 569; *Beard v. Publishing Co.*, 71 Ala. 60, 62.

In *St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co.*, *supra*, Judge Thayer said:

"When it is said that a corporation is engaged in business in a foreign state, and for that reason has voluntarily subjected itself to the operation of the laws of such foreign state regulating the service of process on foreign corporations, reference is plainly had to business operations of the corporation carried on within the state through the medium of agents appointed for that purpose that are continuous, or at least of some duration, and not to business transactions that are merely casual, such as an occasional purchase of goods or material within the foreign state."

In *St. Clair v. Cox*, *supra*, Mr. Justice Field, in delivering the opinion of the court, said:

"We are of opinion that when service is made within the state upon an agent of a foreign corporation it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ or accompanying its service, or in the pleadings or the findings of the court, that the corporation was engaged in business in the state."

In *Insurance Co. v. Spratley*, *supra*, the court said:

"In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is engaged in doing business within the state (*Goldney v. Morning News*, 156 U. S. 519, 15 Sup. Ct. 559, 39 L. Ed. 517; *Merchants' Mfg. Co. v. Grand Trunk Ry. Co.* [C. C.] 13 Fed. 358); and, if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation."

The decree of the district court is affirmed, with costs.

HAMMON et al. v. NIX.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1900.)

No. 1,397.

TAX SALE — VALIDITY — ASSESSMENT OF MINING CLAIMS UNDER COLORADO STATUTE.

Laws Colo. 1891, p. 113 (3 Mills' Ann. St. 1891-96, p. 883, § 3226a), which contains but a single provision that "it shall be the duty of county assessors in assessing mining claims which are entered or patented to give on their assessment rolls the mineral survey numbers of the same," must be regarded as mandatory, and the omission of the assessor to comply with it by giving the number of a claim assessed, where it is not corrected, but is carried through the delinquent tax list, advertisements, and all proceedings until the claim is sold, renders the sale invalid, and the deed based thereon void.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a bill filed by Elizabeth L. Nix, the appellee, against Charles T. Hammon and George M. Seeger, the appellants, to remove a cloud upon her title to the James V. Dexter lode survey, No. 416A, situated in the Uncompahgre mining district, Ouray county, state of Colorado. The cloud consisted of a tax deed executed on May 9, 1898, whereby T. J. York, as treasurer of Ouray county, Colo., conveyed the claim to Charles T. Hammon, one of the appellants, in pursuance of a sale of the claim for the taxes thereon for the year 1891. Subsequently Hammon conveyed to George M. Seeger, the other appellant, an undivided one-half interest in the claim. The case was submitted for decision upon an agreed statement of facts, from which it appears that, as no schedule of the property for taxation was returned by the owners thereof, the claim was listed for taxation for the year 1891 by the county assessor of Ouray county, Colo., at the end of the assessment roll for that year, under the head of "Unknown," by the following description: "James V. Dexter, Red Cañon Creek," and opposite thereto, under the heading "Value of Mines and Output," were the figures "\$200.00." The claim in controversy was advertised for sale, the taxes thereon not having been paid, in the list of unknown owners, in the column designated "Mines," by the following description: "James V. Dexter lode Paq." The publication of such notice of sale for the taxes of 1891 commenced on March 22, 1895. It is agreed that the letters "Paq." are an abbreviation of the word "Paquin," that being the name of a mining district in which the property in controversy was situated. A sale of the claim took place pursuant to such advertisement on May 6, 1895, and at such sale the claim was purchased by Ouray county for the sum of \$20.15, the taxes assessed for the year 1891 being \$19.75. The certificate of sale was subsequently assigned to Hammon, one of the appellants, and on May 9, 1898, the treasurer of Ouray county executed a treasurer's deed in favor of the assignee. The complainant below acquired title to the property on February 3, 1896, through and under the persons to whom the claim belonged at the time it was listed for taxation in the year 1891. The trial court vacated and annulled the tax deed aforesaid, the complainant below having first tendered to the treasurer of Ouray county, and subsequently deposited in court, a sum sufficient to pay all the taxes, interest, and penalties that had been assessed against the property for the year 1891 and subsequent years. From such decree the defendants below have prosecuted an appeal to this court.

Albert E. Pattison, William Story, and William Story, Jr., for appellants.

R. D. Thompson, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The validity of the tax deed which is involved in this case, namely, the deed executed by the county treasurer of Ouray county, Colo., on May 9, 1898, in favor of Charles T. Hammon, is challenged in this court on several grounds: First, because the assessment was void for want of a proper description of the property; second, because the property in question was not properly advertised for sale; third, because the tax deed is void on its face, in that it shows that the sale was made at a time not authorized by law; and, fourth, because the requisite affidavits were not filed by the county treasurer proving the publication and posting of the notice of the tax sale. We have not found it necessary, however, to consider all of these objections to the validity of the tax deed, since we are satisfied that the first objection must prevail, and that the deed should be canceled because the assessment was void for want of a proper description of the assessed property. Before the assessment was made, the following statute relative to the assessment of mining claims had been adopted by the general assembly of the state of Colorado:

"It shall be the duty of county assessors in assessing mining claims which are entered or patented, to give on their assessment rolls the mineral survey numbers of the same; whether said assessment be for real estate or personal property." Laws Colo. 1891, p. 113.

See, also, 3 Mills' Ann. St. Colo. 1891-96, p. 883, § 3226a.

The statute, as last quoted, embraces all the provisions of an act approved on April 10, 1891, relating to the assessment of mining claims, except a provision which was added to the act declaring that it should take effect immediately. And, inasmuch as the sole object of the act seems to have been to prescribe the manner in which mining claims should be described by the assessor on the assessment roll, the direction in that behalf being that "the mineral survey number" of such claims shall be stated on the assessment roll, it is impossible to regard the act in question otherwise than as mandatory. For some reason—probably because confusion had arisen in the method of describing mining claims—the legislature deemed it advisable that they should thereafter be described on the assessment roll by stating the number of the survey. It accordingly made it incumbent on all assessors to thus describe them, giving such officers no discretion to describe them otherwise. Learned counsel for the appellants have called our attention to a provision found in section 3790, Mills' Ann. St. Colo., which declares that "no irregularity or error or omissions in the assessment of any property, or in the levying of any tax, shall affect in any manner the legality of any taxes levied thereon, nor affect any right or title to such real property which would have accrued to any party claiming or holding the same under or by virtue of a deed executed by the treasurer, as provided by law, had the assessment of such property been in all respects regular"; and they insist that the failure of the assessor to give the survey number of the mining claim in question was a mere irregularity, which, by reason of the statute last quoted, did not impair the validity of the assessment or the treasurer's deed.

We are not able, however, to adopt that view of the case. Section 3896, Mills' Ann. St., declares that "omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the treasurer, or by the treasurer at any time after the receipt of said roll by him. When any omission, error or defect has been carried into a delinquent list, or any error appears in any publication, the list or publication may be amended by the treasurer, and republished as amended; or notice of the correction may be given in a supplementary publication; but such publication must be made in the same manner as the original publication and for not less than one week." Considering these two sections together,—that is to say, sections 3790 and 3896,—it may well be that the failure of the assessor to describe a mining claim properly by omitting to state the number of the mineral survey on the assessment roll is not so far fatal as to destroy the treasurer's deed subsequently executed, provided the error in the description is discovered, and corrected pursuant to section 3896, before the property is advertised for sale and a sale takes place. But to say that a tax deed for a mining claim is not rendered invalid by a failure to state the number of the mineral survey on the assessment roll, although the omission is not supplied before the claim is advertised for sale and sold, would, in effect, nullify the act of April 10, 1891, or at least render it of no practical importance as a guide to assessors. In assessing real property for taxation it is of the highest importance that the property assessed should be so described as to clearly identify it; and when the legislature, as in the case in hand, has taken the pains to declare explicitly how a particular kind of property shall be described on the assessment roll, the act should be regarded as mandatory, and not merely directory. And when no effort is made subsequently to correct the error, and the property is advertised and sold under a description of the same appearing upon the assessment roll, which is different from that prescribed by the legislature, the treasurer's deed conveying the property to the tax purchaser should be held void, and a cloud upon the true owner's title. In accordance with these views, the decree below is in all things affirmed.

NORTHERN PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 27, 1900.)

No. 1,382.

1. NAVIGABLE WATERS—OBSTRUCTION OF RIVER.

Where, by reason of the plastic nature of a substratum of clay under the right of way of a railroad located some distance from a navigable river, the track of the road settled, and the additional weight of an embankment built by the company forced the clay into the bed of the river, causing a bar, which obstructed navigation, such bar is the direct result of the building of the embankment, and constitutes a public nuisance, for the creation and maintenance of which the company is liable, unless the ob-

struction was authorized by congress, and such authority cannot be implied from an act authorizing the building of the road where it was located.

2. SAME—INJUNCTION—SUIT BY UNITED STATES.

The additional embankment which caused the obstruction in the river having been built after the passage of Act Sept. 19, 1890 (26 Stat. 454, c. 907), which in express terms prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction," and provided that the creation or continuance of any such unlawful obstruction might be prevented by injunction at suit of the United States, the provisions of such act are applicable, and the further construction of the embankment will be enjoined, except on condition that the company takes measures to prevent any further obstruction of the river thereby.

Appeal from the Circuit Court of the United States for the District of North Dakota.

The United States of America exhibited its bill in the United States circuit court for the district of North Dakota against the Northern Pacific Railway Company, the appellant, to restrain it from creating an obstruction in the channel of the Red River of the North opposite the city of Grand Forks, in the state of North Dakota. At the place in question the Red River is navigable, and constitutes a part of the navigable waters of the United States, for the improvement of which money has been appropriated by congress. While there is some traffic upon the river, the traffic is not large. The case discloses, without contradiction, the following facts: By virtue of lawful authority, the defendant company located and built its railroad through the city of Grand Forks in the year 1887. Between Cheyenne avenue and Hill avenue, in said city, the railway was located about 320 feet from the bank of the Red River of the North at the furthest point therefrom, and 175 feet distant from the nearest point. Intervening between the company's right of way and the bank of the river are other lands, varying in width from 50 to 200 feet. After the road had been constructed, the track for the distance of some 1,200 feet between Cheyenne avenue and Hill avenue began to settle, the greatest depression at any one point being about 17 feet below the horizontal plane on which the track was originally laid. For this reason the defendant company began to raise its embankment by depositing thereon additional material, such as soil, silt, and gravel. It transpired that the embankment rested upon a stratum of yellow clay mixed with sand, which was some distance beneath the surface of the earth, through which water percolates. This stratum was so plastic that it would flow laterally when pressed upon by any considerable weight in addition to the weight of the soil in its natural condition. When the defendant company began to raise its embankment between the points above stated the additional weight added to the embankment caused the yellow clay to flow laterally in the direction of the river, and to bulge up in the channel thereof, thereby causing a bar, which operated as an obstruction to navigation. In view of these facts, the trial court issued a perpetual injunction, restraining the defendant company from placing any additional material in its embankment between the points aforesaid in the city of Grand Forks so as to create an obstruction in, or lessen the navigability of, the Red River of the North at that point. The present appeal was taken to obtain a reversal of this order.

C. W. Bunn, for appellant.

John W. Griggs, U. S. Atty. Gen., and P. H. Rourke, U. S. Dist. Atty., for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended in behalf of the defendant company that the facts above recited do not disclose an actionable wrong on account of

which relief can be afforded under a bill filed by the United States. The principal reasons assigned in support of this contention may be stated briefly as follows: It is said that the existence of the bar in the Red River opposite the city of Grand Forks is not the immediate and direct result of any act done or performed by the defendant company, but is the indirect, consequential, and unforeseen result of placing additional weight upon its right of way; and that inasmuch as it was duly authorized by its charter and a city ordinance to construct its road through the city of Grand Forks on the line where its road is in fact located, and has been guilty of no negligence either in constructing or maintaining the same, it cannot be held accountable for an obstruction to navigation which is merely one of the incidental results of its authorized acts. It accordingly becomes necessary to determine if these several propositions are tenable.

We have no doubt that the bar in the river was the unforeseen result of placing additional weight on the defendant's right of way, but no reason exists for saying that the obstruction was merely an indirect, remote, or consequential result of the increased burden. The bed of the river rose, and navigation was thereby obstructed, because the additional weight placed on the defendant's right of way forced the stratum of plastic clay upwards in the bed of the stream, thereby creating a bar. The relation of cause and effect was as immediate as it would have been if the defendant had dumped a mass of silt and earth into the river, and had thereby formed a bar. And, inasmuch as one who places or creates an obstruction in a navigable river without legal sanction thereby creates a public nuisance, the defendant company can only escape liability for its acts by showing that congress has in fact authorized it to create obstructions of the kind now in question. It is hardly necessary to observe that the city of Grand Forks has no power, by ordinance or otherwise, to authorize persons or corporations to create obstructions in any of the navigable waters of the United States over which congress exercises jurisdiction. The only authority, therefore, on which the defendant company can rely to justify the obstruction in question, is the act of congress which authorized its predecessor in interest, the Northern Pacific Railroad Company, to build and maintain a transcontinental railroad along a designated route. But a statute which authorizes a railroad corporation to build its road parallel to a navigable stream, and several hundred feet distant therefrom, does not, by any fair rule of interpretation, empower it to create an obstruction in the channel of the stream which will interfere with its navigability. The power to build a highway like a railroad does not carry with it, by implication, the right to destroy or obstruct a water highway. There is an implied condition attached to all legislative grants, authorizing the construction and operation of railroads or other public improvements, that in the exercise of the authority conferred nuisances shall not be created, and that private property shall not be taken without just compensation. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 332, 333, 2 Sup. Ct. 719, 27 L. Ed. 739; *Chicago G. W. Ry. Co. v. First Methodist*

Episcopal Church (C. C. A.) 102 Fed. 85; *Costigan v. Railroad Co.*, 54 N. J. Law, 233, 23 Atl. 810; *Shelfer v. Lighting Co.* (1895) 1 Ch. 287, 295, 296. It may be conceded for present purposes that a right conferred upon a railroad corporation to construct its road along a designated route carries with it by implication, when the power is not expressly given, the right to obstruct navigable streams and public highways to such limited extent as may be necessary to carry its track over and across such streams and highways as it is found necessary to cross. Express provisions, however, are usually found in legislative acts authorizing the building of railroads to cover cases of the latter kind, and it rarely happens that the power to create even slight obstructions in navigable streams or public highways is left by the legislature to implication. We are of opinion that the right to create an obstruction in a navigable stream like the one involved in the present case cannot be deduced by implication from the fact that congress has authorized the construction of a railroad parallel to the course of the stream, and some distance therefrom. In the case in hand the fact that the existence of the stratum of plastic clay underneath the surface of the soil was unknown to congress at the time the construction of the defendant's road was authorized, and that the result which would flow from the making of a heavy embankment at the place in controversy was unforeseen conclusively negatives the inference that the legislature intended to empower it to do and perform acts, either in the construction or maintenance of its road, that would not only obstruct navigation in the Red River of the North, but would probably damage some private property adjacent to its roadbed. It is by no means probable that congress would have authorized the building of the defendant's railroad at the point in question, without imposing some restrictions as to the method of building it, had it been acquainted with the condition of the soil in that locality, and had it foreseen the unique effect upon the river bed of building a heavy embankment in close proximity thereto. It cannot be presumed that it intended to authorize the creation of a public nuisance, and what it did not intend to do it has not in fact done.

From another point of view we also reach the conclusion that the defendant company was guilty of an unlawful act in placing such an increased burden on its right of way as occasioned an uprising in the bed of the river and a consequent obstruction to navigation. By the tenth section of an act approved September 19, 1890 (26 Stat. 454, c. 907), congress in express terms prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction"; and furthermore declared, in substance, that the creation or continuance of any such unlawful obstruction might be prevented by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction might be threatened, and that proper proceedings to that end might be instituted under the direction of the attorney general of the United States. The present action appears to have been brought in accordance with the provisions of that act. The prohibition contained in this statute

against creating an obstruction in navigable waters, unless it is affirmatively authorized by law, is general in its terms, and the statute was enacted before the increased burden was imposed on the defendant's right of way which caused the formation of the bar in the channel of the river. Neither the defendant company nor its predecessor in interest had a vested right under its charter to improve its roadbed in such a manner as would obstruct navigation in a navigable river, and, having no such right, the acts complained of fall within the prohibition of the aforesaid statute, and are clearly unlawful.

The record contains evidence which tends to show that the defendant's embankment now in process of construction will shortly settle through the stratum of plastic clay, and rest upon a solid foundation of blue clay, after which time the lateral movement of the plastic stratum will cease. In view of this fact, and because of the present great depression in the defendant's track which impedes the movements of its trains, and because it seems evident that the bar which is at present forming may be kept down by dredging, so as not to obstruct navigation, we have concluded to modify the injunction that was granted by the lower court so as to make it plain that the work of raising the defendant's embankment may proceed, provided the bar in the river is kept down so as not to obstruct navigation. With this purpose in view, and to avoid any misapprehension as to the scope of the injunction, the following clause will be added to the decree:

"The injunction hereby awarded shall not be so construed as to prevent the defendant company from proceeding with the work of raising its tracks between Cheyenne and Hill avenues to the proper level, if by dredging or otherwise, as the work progresses, it shall, at its own cost and expense, prevent the formation of any such bar in the channel of the Red River of the North as will at any time lessen or impair its navigability."

As thus amended, the decree below is affirmed.

BOSTON & A. R. CO. et al. v. PARR.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1900.)

No. 356.

EQUITY PLEADING—SUFFICIENCY OF BILL—STATEMENT OF CAUSE OF ACTION.

A bill filed by alleged creditors of a corporation against its directors, to hold them liable for the amount of its indebtedness to complainants, because of their alleged violation of the statute in their conduct of its business, must set out the facts relating to complainants' claims against the corporation with particularity, so as to advise the defendants explicitly of what they are required to meet; and an allegation in such a bill that the corporation is indebted to a complainant in a sum "exceeding \$239,000," on a contract of indemnity and insurance against liability for death or injury of employes, etc., bearing a certain date (a copy of the form of such contract being set out), is wholly insufficient, where there is no statement of the happening of any occurrence which it is claimed created a liability under such contract, or of any facts showing how or when any part of such liability arose, or that any claims or proofs were ever submitted to the company on account of it.

Appeal from the Circuit Court of the United States for the District of Maryland.

Bernard Carter and Charles J. Bonaparte, for appellants.

Richard M. Venable and George Leiper Thomas, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from a decree of the circuit court of the United States for the district of Maryland. The crucial question in the appeal is one of practice in equity. The complainants are creditors of the American Casualty Insurance & Security Company of Baltimore City, a corporation of the state of Maryland. The bill is filed to enforce the joint and several liability of the defendants, directors of said company, for an infringement of their duty as directors. The liability, it is alleged, is created under the charter of the said company. The original bill was held by the court to be defective on demurrer. Leave was given to amend the bill. The paragraphs following were thereupon inserted in the bill:

"That your orators are all creditors of the said American Casualty Insurance and Security Company of Baltimore City in large sums, exceeding in the case of each one of your orators the sum of \$2,000, by reason of debts contracted by the said American Casualty Insurance and Security Company of Baltimore City with them, respectively, at various dates and times, some of them prior to any, and all of them prior to some, of the said hereinbefore recited illegal and improper loans of the said corporation to its stockholders as aforesaid, and at such times as to render all of the parties defendant herein liable, by reason of the statute aforesaid, for certain of the debts so contracted; and by reason thereof your orators are entitled to have the amounts of their said claims ascertained, and the responsibility of the several directors of the said corporation, as determined by the dates of their respective services as such, and the making of the said last-mentioned contracts by the said corporation with your orators, respectively, and of the various illegal and unauthorized loans above described, determined by a decree of a court of equity, with a view to prevent a multiplicity of actions and to secure the just and equitable rights of all the many parties concerned; and your orators expressly show to this honorable court that of their said last-mentioned claims, amounting in the aggregate to about one million of dollars, and whereof the details will hereafter be made to appear, by proper evidence, to the satisfaction of this honorable court, no portion whatsoever has been as yet paid them.

"That the said American Casualty Insurance & Security Company of Baltimore City contracted the debts in this suit sought to be recovered by your several orators at the times and in the manner following; that is to say: Debts exceeding in the aggregate five hundred dollars to your orator the Boston & Albany Railroad Company, by a contract of indemnity and insurance authorized by the charter of the said American Casualty Insurance & Security Company of Baltimore City, on July 13, 1891; debts to an amount thus exceeding fifty-one thousand dollars to your said orator, by a similar contract, on July 13, 1892; debts thus exceeding fifty-eight thousand dollars to your said orator, by a similar contract, on July 13, 1893; debts thus exceeding ten thousand dollars to your orators so as aforesaid doing business as Jordan, Marsh & Co., by a similar contract, on April 29, 1892; debts thus exceeding one hundred and fifty thousand dollars to your orator the Long Island Railroad Company, by a similar contract, on August 5, 1892; and debts thus exceeding sixty-eight thousand dollars to your said orator, by a similar previous contract, on August 5, 1891; debts thus exceeding one hundred and two thousand dollars to your orator the Boston & Maine Railroad Company, by a similar contract,

on December 31, 1891; debts thus exceeding six hundred dollars to your orator the Cochrane Chemical Company, by a similar contract, on August 1, 1891; debts to an amount not less than ten thousand dollars to your said last-mentioned orator, by a similar contract, on August 1, 1892; debts exceeding in the aggregate five thousand dollars to your orator the New England Telephone & Telegraph Company, by a similar contract, on October 12, 1892; debts thus exceeding twenty-seven thousand dollars to your orator the Concord & Montreal, by a similar contract, on November 24, 1891; debts thus exceeding nineteen thousand dollars to your said last-mentioned orator, by a similar contract, on November 24, 1892; and debts thus exceeding three hundred and twenty-nine thousand dollars to your orator the West End Street-Railway Company, by a similar contract, on August 1, 1891. That the said contracts were all in writing, and all substantially, and in all respects whatsoever in any wise material to the present controversy, or the rights of any party to this suit, whether complainant or defendant, of the tenor indicated by a blank form used by the said corporation for such purpose, herewith filed, marked 'Complainants' Exhibit B,' and prayed to be taken as part of this amended bill of complaint. That, whilst the said several debts above mentioned were so contracted as is hereinbefore set forth, the losses incurred by your orators, respectively, and whereas they were so entitled to indemnity by the terms of the contracts aforesaid as to cause the said American Casualty Insurance & Security Company of Baltimore City to be thereunder indebted to your orators in the several amounts above enumerated, were incurred at such dates and times that none of them became or were due or payable by the said American Casualty Insurance & Security Company of Baltimore City more than three years before the institution of this suit, but all of them are now due and payable, and none of them have been paid, either wholly or in part, to the said several creditors, or any of them, and all of the said debts were contracted and became due and payable at such dates and times, respectively, as to render each one of the parties defendant to the present suit liable for more than two thousand dollars thereof to each one of the parties complainant, as well by reason of the matters and things hereinabove set forth, as of the matters and things in this bill of complaint hereinafter contained."

The Exhibit B referred to in the amended bill is a form in blank of the policies issued by the American Casualty Insurance & Security Company of Baltimore City. The defendants demurred to this amended bill on various grounds. Among others is the following:

"That it does not appear by said bill to what extent the said plaintiffs, or any one of them, are creditors of the said American Casualty Insurance & Security Company of Baltimore City, when they, or any of them, become such creditors, and how and from what the alleged indebtedness to them or any of them arose, and there is no such allegation of the amounts, times, and nature of said claims or indebtedness in paragraphs 12 and 13 of said bill, or elsewhere, and that said bill states no cause of action or suit as entitles said plaintiffs, or any of them, to the relief prayed, and that said plaintiffs consequently are not entitled to such relief."

This demurrer was sustained. The bill was dismissed. Assignments of error were filed, an appeal was allowed, and the cause comes here.

The question is, was the court below in error in sustaining the demurrer? The rule of all pleading, whether at law or in equity or admiralty, is that the party seeking relief at the hands of the court must state the facts on which his prayer rests, clearly, distinctly, fully, and accurately, so that the party against whom relief is sought may know to what he must answer. "Whatever is essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision."

Mitt. Eq. Pl. marg. p. 41. Or, as it is put in a note to the sixth American and the fifth London editions of the same book:

"In setting forth such right and title [of plaintiff], the governing principle is that so much certainty must pervade the statement as to prevent the defendant from being taken by surprise. He must be permitted to know explicitly what the complaint against him is, and not be compelled to guess it under the form of a general charge. There must be such a specification as will enable him to meet the alleged fact by a direct issue, and thereby counter-vail the general charge. But after alleging such specific act or fact the plaintiff need not set forth numerous circumstances merely going to make out or corroborate such specification."

To the same effect is 1 Daniell, Ch. Prac. p. 364 (stating part of bill), and Story, Eq. Pl. §§ 27, 28. The bill must show distinctly and unambiguously all the facts entitling the party to relief. 1 Smith, Rules, § 83, and note "a." As is said in *Harrison v. Nixon*, 9 Pet. 504, 9 L. Ed. 209:

"The bill should allege all the material facts upon which the plaintiff's title depends, and the final judgment of the court must be given so as to treat them, in contestation, in a proper and regular manner."

Especially must this rule be strictly followed in a case like that before the court, in which the complainants seek to hold the defendants responsible for a debt due by a corporation which is not, and should not be, a party to the suit, and is not in any wise represented therein. The debt or claim must be set forth with such particularity as will enable the defendants to see precisely what claim they are called upon to meet. The amended bill in this case sets out that the American Casualty Insurance & Security Company of Baltimore City contracted the debts in this suit sought to be recovered at the times and in the manner following: By a contract of indemnity and insurance authorized by the charter of said company. Looking at the form of contract of indemnity and insurance filed as an Exhibit B to the bill, the contract is in these words:

"Against all liability of the assured on account of the personal injury or death of any employé, passenger, or other person, and on account of loss or damage to horses, vehicles, or merchandise owned by others, resulting from any and every accident happening upon the premises or by reason of the operation of the road hereby insured, or, in the case of any employé, elsewhere, while in the service of the assured. But the company's liability under the policy shall be limited as follows: In respect to any one accident it shall not exceed \$——. In respect to any one person who may be injured it shall not exceed \$——. In respect to any one person who may be killed it shall not exceed \$——. In respect to any horse, vehicle, or for merchandise, it shall not exceed for any one accident \$——, but the company shall not be liable for any loss in respect to any horse, vehicle, or for merchandise, unless amounting to \$25.00 or more."

This is followed by eight clauses specifying the conditions on which the company shall be held liable, and ending:

"And this policy shall only cover losses sustained by, and liability for any claims against, the assured, as above specified, between the —— day of ——, eighteen hundred and ninety ——, to the —— day of ——, eighteen hundred and ninety ——, at 12 o'clock noon, to be paid at the office of the company in the city of Baltimore, or at its office in the city of New York, within thirty days after the proof of loss, injury, or death has been duly verified by

the assured and has been received and accepted by the company; such payment being subject to the covenants and agreements herein."

To be informed as to the character of a claim against the corporation under a contract of this kind, it should appear when the accident occurred; the amount claimed and paid for it; the number of persons injured, and the amount claimed and paid for each; the number of persons killed, and the amount claimed and paid for each; the amount claimed and paid for any horse, vehicle, and merchandise injured in each accident. It should also appear that the loss occurred within the prescribed period, and that proof of loss had been verified by the assured, and had been received and accepted by the company. The bill states the claim in this way:

"Debts exceeding in the aggregate \$500, to your orator the Boston & Albany Railroad Company, by a contract of indemnity and insurance authorized by its charter, on July 13, 1891; debts to an amount thus exceeding \$51,000, to your said orator, by a similar contract, on July 13, 1892; debts thus exceeding \$58,000, to your said orator, by a similar contract, on July 12, 1893."

The claims of the other complainants are set forth in precisely the same form. The bill goes on to state that, although the debts were incurred on the days stated, the losses incurred were at dates later, and within three years before institution of this suit. It is evident, therefore, that the dates stated in the bill were the dates of the several policies. By these policies there was a contract to indemnify against liability. No debt arose under them until the occurrence of an accident of the character insured against, within the period fixed by the policy, and a presentation of a proof of loss, injury, or death, duly verified, and its receipt and acceptance by the company. All these created and fixed the debt. This debt, under the theory of the bill, defendant must pay; and of the debts, under the rules of pleading, defendant must be informed. The allegations of the bill not only give no information of this kind, but they do not give any intimation of it. Every fact attending his claim is known, or should be known, to each complainant. Yet it is carefully withheld, so that, when the defendants are examining the bill for the purpose of answering it, they can only "guess it under the general charge." There is no allegation that the claims have been proved or established against the corporation, or that they have ever been presented to and acknowledged by the corporation. From all that appears, they are now presented for the first time. The defendants are called upon to defend themselves against claims of which they know nothing, originating in causes outside of their knowledge, and of which they can in no way get information until the testimony is taken after issues joined in the cause. What can they learn from a statement that the American Casualty Insurance & Security Company is indebted to one of these complainants (the West End Street-Railway Company) in a sum exceeding \$329,000, on the contract of indemnity and insurance? The liability under this contract is contingent upon the happening of certain facts within a certain time, verified in a certain way, presented to the company, and accepted by them. How can these defendants know of the existence of any of the facts, when and how they oc-

curred, whether or not they created just claims against the company, and whether or not the proper steps were taken to fix the liability of the company? Certainly they can get no information from the pleadings. And to this they are entitled by all the rules of pleading. As the bill now stands, it is a dragnet, leaving to the complainants an opportunity of proving anything they please, and completely mystifying the defendants as to the course they should pursue in obtaining means of defense. We see no error in the circuit court in sustaining this ground of demurrer.

This demurrer having been sustained, the complainants applied for leave to amend their complaint still further. This the circuit court refused to do. Under the thirty-fifth rule of court, this is a matter wholly within the discretion of the court. It is therefore not reviewable here. *Murphy v. Stewart*, 2 How. 263, 11 L. Ed. 261; *Spencer v. Lapsley*, 20 How. 264, 15 L. Ed. 902. The decree of the circuit court in sustaining the demurrer and in dismissing the bill on this ground is affirmed.

SOUTHERN RY. CO. et al. v. NORTH CAROLINA CORP. COMMISSION
et al.

(Circuit Court, E. D. North Carolina. April 11, 1900.)

1. TAXATION—SUIT TO ENJOIN DISCRIMINATION—EVIDENCE.

In a suit to enjoin a discriminating assessment of railroad property by a state commission on the ground that there was an established rule by which all other property in the state was assessed at less than its actual value, where it is impossible to prove directly the adoption of such a rule by the assessing officers, it is competent for the complainants to establish its existence by inference from a uniform course of conduct, and for that purpose to introduce evidence of particular assessments and the value of the property assessed.

2. SAME.

In such suit the presumption is that the commission assessed the property of complainants at its actual money value, where that is the requirement of the constitution and laws of the state, and, as that question cannot be reviewed by the court, evidence upon the subject is immaterial, unless it becomes material by reason of proof by complainants that other property is assessed under a different rule, and to show that the same rule was applied to railroad property.

3. DISCOVERY—CORPORATIONS—RIGHT TO COMPEL PRODUCTION OF BOOKS.

An officer or agent of a private corporation cannot be compelled to produce and open for examination the books of such corporation in a suit to which it is not a party, on the ground that they may disclose facts material to the issues between the parties.

In Equity.

See 97 Fed. 513, 99 Fed. 162.

On questions certified to the court by the master as follows:

"To His Honor, Judge Simonton: The question under consideration being of very great importance, it is agreed by counsel that it be certified to your honor, waiving any points as to procedure. And the standing master hereby certifies the same to your honor; that is to say, whether the said books should be ordered to be produced for the purposes mentioned in the annexed copy

of the proceedings, marked 'A.' Inasmuch as a recess is necessitated by reason of the foregoing, the standing master respectfully asks instructions upon an additional question; that is to say, whether testimony tending to show that the defendant commission has not assessed the complainant's property at its full value is admissible. The point is illustrated by the annexed extract from the proceedings, marked 'B.' Your honor's decision upon these questions will greatly facilitate the hearing before me.

"Respectfully submitted, James E. Shepherd, Standing Master."

"A.

"Mr. Henry Savage, being called by the complainants, being duly sworn, was examined as follows: 'Q. 1. Your name is Henry Savage? Ans. Yes, sir. Q. 2. What is your age, residence, and occupation, Mr. Savage? Ans. I will be 66 next month. Residence, Wilmington, N. C. My occupation is secretary and treasurer of the Acme Manufacturing Company, Limited. Q. 3. It is a corporation? Ans. Yes, sir. Q. 4. How long have you been secretary and treasurer? Ans. I think I have held that position since '91. Q. 5. Do you keep books showing your gross earnings and operating expenses? Ans. Yes, sir. Q. 6. Have you those books with you? Ans. No, sir. Q. 7. Have you been subpoenaed to produce them? Ans. Yes, sir. Q. 8. Will you produce them? Ans. On the advice of counsel, I decline.' The court requested counsel to state the purpose for which they demanded the production of the books. Counsel for complainants state that the purpose is to show by the books of the corporation the true value of the plant and property of this corporation on the 1st day of June, 1899, and for a number of years previous thereto, and to show that the assessed value for taxation is at least 25 per cent. less than the true value of the plant, including real estate; and, further, to enable the witness to refer to said books and inform the court as to the gross earnings and operating expenses of said corporation for the year 1899 and for several years previous thereto, so as to ascertain the true value of the plant of said corporation, including its real estate; and, further, to show that, if the said corporation were assessed in accordance with the manner of assessing railroad companies prescribed by the tax law of 1899 of the state of North Carolina, such corporation would be assessed at a much higher value than it has been for several years past and was on June 1, 1899. Counsel for complainants requested the court to order witness to produce the books. Counsel for defendants object to the order and to the production of the books and papers named in the subpoena duces tecum, on the ground that the same are irrelevant and incompetent, and are not admissible in evidence if produced, and upon the further ground that the entries which may be contained in such books are not competent evidence against the defendants. At this point counsel for witness, Messrs. E. S. Martin, E. K. Bryan, and Cameron Morrison, were allowed to appear for the purpose of moving that the subpoena duces tecum be recalled, and that witness be not ordered to produce the books over his objection, and argued same."

"B.

"'Ques. State the par value of an original share of the capital stock of the Wilmington & Weldon Railroad Company. State what certificates of indebtedness or of stock in other corporations or other additions have been made thereto, or issued to the holders thereof. State the present market value of a share of stock of said corporation, with such additions as have been made thereto.' (Complainants object to this question, because no such issues as are indicated by said question are raised by the pleadings. The value of the stock, etc., of the Wilmington & Weldon Railroad Company is not involved in this controversy, or any aspect thereof; and the question is irrelevant, impertinent, and immaterial.) 'Ques. State the amount of the outstanding indebtedness of the Wilmington & Weldon Railroad and the market value of the bonds issued by said corporation.' (Same objection.) The purpose of the defendant in asking this question is to show the value of the property of the roadbed and other property of said corporation included in the assessment made by the defendant corporation commission."

John D. Shaw, Chas. Price, W. F. Day, R. O. Burton, and Geo. Rountree, for complainants.

H. G. Connor, Simmons, Pou & Ward, J. C. L. Harris, C. A. Cook, and John W. Hinsdale, for defendants.

SIMONTON, Circuit Judge. The standing master has submitted to the court certain questions which have arisen in the course of his examination. The complainants, in their testimony in chief, produced evidence as to the taxes assessed on property in the county of New Hanover for the year 1898, having up for this purpose the register of deeds. In the course of this examination they sought to prove the true value of the property of certain corporations, probably for the purpose of comparison with the assessed value for taxation of these corporations. To this end they issued subpoenas duces tecum, and required the production of the books of such corporations, and their examination. Two questions arise: First, as to the competency and relevancy of an examination into the assessment for taxation of various parcels of property. Second, as to the right of complainants to demand the production of the books of these private corporations, and the examination of them. The discussion and decision of this last question has been postponed at the request of counsel on both sides.

As to the first question: Counsel for defendants earnestly protest against this method of examination. They say, if separate items of property are examined in order to discover if the assessment of each is or is not its true value in money, the examination will be protracted in infinitum. The complainants allege that there is an established rule in North Carolina whereby all real and personal property other than railroad property is assessed for taxation below its actual value in money, and so the action of the corporation commission in assessing railroad property at its actual value in money creates a discrimination which is unlawful. If this alleged rule existed in resolution of the various boards of assessors, or in any compact between them, oral or written, or in any statutory enactment, the proper mode of proving it would be by evidence directly showing the existence of such rule. If, however, the existence of the rule cannot be shown in this way, but is a matter of inference from a uniform course of conduct, then the only mode of proof is by showing a sufficient number of instances from which such a course of conduct could be inferred. In the one case the conclusion would be reached *a priori*; in the other *a posteriori*. In the one case we would go from the general to the particular; in the other from particular to the general. If, therefore, the complainants cannot establish the existence of the rule except by inference, it is lawful for them to introduce evidence as to the particular instances from which they seek to establish the general rule. During the examination the defendants propounded questions tending to show the value of the property of the roadbed and other property of the corporations complainant, complaining of the action of the corporation commission. Complainants object to this line of examination on the ground that the matter is not in this issue. The constitution of the state of

North Carolina and the acts of assembly passed under the authority thereof require all real and personal property in the state to be assessed for taxation at its actual value in money. The corporation commission, which is intrusted with the assessment of railroad property for taxation, assessed the property of the several complainants at a certain sum each. The complainants thereupon come into this court, alleging that the method adopted with regard to them differs materially from the method adopted with regard to all other real and personal property in the state, so that they are exposed to unjust discrimination. On that allegation they ask an injunction. On the truth of that allegation depends the action of this court. It cannot assess the value of property, nor perform any of the functions of the assessor. It cannot pass upon the assessment, and say whether or not it be excessive, or whether it be illegal, irregularly imposed, or unjust. *Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 669. There must be some ground for the interference of a court of equity. And its interference cannot go to the reassessment of the property, but to the removal of the unlawful action. In the present case we must assume that the commission did its duty and fulfilled the constitutional and statutory requirement in assessing the railroad property. The amount of the assessment this court cannot question. The sole question is, does there exist in North Carolina a rule or practice universal enough to presume the existence of a rule whereby all real and personal property other than railroad property is assessed below its value for taxation? The burden of showing this is on complainants. Until this burden is removed, the inquiry must be directed to it. If it be removed, then it may possibly be competent for the defendants to show that, if such a rule or practice does exist, it is applied also to the railroad companies, and as to them there is no discrimination. The standing master will conduct the examination in accordance with these rulings.

(April 23, 1900.)

Of all the questions certified to the court by the standing master every point has been answered but one. An officer or agent of a private corporation was served with a subpoena duces tecum requiring him to bring into court the books of the corporation, with the purpose of opening them for examination. The witness very properly has so far obeyed the exigency of the subpoena as to produce the books. *Whart. Ev.* § 377. He now objects to the examination of them upon the ground that his corporation is not a party to this suit, and that such an examination will betray all the secrets of the business of the corporation, would expose its business methods to the world, and might work to it irreparable injury. In *Henry v. Insurance Co.* (C. C.) 35 Fed. 15, a motion to compel the opening of the records of a corporation not a party to the suit, but whose records it is claimed would disclose something of importance to the litigation, was refused by Mr. Justice Brewer. In *Re Pacific Ry. Com'n* (C. C.) 32 Fed. 250, Mr. Justice Field denied the authority of congress to grant such power to a commission created by it to examine the affairs of a debtor of the government. He puts this on the ground

of the right of personal security possessed by each citizen; that this right of personal security involves not merely the protection of his person from assault, but also the exemption of his private affairs, books, and papers from the inspection and scrutiny of others. It may be that when one is a party to proceedings he may be compelled, on proceedings for discovery, to open his private books, proper interest being shown in the party seeking the discovery. But I am of the opinion that the agent of a private corporation, not a party to the proceeding, cannot be compelled to open for examination the books of the company, and expose them to the scrutiny of third persons. In *U. S. v. Babcock*, Fed. Cas. No. 14,484, the subpoena required the production of certain telegraph messages. No objection whatever was made because this would work a betrayal of the business secrets of the company. In *Russell v. McLellan*, Fed. Cas. No. 12,158, the person served with notice to produce books was a party to the cause. *Kirkpatrick v. Manufacturing Co.* (C. C.) 61 Fed. 46, applies only to parties to the suit. In *re Hirsch* (C. C.) 74 Fed. 928, relates to public records. In *Wertheim v. Trust Co.* (C. C.) 15 Fed. 716, Judge Wallace states broadly the proposition contended for by complainants. It seems, however, that the main objection in that case was on the score of inconvenience. But, even if the case goes to the length ascribed to it, the opinion of Brewer, J., is to the contrary. In this difference of persuasive authority, I prefer to side with him.

BALLIET v. CASSIDY.

(Circuit Court, D. Oregon. November 8, 1900.)

No. 2,305.

INJUNCTION—GROUNDS—RESTRAINING PUBLICATION OF LIBEL.

A court of equity is without jurisdiction to enjoin the publisher of a newspaper from inserting therein libelous articles against the complainant.

In Equity. On demurrer to bill.

Emmett Callahan and M. A. Butler, for plaintiff.

John M. Gearin, for defendant.

BELLINGER, District Judge. It is alleged in the complaint that the plaintiff is the owner of valuable mining property in Baker county, in this state, and that he has completed plans for the erection of a smelting and quartz milling plant, to cost \$1,250,000, and that he was able and had the financial ability to carry out such plans, but that he has been damaged by reason of certain libelous and blackmailing articles published by the defendant in a newspaper called the "Baker City Herald," owned by him, in Baker county. It is alleged that on the 29th day of September, 1900, and each week thereafter for four consecutive publications, the defendant falsely and maliciously caused to be published in his said paper an article of the character mentioned, one of which articles is set out in the complaint. The plaintiff further alleges that the defendant has

made statements that unless the plaintiff pay him certain sums of money he would write unfavorable, malicious, and defamatory articles in his said newspaper against plaintiff and his mining and smelting business, and that on account of these publications plaintiff has been damaged in the sum of \$10,000; that the defendant is insolvent; that the defendant will continue to print and circulate malicious and defamatory libels against the plaintiff, thereby injuring him among his neighbors, business associates, and the business world, to his irreparable detriment and damage in his good name, character, financial worth, and business opportunities. The prayer of the complaint is that the defendant be restrained from further publishing or distributing said Baker City Herald in which any article referring to the said plaintiff, either directly or indirectly, in any manner whatsoever, shall appear, and that the plaintiff have judgment against the defendant for the said sum of \$10,000 as damages aforesaid. Upon the application of plaintiff for a preliminary injunction, an order to show cause why the injunction should not be granted was made, whereupon the defendant appeared and filed his demurrer to the bill of complaint, upon the ground that the court is without jurisdiction to restrain the publication of a libel.

The decisions in this country are against the jurisdiction of the court to grant the relief prayed for. In *Kidd v. Horry* (C. C.) 28 Fed. 773, and in *Car-Wheel Co. v. Bemis* (C. C.) 29 Fed. 95, it is held that the court is without the power to issue an injunction to restrain a libel or slanderous words. Mr. Justice Bradley, in *Kidd v. Horry*, said:

"The application seems to be altogether a novel one, and is urged principally upon a line of recent English authorities, such as *Dixon v. Holden*, L. R. 7 Eq. 488; *Cattle-Feed Co. v. Massam*, 14 Ch. Div. 763; *Thomas v. Williams*, Id. 864; and *Loog v. Bean*, 26 Ch. Div. 306. An examination of these and other cases relied on convinces us that they depend on certain acts of the parliament of Great Britain, and not on the general principles of equity jurisprudence. * * * But neither the statute law of this country, nor any well-considered judgment of a court, has introduced this new branch of equity into our jurisprudence. There may be a case or two looking that way, but none that we deem of sufficient authority to justify us in assuming the jurisdiction. * * * We do not think that the existence of malice in publishing a libel or uttering slanderous words can make any difference in the jurisdiction of the court. Malice is charged in almost every case of libel, and no cases or authority can be found, we think, independent of statute, in which the power to issue an injunction to restrain a libel or slanderous words has ever been maintained, whether malice was charged or not."

That was a case where an application was made for an injunction restraining the defendant from publishing certain circular letters alleged to be injurious to the patent rights and business of the complainant, and from making and uttering libelous and slanderous statements concerning the business of complainant, or concerning the validity of their letters patent, or of their title thereto. There is nothing to distinguish it from the present case.

In *Emack v. Kane* (C. C.) 34 Fed. 47, jurisdiction was entertained to restrain an attempted intimidation by one issuing circulars threatening to bring suits for infringements against persons dealing in a competitor's patented article; the bill charging and the proofs

showing that the charges of infringement were not made in good faith, but with malicious intent to injure complainant's business. The court, in its opinion, distinguishes that case from the case of *Kidd v. Horry*, upon the ground that while the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade or otherwise, yet if, instead of resorting to the courts to obtain redress for alleged infringements, he threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor and destroying his competitor's business, such acts should fall within the preventive reach of a court of equity. The two cases, as stated in the opinion in the latter case, are widely different. Upon the authority of these cases, it must be held that this court is without jurisdiction to grant the relief prayed for. But, without this, there can be no injunction restraining defendant from publishing generally statements in which reference is made to the plaintiff; and this is what is prayed for. With whatever reason a complainant might ask that the publication of a particular injurious statement be restrained, there is no reason at all in support of a prohibition of publications in general that may be thought to be, or may in fact be, offensive or injurious to the plaintiff. The court cannot assume to supervise the publication of offending newspapers, or otherwise constitute itself a press censor. The demurrer must be sustained, and the bill of complaint dismissed, and it is so ordered.

SAN DIEGO FLUME CO. v. SOUTHER et al.

(Circuit Court of Appeals, Ninth Circuit. October 25, 1900.)

No. 419.

WATER—CONTRACTS FOR SUPPLYING—VALIDITY UNDER LAWS OF CALIFORNIA.

Const. Cal. 1879, art. 14, § 2, providing that "the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in a manner prescribed by law," does not render invalid contracts for the supplying of water, and the payment of rentals therefor, until such time as the legislature shall expressly confer power by statute to make such contracts, but its purpose is to require conformity to such statutes if enacted.

On Rehearing. For former opinion, see 32 C. C. A. 548, 90 Fed. 164.]

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. A rehearing of this case was allowed upon the petition of persons interested in one of the questions involved appearing as *amici curiæ*, who earnestly contended that the long line of decisions of the supreme court of California, sustaining the validity of contracts for water rights entered into between wa-

ter companies and consumers of water, did not necessarily include an adjudication that such contracts were not rendered invalid by certain provisions of the constitution of California, since it nowhere, in express terms, appeared in any of those decisions that those provisions were construed, or that they were brought to the attention of the court. It was further suggested that the question of the validity of such contracts as affected by the constitution was about to be directly presented to that court in a case then pending. Upon the presentation of the cause before us on the rehearing several briefs have been filed by amici curiæ, indicating that the question discussed is one of general interest, and involves issues which are important to large industries in the state. Following upon these briefs comes a decision of the supreme court of California, which leaves no doubt of the attitude of that court towards the constitutional question which we are asked to reconsider. *Irrigation Co. v. Parke*, 62 Pac. 87. In the opinion in that case the court, referring to its numerous decisions covering a period of about 10 years, in which decisions the validity of contracts such as that involved in the present suit was sustained, alluded to the contention that those cases should not be considered of value as authority because it did not expressly appear therein that the provisions of the constitution had been brought to the attention of the court, and said:

"It would be remarkable, indeed, if, during the consideration of all these various cases down to the year 1898, the thought never suggested itself to either the court or counsel that the novel and notable provisions of the constitution about water, now relied on, could be invoked as defenses to those actions."

The court then proceeded to set at rest all doubt of the validity of such contracts by carefully considering the provisions of the constitution which were referred to in the former opinion of this court in the present case, and held that the provision that "the right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in a manner prescribed by law" (article 14, § 2), did not prohibit the owner of a water ditch from selling water, or contracting to furnish water, or from collecting rentals therefor, until the legislature should enact a statute expressly conferring the power to do these things; but that the true meaning of such provision is that, if the legislature shall prescribe by statute the manner in which such right shall be exercised, that manner must be followed, if the consumer insist upon it, but that, in the absence of such a statute, the words, "by authority of law," mean only by authority of the general law of the land. The court said: "Our conclusion is that the contract involved in the case at bar is not made invalid by the provisions of the constitution invoked by the appellants." We consider that case an affirmative expression of the meaning of the former decisions of the supreme court of the state of California construing rights arising out of contracts between corporations such as the appellant in the present case and consumers of water. It is urged that the doctrine of that decision is not binding upon us. We think oth-

erwise, but, if it were not, our investigation of the question involved leads us to the same conclusion as that reached by the supreme court of California. The facts so aptly alluded to in the opinion of that court, that at the time when the constitution was adopted, in 1879, there existed numerous water companies in the state which were subject to its provisions, and which, upon the contention of the amici curiæ who take the contrary view of the meaning of the constitution, were left powerless to contract for water rights, or collect for the same during the years that followed until statutory provision for their regulation was made, and the fact that such corporations were not by statute made public or quasi public, taken together with the language itself of the constitutional provisions, all point to the conclusion that notwithstanding that the use of water was declared to be a public use and subject to regulation by law, and the right to collect rates was declared to be a franchise to be exercised only in the manner prescribed by law, such corporations were not intended to be deprived of the power to enter into contracts with consumers upon terms agreeable to both, or until such time as the right should be fixed in the manner prescribed by law, or to agree upon a rate less than the maximum rate so established.

Our attention is directed to a recent decision of the United States supreme court in *Osborne v. Town Co.*, in the official report of which, as found in 178 U. S. 22, 20 Sup. Ct. 860, Adv. S. U. S. 860, 44 L. Ed. 961, it is said in the syllabus that the court held the appropriation and disposition of water in California to be a public use, and that tolls for the use of the same "cannot be fixed by the contract of the parties." This statement of the syllabus is misleading.¹ As we understand the import of the decision, it is quite the reverse of the quotation from the syllabus, and it admits impliedly, at least, that, in the absence of statutory regulation of water rates, contracts may be made therefor between water companies and the consumers of water.

We have no doubt of the correctness of our former ruling, that the judgment of the circuit court should be reversed, and the cause remanded for further proceedings in accordance with these views. It is so ordered.

¹ The misleading paragraph in 178 U. S. reads as follows:

"The appropriation and disposition of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by the contract of the parties."

The syllabi published in 20 Sup. Ct. and 44 L. Ed. are not criticised.

McGREGOR et al. v. VERMONT LOAN & TRUST CO.

(Circuit Court of Appeals, Ninth Circuit. October 1, 1900.)

No. 592.

1. EQUITY—POWER TO VACATE DECREE—EXPIRATION OF TERM.

A federal court of equity has no power to vacate a decree on motion made after the close of the term at which it was entered.

2. SAME—EXTENSION OF TIME TO PLEAD—DISCRETION OF COURT.

Where defendants failed to answer within 60 days allowed them by the court after the overruling of their demurrer, or within the additional time allowed by equity rule 34 after the overruling of a plea in abatement subsequently filed, it was not an abuse of discretion for the court to refuse to grant further time and to sustain a motion for a decree *pro confesso*.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

George W. Goode, for appellants.

A. E. Gallagher, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a suit to foreclose a mortgage executed to the appellee by the appellants Henry McGregor and Thyrza C. McGregor, his wife. Various other parties were made defendants; among others, the appellant Alfred Goode. To the amended bill filed in the cause the appellants filed a demurrer, which was overruled by the court December 5, 1898, with leave to answer within 60 days. None of the other defendants made an appearance, and their default was, therefore, entered. Without having filed any answer, the appellants, together with the defendants Nathan A. West and Mary J. West, his wife, filed, on the 14th day of February, 1899, a plea in abatement, which plea was, on the application of the appellee, set down for hearing, and, being heard, was by the court overruled on March 13, 1899, for manifest insufficiency. On the 16th day of March following, the parties whose plea had thus been overruled filed "a petition for rehearing and for leave to file an amended plea in abatement," and this petition the appellee caused to be set down for hearing April 3, 1899, which was the rule day next succeeding the overruling of the plea. The appellants not having answered, or filed any other plea, on or before April 3, 1899, appellee moved for a decree *pro confesso*, which motion, together with the application of the appellants and the defendants Nathan A. West and Mary J. West for leave to file an amended plea, came on for hearing in open court on the day last mentioned, both sides being represented by their solicitor, when the court denied the application for further time to plead or answer, and granted the appellee's motion that the amended bill be taken *pro confesso* as to the defendants McGregor, West, and Goode, and subsequently signed a final decree granting the appellee the relief prayed for, which was entered of record. After the expiration of the term at which the decree was entered, the appellants moved, upon certain

affidavits, that the decree be vacated; and the denial of that motion by the court below and the action of the court in confirming a sale of the mortgaged property made under the decree constitute the only matters complained of that appear in the bill of exceptions.

It is a sufficient answer to the motion to vacate the decree to say that, the term of the court at which the decree was entered having ended, the court had no power to vacate it. *Brooks v. Railway Co.*, 102 U. S. 107, 26 L. Ed. 91; *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 997; 2 Beach, Mod. Eq. Prac. § 983. The objections to the confirmation of the sale seem to proceed upon the ground that the amount for which the decree was entered exceeded the amount which should properly have been adjudged under the averments of the amended bill. It is manifest that the decree, until properly vacated, is conclusive of the amount due the complainant in the cause.

Assuming that the record is in such condition as to admit of a consideration of the action of the court below in respect to the pleadings, we do not find any error for which the judgment should be reversed. Upon the overruling of the appellants' demurrer to the amended bill the court below gave them 60 days within which to answer, which they wholly failed to do, either within the time thus granted or within the further time allowed them under equity rule 34 after the overruling of their plea in abatement. When, therefore, the court below, on the 8th day of May, 1899, refused them further time to plead or answer, and gave the appellee a decree pro confesso, it did not abuse its discretion. The judgment is affirmed.

NEW YORK SECURITY & TRUST CO. et al. v. ILLINOIS
TRANSFER R. CO.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1900.)

No. 721.

APPEAL—APPEALABLE ORDERS.

An order made by a circuit court granting leave to sue its receiver in a state court is discretionary and administrative, and is not appealable.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

On Motion to Dismiss Appeal.

J. M. Hamill, for appellee.

Bluford Wilson, for appellants.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

PER CURIAM. This appeal is from an order granting leave to sue in a state court a receiver appointed by the United States circuit court. The order was made after the suit was brought, and entered nunc pro tunc as of a date prior to the bringing of the suit. Whether for that reason it was invalid, we do not consider. Such an

order is discretionary and administrative, and therefore, in the opinion of the court, is not appealable. The motion to dismiss the appeal is therefore sustained.

AVERY et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 882.

1. DEEDS—CONSTRUCTION—CONVEYANCE TO CITY.

Unless restricted by statute or by its charter, a city has power to acquire and hold the fee to land used for public purposes, and the fact that under the statute, where property is dedicated by the owner to a public use, or is appropriated by proceedings in invitum, the city takes only an easement, terminable by the cessation of the use, does not affect the construction of a deed by which land is conveyed to the city, so as to limit the title acquired to an easement where the deed in terms conveys the fee.

2. SAME—QUALIFIED FEE—CONVEYANCE FOR STREET PURPOSES.

A declaration in a deed of land to a city, made upon a purported valuable consideration, and containing apt words to convey the fee, that the land is conveyed "as and for a public street of said city," does not create a condition subsequent, so that upon a discontinuance of the use of the property for a street the title reverts to the grantor, but the deed divests the grantor of all estate.

3. SAME—ORDINANCE ACCEPTING GRANT.

A deed of land to a city to be used as a street, which by its terms conveys the fee, is not reduced to a grant of a mere easement by an ordinance accepting "the dedication of the land specified" in the deed, and confirming the same as a public street, where such ordinance is required by statute to constitute the land a public street, for the care and maintenance of which the city is responsible.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 98 Fed. 512.

The questions arising upon this writ of error originate in a petition filed by the United States for the condemnation and appropriation of certain property in the city of Cleveland, Ohio, for the purpose of constructing a building for the use of the government as a post office, court and custom house. In 1856, Leonard Case was the owner of a lot of ground, part of original city lot No. 63, bounded on the east by Wood street, on the south by Superior street, on the west by the public square, and on the north by Rockwell street, having a front on Superior street of 214 feet 6 inches, and a depth of 200 feet. April 9, 1856, said Case, for a valuable consideration, conveyed to the United States, by absolute fee-simple deed with usual covenants, a part of said lot fronting on the public square 200 feet, and having a depth of 105 feet. This deed described the part so conveyed as follows: "Beginning at a post in the southwest corner of said lot; then northerly, on the easterly line of the public square and westerly line of said lot, about 200 feet, to Rockwell street, which is 66 feet wide; then easterly, on the southerly line of said Rockwell street, 105 feet, to a parcel of land 40 feet wide, which said parcel is dedicated for a street 40 feet wide, and to be opened by said Case; thence southerly, by the westerly line of said parcel of land mentioned, and parallel with the line of the public square, about 200 feet, to Superior street; then westerly, with Superior street, 105 feet, to the place of beginning." On the 18th of May, 1859, Case executed a deed to the city of Cleveland for a strip 35 feet wide, extending through from Rockwell to Superior street. This deed was in the usual words of a fee-simple deed, and contained covenants of seisin and warranty. The conveying clause, after describing the property, concluded with the words, "as and for a public

street of said city," and upon these words and their import the present case hinges. This deed was recorded October 14, 1859.

Two ordinances of the city council were introduced as tending to show the consideration for the deed and the purposes of the grant. Both were passed October 18, 1859, and were in these words:

"Be it ordained by the city council of the city of Cleveland, that the dedication of the land specified in the deed from Leonard Case to the city of Cleveland, being a strip of land thirty-five feet wide, from Superior street to Rockwell street, the westerly line of which thirty-five feet, is one hundred and five feet easterly from the easterly line of the public square, be, and the same is hereby, accepted and confirmed as a public street."

An ordinance to grant certain building privileges to William Case and Leonard Case, Jr.:

"Section 1. Be it ordained by the city council of the city of Cleveland, that in consideration of the conveyance to said city by Leonard Case, by a deed dated May 18, 1859, of a parcel of land lying east of the postoffice and between Superior street and Rockwell street, which land is hereby granted to William Case and Leonard Case, Jr., to occupy such a portion of the sidewalks on Superior street, Wood and Rockwell streets, and the land deeded as above mentioned, as may be necessary for the pilasters, areas and balconies for a block of buildings about to be erected by them on the vacant lot next east of the United States buildings, and bounded on the north by Rockwell street, on the east by Wood street, on the south by Superior street and on the west by a street thirty-five (35) feet in width. The outside of the main walls of said block is not to extend beyond the line of said streets, the pilasters, areas and balconies to extend into the sidewalks as shown on the ground plan, a copy of which is hereto attached.

"Sec. 2. That the owner thereof shall erect and keep in good repair a good iron railing around said areas, or suitably cover the same.

"Sec. 3. That the privileges granted in section 1 of this ordinance shall not apply in any other case than the one above mentioned.

"Passed October 18, 1859."

That part of the original Case lot, not included in the deeds above recited, was conveyed July 1, 1876, by said Case to a corporation known as the "Cleveland Library Association," now the "Case Library," by deed which called for said 35-foot street or place as a monument bounding the parcel conveyed on the west. The object of the proceedings begun by the United States was to appropriate the property so conveyed by Case in 1876 to the Case Library, as well as the 35-foot street or place so conveyed by him to the city of Cleveland, for the purpose of enlarging the present post-office site, and erecting thereon a new and much-enlarged public building. The defendants to the petition were the "Case Library" and its trustees, the city of Cleveland, and the heirs of Leonard Case, whom the petition alleged to claim some right, title, or interest in the parcel, which came subsequently to be known as "Case Place" or "Case Street." Issues were properly made up, and the value of the Case Library lot assessed by a jury, and no question is now made as to that. The jury assessed the damages sustained by the city of Cleveland, by reason of the appropriation of said "Case Place" for the post-office purposes, at a nominal sum, of which no complaint is made. In reference to the right, interest, or title of the Case heirs, the court instructed the jury that the conveyance of Leonard Case to the city of Cleveland was absolute, and that no interest or reversion remained in them, and that they had no interest or estate, conditional or otherwise, and were entitled to no compensation. This writ of error is sued out by the Case heirs alone, who have assigned this instruction as error.

Lewis J. Wood and E. J. Blaidin, for plaintiffs in error.

Robert Tucker and John J. Sullivan, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The deed of Leonard Case to the Cleveland Library Association

described the property as bounded on the west by "Case Place." If Leonard Case had any title, contingent or otherwise, to Case place, this call for Case place as a monument bounding the parcel conveyed to the library association would carry that title to the center of Case place, and this title would pass to the United States under the proceedings for the condemnation of the property of the library association. This has been conceded by counsel for the Case heirs, who have limited the controversy to the western half of the street which the government is seeking to appropriate.

2. The deed of April 9, 1856, to the United States for the lot now owned and occupied by the United States differed from the conveyance subsequently made to the library association, in that the easterly line of the parcel conveyed to the United States is described as running "with the westerly line" of Case street. We shall assume, for the purposes of this case, that, under the law of Ohio, a grantee holding under a conveyance which bounds his property by the west line of a street will take title only to the west line of the street, and not to the center thereof, as he would if the parcel had been simply bounded "by the street," or "along the street," or "upon the street." *Lough v. Machlin*, 40 Ohio St. 332; *Lembeck v. Nye*, 47 Ohio St. 336, 351, 24 N. E. 686, 8 L. R. A. 578.

3. Did the city of Cleveland acquire an unqualified fee in the parcel of land in controversy by virtue of the deed of Leonard Case of May 18, 1859? First, it is said that the city had not the capacity to take the fee. A municipal corporation, unless restrained by statute or charter, has the implied power to purchase and hold all such real estate as may be necessary to the proper exercise of powers specifically granted. 2 Dill. Mun. Corp. (2d Ed.) § 432; *Ketchum v. City of Buffalo*, 14 N. Y. 356; *Beach v. Haynes*, 12 Vt. 15; *State v. Woodward*, 23 Vt. 92; *Reynolds' Heirs v. Commissioners*, 5 Ohio, 204; *Gall v. City of Cincinnati*, 18 Ohio St. 563. So it is competent for the legislature to authorize the appropriation of the title in fee to land taken for a public use, and if such a full appropriation is made, and the owner compensated, nothing remains in the owner, and he cannot claim additional compensation if the land shall be subsequently alienated or lawfully appropriated to a different public use. *Cooley*, Const. Lim. (5th Ed.) 692; *Heard v. City of Brooklyn*, 60 N. Y. 242, 247; *Heyward v. Mayor*, etc., 7 N. Y. 314; *Com. v. Armstrong*, 45 N. Y. 234; *Haldeman v. Railroad*, 50 Pa. St. 425, 436; *Coster v. Railroad Co.*, 23 N. J. Law, 227; *Dingley v. City of Boston*, 100 Mass. 544.

The legislative power has not generally deemed it essential to require or authorize the taking of any greater interest in the land than an easement terminable by cessation of the use. Hence the well-settled rule that when the public use for which the property was taken, or to which it was dedicated, has become impossible, the freehold reverts to the grantor. But this right of reverter depends upon the question as to whether the original owner was divested of his entire interest by the proceeding, dedication, or grant under which the municipality acquired the property in question.

The charter under which the city of Cleveland was governed at the

time of Case's deed (34 Ohio Laws, 271), gave ample power to receive, purchase, and hold real estate for the due exercise of its corporate purposes, and we fail to find anything in the statute law of Ohio which would convert a fee in property acquired by deed for street purposes into a conditional estate or a mere easement. This power of taking land for street purposes by deed or grant is quite distinct from the power of appropriating land in invitum. The observation of Judge White in *Gall v. City of Cincinnati*, 18 Ohio St. 563, 568, where the title of the city to the market space involved depended upon deeds, that "the title acquired by purchase is to be determined by the character of the conveyance, and is not affected by the character of the estate conferred on the city in case of appropriation," is equally true here. Neither is the title of the city in any degree affected by the character of title and trust created by the Ohio act of March 3, 1831 (29 Ohio Laws, 320, and section 2601, Rev. St. Ohio). That act simply provides what the effect shall be of recording a town map or plat made by persons laying off a town. Under that act the recording of such plat showing streets, commons, alleys, etc., operates as a conveyance in fee to the town or city of the property laid off into streets, etc., to be held "in trust to and for the uses and purposes so set forth and expressed or intended." This act has been construed by the Ohio court as a statutory dedication of streets, commons, etc., shown by such a recorded map or plat, and as conferring no power of alienation discharged of the use thereby indicated, and that when the particular use becomes impossible of execution the property reverts to the dedicator or his representatives. *Board v. Edson*, 18 Ohio St. 226; *Commissioners v. Young*, 8 C. C. A. 27, 59 Fed. 96, 99.

The deed made by Leonard Case is the only source of the city's title, and the title thereby acquired is entirely unaffected by the statute we have cited, or the Ohio cases which construe and apply it. Neither have we to deal with a common-law dedication. That sort of dedication, as we had occasion to observe in *Commissioners v. Young*, 8 C. C. A. 27, 30, 59 Fed. 99, operates "only by estoppel." "The acquiescence of the owner and use by the public estop him from asserting any right of possession hostile to such use." It is obvious that under such a dedication the public acquire only an easement. "The owner of the fee may resume possession wherever there has been a full and lawful abandonment of the use for which the dedication was made." This is the well-settled rule concerning public roads, streets, etc., when the fee remains in the owner of the land over which the road, street, or alley has been established. *Commissioners v. Young*, cited above; *Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440; *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477.

The title of the city of Cleveland depends neither upon a common-law dedication, nor upon a statutory dedication under the act of March 3, 1831, nor upon the effect of any legal proceeding appropriating land for street purposes, but solely and wholly upon the legal effect of the deed of Leonard Case to it. The city, in view of the public interests involved, has consented to a nominal assessment of damages for its interest in Case street; and if Leonard Case has, by his deed, divested himself of every interest in the property, his heirs have

no interest to be appropriated by the present proceeding, and no ground to complain because they were not awarded damages. The deed of Leonard Case cannot, in strictness, be regarded as a pure donation. We have no other evidence as to the consideration than that shown by its recitals, and by the ordinance of the city granting to the vendor, in consideration of his conveyance, the right to occupy a portion of the sidewalks upon the four sides of the lot retained by him, and subsequently conveyed to the Cleveland Library Association. His deed recites that the consideration for his conveyance is one dollar, "and divers other considerations received, to my full satisfaction, of the city of Cleveland." The right to occupy five feet of the sidewalk upon Superior, Wood, Rockwell, and Case streets, with pilasters, areas, and balconies, for a block of buildings about to be erected upon that part of his original lot retained by him, was a valuable consideration. If it be conceded that this contract was in excess of the corporate power of the city, as urged by counsel, it would still leave the deed as one made upon a purported valuable consideration, and take it out of the category of a purely voluntary donation. The deed undoubtedly carried the legal title to the city. Apt words for that purpose are used. The words are, "do give, grant, bargain, sell, and confirm unto the city of Cleveland," not an easement or right of user, but "the following described tract or lot of land." Then follows the description, which concludes with the words, "which land is conveyed to said city as and for a public street of said city." The habendum clause is in these words: "To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging, unto the said city of Cleveland and its assigns, forever, to its and their own proper use and behoof." This is followed by the usual covenant of seisin and warranty, the latter running to the city and "its assigns." The words concluding the description, "as and for a public street of said city," are the only words which in any way distinguish this conveyance from an ordinary warranty deed to an individual. Do these words, without more, operate to qualify the estate conveyed so that, upon a discontinuance of Case street, the property will revert to the grantor? If so, the plaintiffs in error, as heirs at law of the grantor, have an interest in such possibility of reverter which is of some value, and which cannot be appropriated without compensation. The mere expression of a purpose for which it is intended that the granted premises will be used will not debase a fee into a conditional estate. This rule we had occasion to declare and apply in the case of *Commissioners v. Young*, 8 C. C. A. 27, 36, 59 Fed. 96, where the authorities are fully considered and cited. The deed construed in that case was a quitclaim deed to the village of Youngstown by the heirs of one who had theretofore dedicated the parcel of land as a "burying ground." The words, "to be under the authority and control of its proper council and municipal authority, in conformity with the act of the legislature of Ohio in that behalf," were held to be words merely indicating the purpose of the grantor as to the use to which the property should be appropriated, and as not making the fee a conditional one. The Ohio act referred to was one which regulated the powers of villages over

cemeteries. The declaration of the purpose to which the grantor expected the property to be devoted, and the details of management, read into the deed by the reference to the Ohio act, tended much more strongly to make the deed there construed a conditional fee than the deed here involved. The opinion of this court in that case is therefore controlling in the disposition of the present case. There are in the Case deed no words of re-entry and no words implying a condition other than the words, "as and for a public street." "A deed will not be construed to create an estate on condition unless language is used which, according to the rules of law, *ex proprio vigore* imports a condition, or the intent of the grantor is otherwise clearly and unequivocally indicated." *Rawson v. Inhabitants of School Dist. No. 5*, 7 Allen, 125, 127.

The words, "as and for a public street," do not, *ex proprio vigore*, import a condition. In *Greene v. O'Conner*, 18 R. I. 56, 25 Atl. 692, it appeared that the owner of land conveyed a strip to the city of Providence. The conveyance was in fee, but recited that "this deed is made upon the condition that the said strip of land shall be forever kept open and used as a public highway, and for no other purpose." It was held that the clause did not create a condition subsequent. In *Kilpatrick v. City of Baltimore*, 81 Md. 179, 31 Atl. 805, the conveyance was of a parcel of land to the city, with an *habendum* clause as follows: "To have and to hold the parcel of ground above described, * * * unto the mayor and city council of Baltimore aforesaid, and its successors, forever, as and for a street to be kept as a public highway." The land was diverted to another use, and action was brought to recover the property as for a condition broken. The court held that the words were consistent with an intent to repose a confidence in the authorities that they would carry out the purpose of the grantor so long as it was reasonable and practicable, but did not constitute a condition subsequent. In *Rawson v. Inhabitants of School Dist. No. 5*, cited above, the words, "for a burying ground, forever," in a deed to the town of Uxbridge, were held not to make the estate conditional. In *Raley v. Umatilla Co.*, 15 Or. 172, 13 Pac. 890, a warranty deed to the county, "for the special use, and none other, of educational purposes, and upon which block shall be erected a college or institution of learning," etc., was held to convey an unqualified fee. In *Beach v. Haynes*, 12 Vt. 15, a conveyance of land in fee to the town of Westford, "for the use of a common," was held to pass an alienable fee; and in *State v. Woodward*, 23 Vt. 92, a deed to a town, "for the use of the town as a meeting house," was held to pass an unqualified fee. In *Taylor v. Binford*, 37 Ohio St. 262, it was held that the grantor could not re-enter for condition broken, where his deed was to a township board of education, "its successors and assigns, forever," "for the use of school purposes only," although the property has been sold at public sale to the highest bidder and conveyed by the board. In *Watterson v. Ury*, 5 Ohio Cir. Ct. R. 347, affirmed by the supreme court upon the opinion of the circuit court, the deed contained a clause, "as a burial ground for the Roman Catholics." It was held that the grantee took a fee-simple estate, and not an estate upon condition. To the same purport are

the cases of *Curtis v. Board*, 43 Kan. 138, 23 Pac. 98; *Packard v. Ames*, 16 Gray, 327; *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502.

If the deed of Case divested the grantor of every interest, and conveyed an unconditional fee, the title thus vested was unaffected by the subsequent city ordinance. The words, "as and for a public street of said city," are to be regarded as an expression of the grantor that the property shall be constituted and maintained as a public street, so long as it shall be reasonable and practical. The ordinance is the action of the city carrying out this purpose of the grantor. Such an ordinance was made necessary by the Ohio act of March 18, 1859 (56 Ohio Laws, 57), which provided that no street thereafter dedicated to public use by its owner should be deemed a public street so as to impose responsibility upon the city for its care and maintenance, "unless the same shall be accepted and confirmed by an ordinance specially passed for such purpose." The object of the ordinance is therefore palpable. Its effect was not to qualify the city's title, but to make a public street over and upon property which the city owned in fee. That the title of a city to its streets is property held *publici juris* for use as streets may be conceded. But if the grantor has parted with all of his title, and the street is lawfully vacated or devoted to some other public use, no right, title, or interest of the grantor is affected, and his heirs have, as such, no interest which is taken and for which compensation may be demanded. The rights of abutters may be affected by devoting a street to other purposes, and they may have such rights as will entitle them to interfere, but the grantor has no such right if, in fact, there is no reverter upon abandonment of use as a street. We cannot hold that the language of this deed so unequivocally imports a right of re-entry upon the discontinuance of this street as to make the title subject to a condition subsequent without violating the cardinal principle of real property, "that conditions subsequent, which defeat an estate, are not to be favored or raised by inference or implication." The judgment is accordingly affirmed.

HUNT v. KILE.

(Circuit Court of Appeals, Seventh Circuit. November 19, 1900.)

No. 553.

On Petition for Rehearing. Denied.

For former opinion, see 98 Fed. 49.

PER CURIAM. Three specific points were ruled in this case, namely, that there was error in refusing each of two special requests for instruction and in the instruction given upon the subject of damages. The petition for rehearing is not addressed to those points, but complaint is made that the effect of a portion of the opinion is to limit the issues of the case to the question whether the rope of the apparatus used was of sufficient strength, and whether the failure to furnish chocks was negligence which made the master respon-

sible, excluding, as it is claimed, inquiry whether the apparatus furnished was defective in that it did not allow the work to be performed in the usual way, and required it to be done in an unnecessarily hazardous way, in that it compelled the constant presence of a man with a pinch bar behind the log which was being loaded. Neither the opinion nor judgment of this court is to be considered as controlling or limiting the inquiry in those respects when the case shall again be brought to trial, and nothing herein shall be deemed to affect the question of the assumption of risk by the deceased. The petition for a rehearing is denied.

HAYDEL v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1900.)

No. 1,408.

1. LIFE INSURANCE—ASSESSMENT POLICY—WHAT CONSTITUTES.

A life insurance company, authorized by its charter to do business only on the assessment plan, does not exceed its authority by the issuance of a policy which requires the payment of fixed premiums, or such ratio or multiple of such premiums as shall be determined by the directors, and provides, in effect, that the excess of such premiums above what is required to meet current mortuary claims, expenses, etc., shall be paid into a reserve or emergency fund, and that, after the expiration of a certain number of years, the policy holder may surrender the policy, and receive as its surrender value a certain per cent. of the amount remaining in the reserve fund and directly contributed by him, or at his option have the same applied to extend the obligation of the company to pay the principal sum in event of death. Such a policy is not an endowment policy, but retains the essential features of the assessment plan.

2. SAME—CONSTRUCTION OF POLICY—POWER TO INCREASE ASSESSMENTS.

Where the constitution of a mutual life insurance company, doing business on the assessment plan, authorized the board of directors to fix the amount of each assessment at such sum as it should deem necessary to meet death losses, and apportion the same among the members, and its policies provided that they should be governed by and construed according to the constitution, a memorandum on the back of a policy, giving a table of rates on each \$1,000 of insurance, which "shall be the basis of the assessment rate for each member according to the age," must be construed as merely fixing the basis for apportionment as between the members of different ages, and at most as an estimate of the probable cost of insurance, the accuracy of which would be determined by the actual experience of the company, and not as a contract that the assessments should not exceed those given.

3. SAME—CONSTRUCTION BY PARTIES.

When the provisions of a policy leave it in doubt as to whether a limitation was thereby placed on the power of the company to make assessments exceeding a certain rate, the making of numerous assessments above such rate, and their payment by the policy holder without objection, constitutes a construction by the parties which will be followed by the courts in determining their respective rights.

4. SAME—DEFENSES AGAINST INCREASED ASSESSMENTS.

A provision of the constitution of an assessment life insurance company that its reserve fund above a certain sum and in excess of sums represented by outstanding bonds "may be applied to the payment of claims, in excess of the American Experience Table of Mortality," or to make up any deficiency existing in the death fund after the collection of an assessment, is permissive, rather than mandatory; and, where other provisions ves*

the board of directors with power to devote the reserve fund to other purposes, it cannot be held that an assessment was invalid because the reserve fund was largely in excess of the sum named.

5. SAME.

A provision of the constitution of an assessment life insurance company that at the expiration of each period of five years the reserve fund should be apportioned between the existing members in each class, which should include the holders of all policies issued in the same year, and bonds issued to each member for his proportion, which after ten years might be used in payment of assessments, and that at such apportionment "the rate of assessment may be changed to correspond with the actual mortality experience of the association," cannot be construed to deprive the directors of the power given them by other provisions, and necessary to the continued life of the company, to fix the amount of each assessment at such sum as might be necessary to meet the company's losses.

6. SAME—FAILURE TO PAY ASSESSMENT—WAIVER OF PROMPT PAYMENT.

A policy holder in an assessment life insurance company died 3 days after the maturity of an assessment, not having paid such assessment. His policy had been in force for 14 years, during which he had paid more than 70 assessments, all but 5 of which were paid on the day they matured, and, of such 5, 4 were paid on the next day, and 1 on the second day. In each instance, except one, a receipt was given conditioned that the member was in good health, and that the acceptance of the payment after maturity should not be regarded as a precedent. The last default was 4 years before the death of the insured. *Held*, that such facts did not establish a course of dealing which would sustain a claim that the company had waived payment on the day of maturity.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

In this case Mary E. Haydel, the plaintiff in error and the plaintiff below, sued the Mutual Reserve Fund Life Association, the defendant in error, to recover the amount alleged to be due on two policies of insurance issued by the defendant company on the life of her deceased husband, F. L. Haydel, one of which was executed August 1, 1884, in the sum of \$10,000, and the other on September 15, 1884, in the sum of \$5,000. Both policies were issued on what is termed the "assessment plan," and remained in force until March 3, 1898. On January 12, 1898, an assessment, known as "Mortuary Call No. 96," was levied on the first of the above-mentioned policies in the sum of \$141.90, which sum, by the terms of the assessment, was payable February 1, 1898, but might be paid on or before March 3, 1898. On January 28, 1898, a similar assessment, also designated "Mortuary Call No. 96," was levied on the second of the above policies in the sum of \$70.95, which sum was likewise made payable, by the terms of the assessment, on or before March 3, 1898. F. L. Haydel, the plaintiff's husband, although duly notified of these assessments, declined to pay them, and died on March 6, 1898, leaving them wholly unpaid. Under a provision contained in the policies the failure to pay these assessments, if they were legally levied, rendered the policies void, and the defendant company relied on this provision as a defense thereto. The plaintiff pleaded that these assessments known as "Mortuary Call No. 96" were unlawfully levied, and that the policies had not become forfeited when her husband died. The reasons that were assigned and are principally relied upon to support this contention are as follows: First. It was said that the defendant company was incorporated under the laws of New York to do business solely on the "co-operative or assessment plan," and that after its organization, and after the issuance of the policies in suit, it began to issue a class of policies known as "five-year combination option policies," which were not authorized by its charter, not being issued on the co-operative and assessment plan; that it amalgamated this business with its authorized business by levying assessments on all its members to pay losses incurred under its unauthorized policies, and that mortuary call No. 96 was levied in part for that purpose. Second. It was urged, in substance, that by a table or rate

of assessment indorsed on the policies in suit it was stipulated that the rate of assessment should not exceed \$3.50 for each \$1,000 of insurance, making each assessment in the aggregate on the \$10,000 policy \$35, and that assessments at that rate were paid until 1895, when the rate was unlawfully raised by levying an assessment every two months to the amount of \$82.80 on the \$10,000 policy; that the assessment was again raised in 1898 by requiring a payment of \$141.90 on February 1, 1898, on the \$10,000 policy, and that this latter assessment was unlawful. Furthermore, it was contended that an agreement existed between the insurer and the insured to the effect that the reserve fund of the defendant company "above \$100,000 and in excess of sums represented by outstanding bonds should be applied to the payment of claims in excess of the American table of mortality, and when any claim by death was due to make up any deficiency that might then exist in the death fund"; and that this agreement was not kept by the defendant company when mortuary call No. 96 was levied, by virtue of which fact the call was also illegal. It was also urged that by the terms of the policies the rate of assessment thereon, to correspond with the actual mortality experience of the company, could be changed only at the expiration of periods of five years after the issuance of the policies,—that is to say, in 1889, 1894, and 1899,—but that instead thereof the defendant increased the assessment at the beginning of the year 1898 by levying mortuary call No. 96 to the amount of \$141.90 on the \$10,000 policy, and that such increase rendered the assessment void, it not having been raised at the end of the quinquennial period. It was finally claimed that by acts in pais the defendant company had waived the right to exact payment of assessments on the precise day of maturity. These were, in substance, the principal grounds relied upon in the trial court to avoid a forfeiture of the policies for nonpayment of the assessments due on March 3, 1898. They were each overruled, and a direction was given to the jury that under the evidence adduced by the plaintiff there could be no recovery. (C. C.) 98 Fed. 200. The plaintiff below has brought the case to this court for review.

E. T. Farish, for plaintiff in error.

James C. Jones (William C. Jones, George Burnham, Jr., and Sewell T. Tyng, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It may be conceded at the outset that, if the assessment on the policies which was due on or before March 3, 1898, was unlawfully levied, the policies remained in force on March 6, 1898, when the plaintiff's husband died; and, taking this proposition for granted, we shall proceed to consider whether the assessment in question was, for any reason, illegal. The first point to be determined is whether the issuance by the defendant company "of the five-year combination option policies," so termed, rendered the assessment due on March 3, 1898, unlawful. The principal objection urged to the validity of the latter class of policies is that they were endowment policies, and in this behalf counsel for the plaintiff in error asserts that they were endowment policies because "the company undertook to pay or make return of a specified sum of money at the termination of certain designated periods during the lifetime of the assured." An inspection of one of these policies, which has been inserted in the record, discloses the fact that by the terms of the policy, as expressed on its face, the insured is required to pay a stated sum at stated periods, instead of paying an uncertain sum, which is fixed on each occasion

by the executive committee of the company; and in this respect this class of policies does differ from the company's ordinary policy. A critical examination of the conditions appended to the policy discloses, however, that out of the premiums thus agreed to be paid the company is authorized to deduct "the amount included therein for dues, for expenses, and other expenses chargeable against moneys received from mortuary calls as provided in the constitution and by-laws, medical fees, and amounts paid for the surrender and cancellation of policies," and that, "after paying the death and disability claims through the death fund," it is required to add the remainder "to the reserve or emergency fund." This class of policies also contain provisions to the following effect: That there shall "be due to the association for premiums the amount mentioned on [the face thereof], or such multiple or ratio thereof as its executive committee may determine"; that, should said policies continue in force, "the actuary of the association will annually after the eleventh year while the same is in force determine and credit thereto the equitable proportion to which this policy is entitled * * * from its direct contribution to the reserve or emergency fund for the tenth respective year prior to said credit, which amount so determined and credited may be used towards payment of future premiums"; that, after such policies have been in force for the full term of five years, "if the member notify the association, in writing, at least six months before the expiration of any policy year, that he desires to surrender this policy, and receive therefor its cash surrender value, the actuary of the association will determine the amount remaining in the reserve or emergency fund * * * directly contributed thereto by said member, and the association will, upon surrender and cancellation of this policy while in force, pay to said member in cash at the end of five years fifty per cent., at the end of six years fifty-five per cent. (with an additional five per cent. for each added year of continuous membership not exceeding one hundred per cent.), of the net amount so determined"; and that after such contracts have been in force for the full term of five years, and during their continuance, "the member, by giving at least thirty days' notice in writing to the association, may have the amount to which he would have been entitled as a cash surrender value under [the preceding] provision applied to extend the obligation to pay the principal sum in event of death for such period as said value will meet the dues for expenses fixed by the board of directors, and the full tabular cost as per American Experience Table of Mortality at attained age, at the expiration of which period said obligation shall cease and determine." While these provisions are somewhat involved, and to a certain extent difficult of comprehension, still we think it is clear that the policies in question which contain the same are not endowment policies; and we are also of opinion that they are not so far variant from ordinary policies issued on the co-operative or assessment plan as to warrant a ruling that the defendant company exceeded its power in issuing them. They lack some of the essential features of endowment policies. While the premium at first reserved is a definite sum, yet by further provisions the executive committee

of the company can require the holders of such policies to pay a greater or less sum than that stipulated to be paid on the face of the policies, if the condition of the defendant company at any time renders such action necessary. It is true that a person who takes out a policy of insurance on the five-year combination option plan enjoys certain privileges which ordinary members do not enjoy,—such as the right after five years, upon due notice, and upon surrender of his policy, to receive a certain per cent. of the net amount remaining in the reserve or emergency fund which has been directly contributed by him, or to have the amount to which he is so equitably entitled applied to extend the obligation to pay the principal sum for such period as the ascertained surrender value will pay the member's share of expenses and the cost of insurance at his attained age. But it will be observed that such policy holder is not entitled to receive any fixed amount by way of dividends or as surrender value, and that he shares with other members in the success of the company, and suffers loss as they suffer, if the reserve or emergency fund is depleted by unexpected losses. In exchange for the peculiar privileges which a member of this class enjoys, he agrees to pay stated sums at stated intervals (which we assume to be somewhat in excess of the average assessments paid by the ordinary policy holder), unless the executive committee, in the exercise of its discretionary powers, elects to compel him to pay a multiple or ratio of the specified premium. In view of all the provisions which the form of policy in question contains, we conclude that such policies were issued substantially on the co-operative or assessment plan, and that nothing therein found in the shape of special privileges accorded to the policy holder would justify a decision that they were unauthorized by the defendant's charter. It is quite likely that the policy in question was adopted to attract the patronage of a class of persons who prefer to pay specified sums at stated intervals, instead of assessments, which may vary in amount; but, when all the provisions of the contract are considered, it seems to retain all the essential features of assessment insurance.

The next question to be determined—and it is the one to which special prominence is given in the argument—is whether mortuary call No. 96 was illegal as to the deceased because of an agreement that assessments on his policies should be levied at the rate of \$3.50 per thousand, bimonthly. The claim to this effect is predicated on the fact that on the back of each of the policies, after the signature thereto of the president and secretary, is found an indorsement as follows:

“Table of Rates.

“Admission Fee.

“\$1,000, \$8.00; \$2,000, \$12.00; \$3,000, \$15.00; \$5,000, \$20.00; \$10,000, \$30.00.

“Dues.

“The dues for expenses are limited to \$2.00 on each \$1,000, payable annually in advance.

“Assessment Rate Table.

“No assessments will be made while there remains in the death fund a sum sufficient to pay existing claims in full.

“The basis of the assessment rate for each member according to the age taken at the nearest birthday on each \$1,000, shall be as follows.”

Then follows a scale of rates in the form of a table showing the rate of assessment from the age of 15 to 65. An examination of this table shows that from the age of 25 to 33 the rate increases 2 cents each year; from 33 to 50, 4 cents each year; from 50 to 60, 25 cents each year; and from 60 to 65, 50 cents each year. At the age of 56 the rate specified in this table is \$3.50, and the deceased is said to have been of that age when the policies in suit were issued. On the other hand, section 5 of article 11 of the defendant's constitution clearly confers authority to make such assessments as the board of directors deem necessary to meet death losses, the provision being that "on the first week day of the months of February, April, June, August, October, and December of each year (or at such other dates as the board of directors may from time to time determine) an assessment shall be made upon the entire membership in force at the date of the last death to the audited death claims prior thereto, for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members according to the age of each member." Section 8 of the same article also confers a general power to make assessments, the language being that "the board of directors shall have authority to fix and determine the amount of benefits for which certificates of membership will be issued, rates of assessment, admission fees, and annual dues, and to adopt such other rules and regulations as they may deem best for the interest of the association." The tenth paragraph of the policies in suit also declares that "the entire contract contained in this certificate and said application, taken together, shall be governed by, subject to, and construed only according to the constitution, by-laws, and regulations of said association and the laws of the state of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." The proof discloses that when mortuary call No. 96 was levied, and the demand was made upon the deceased for its payment, he did not decline to pay the same for the reason that by the terms of his policies assessments could not be levied thereon exceeding \$3.50 per thousand bimonthly, but his refusal to pay was based on other grounds.

On this state of facts the question to be determined is whether the indorsement on the back of the policies should be regarded as an agreement between the insured and the insurer, binding the latter not to make assessments in a sum greater than \$3.50 per thousand bimonthly, or whether it should be regarded merely as a memorandum showing how assessments would be apportioned as between persons of different ages, and the probable amount of the bimonthly assessment as then foreseen and estimated. For several reasons we incline to the opinion that the latter is the correct view. In the first place, the defendant was a mutual company operating on the assessment plan. It had no means wherewith to pay expenses and death losses, other than such as it derived from assessments on its members. It is by no means probable, therefore, that by the indorsement in question it intended to divest itself of the authority plainly conferred by its constitution upon the board of directors to make

such assessments as might at any time be found necessary to meet its liabilities, or to tie its hands so that it could not exercise this necessary power. In the second place, the cost per year to a person aged 56 of a policy for \$10,000 at the rate indicated by the indorsement would only be \$210, which is a sum so far below the usual cost of that amount of insurance to a person of that age as constrains us to believe that the deceased did not himself regard the indorsement as a contract binding the defendant to furnish insurance at that rate, without reference to what might be its actual experience. It is most probable, we think, that he understood it to be an estimate of the probable cost of insurance, the accuracy of which would be determined by the class of risks which it succeeded in obtaining. In the third place, if such a wide departure from the principle of operation described in the defendant's constitution was contemplated by the parties as an agreement for a fixed or level rate of assessment irrespective of the company's actual experience, then it is most likely that a stipulation of that nature would have been embraced in the body of the contract, instead of being indorsed in the form of a memorandum on the back of the policies. And lastly, if it be conceded that the memorandum in question is adequate to raise a doubt as to the proper interpretation of the contract, then the contract should be construed as the parties themselves saw fit to construe it in their dealings with each other. *Chicago G. W. Ry. Co. v. Northern Pac. Ry. Co.* (C. C. A.) 101 Fed. 792, and cases there cited. It is conceded that the rate of assessment was raised above the rate specified in the memorandum on the back of the policies, and that the increased rate was paid by the deceased without dissent. The proof shows that after the policy had been in force for something more than three years numerous bimonthly assessments for the sum of \$52.50 were levied and paid, and that subsequently numerous bimonthly assessments to the amount of \$82.80 each were likewise levied and paid. Moreover, the final refusal to pay mortuary call No. 96 was not based on the ground that the defendant company lacked the power under its policies to make the assessment. For all of these reasons we conclude, as above stated, that the indorsement on the policies can be regarded in no other light than a memorandum showing the basis upon which assessments would be apportioned as between members of different ages, and as an estimate of the probable amount of the assessments, which was not intended to divest the board of directors of the power plainly conferred on them by the charter of the company to make such assessments as might at any time be found necessary to meet its death losses.

The next proposition is that the defendant was bound to pay the death claims intended to be paid with the proceeds of mortuary call No. 96 out of its reserve fund, and that the call was illegal for that reason. This contention is based on the following provision found in the defendant's constitution, which is copied substantially into its policies:

"The reserve fund above \$100,000, and in excess of sums represented by outstanding bonds, may be applied to the payment of claims in excess of the American Experience Table of Mortality, and when any claim by death is

due, after a mortuary assessment upon each member of the association has been made according to the rules of the association, to making up any deficiency that may then exist in the death fund." Article 10, § 3.

The trial court answered this proposition as follows:

"It is to be noted in considering this excuse (that is, the excuse for not paying mortuary call No. 96) that the plaintiff entirely fails to aver that the reserve fund exceeded its bond obligations, or that the mortality experience of the defendant association was in excess of the American Experience Table of Mortality. In other words, in the allegation that there was this large amount of reserve fund the pleader utterly fails to observe that this particular fund could not have been devoted to the payment of the death claims unless such claims were in excess of the American Experience Table of Mortality. Entirely apart from this, however, it appears from the different provisions of the constitution and by-laws, and in the subsequent amendments of the constitution and by the subsequent development of the schemes of business of this company, that the board of directors had the power to devote its reserve fund in any manner they saw fit, provided it be made subject to the general purpose of the corporation and to the business being carried on for the benefit of the members."

In addition to the point thus made by the trial court that the reply was insufficient to sustain the plaintiff's contention, it is to be observed that the language above quoted from the constitution, and on which the plaintiff's contention is founded, is permissive, rather than mandatory, and seems to have been designed to vest in the board of directors of the defendant company the right to determine when such conditions existed that its reserve fund could be safely or properly used to pay accumulated death losses without making an additional assessment. Under the laws of New York (Laws 1892, c. 690, § 205) the defendant was required to keep on hand the amount of one assessment, and was also required to keep on hand the amount of two assessments before apportioning its reserve, or permitting the same to be applied in reduction of assessments upon its members. When mortuary call No. 96 was made, two assessments, it seems, such as were required by law, amounted to \$1,200,000. The company had bonds outstanding to the amount of \$383,962.43. It had executed bond statements to the amount of \$2,583,602.39, and the amount of death claims approved and accruing were in the neighborhood of \$750,000. The amount of reserve required by the company's by-laws was \$100,000. At the same time the amount of its reserve fund on hand and invested was \$3,305,997.25. It will be seen, therefore, that the several items first enumerated exceeded the reserve fund on hand and invested to the amount of \$1,711,567.57. It is claimed in behalf of the plaintiff in error that the bond statements, aggregating \$2,583,602.39, were not, in any proper sense, liabilities of the defendant company at the time mortuary call No. 96 was levied. But, be this as it may, we are of opinion that the directors of the defendant company were under no obligation to defer levying the assessment, or to pay the accrued and accruing death losses, then amounting to \$750,000, out of its invested reserve fund, if, in the exercise of their discretionary power, they deemed it for any reason unwise or impolitic to do so.

Section 4 of article 10 of the defendant's constitution contains the following provision, which is also found, in substance, in the defendant's policies:

"After the expiration of each period of five years during the continuance of a certificate of membership, a bond shall be issued for an equitable proportion of the reserve fund, and the principal of said bond shall be available ten years from its date towards paying future dues and assessments under said certificate; and, should membership under said certificate cease from any cause, said bond shall at once become null and void, and any portion of said principal not thus used shall be applied to increase the bonds issued at the next quinquennial apportionment to other members of the association holding certificates issued during the same year as the aforesaid certificate, and at which apportionment the rate of assessments may be changed to correspond with the actual mortality experience of the association."

In view of that clause of the section which has been italicized, learned counsel for the plaintiff in error contends that there was an implied agreement on the part of the insurer that it would not raise the rate of assessment indorsed on the back of its policies, except at quinquennial periods, and that, as the rate was raised in 1898, when mortuary call No. 96 was levied, and, as that was not one of the quinquennial periods, the call was illegal and the deceased was under no obligation to pay the same. If this clause is construed to mean that the board of directors could not change the rate of assessment except at quinquennial periods, no matter how great the need for such a change, then it conflicts with other provisions of the constitution, already quoted, which in broad terms gave the board power to make assessments at stated periods "for such a sum as the executive committee may deem sufficient to meet the existing claims by death," and "to fix and determine * * * rates of assessment, admission fees, and annual dues." A construction of the clause now in question must accordingly be sought which will harmonize with the other provisions of the constitution, and, inasmuch as the power to make such assessments as are adequate to meet death claims is vital to the successful operation of the company, a construction of the clause should be sought which will, if possible, save to the managing officers this very necessary power. It will be observed that section 4 of article 10 of the constitution deals mainly with the subject of issuing bonds to members, representing their respective interests in the reserve fund, the provision being that they shall be issued at the expiration of 5 years, and be available at the end of 10 years from their date for the payment of assessments, and that, if any membership should cease, the bond of that member shall become void, and the share of the reserve fund which it represents inure to the benefit of those who became members during the same year as the one whose membership ceases. It is then said, "At which apportionment the rate of assessment may be changed to correspond with the actual mortality experience of the association." Certificates of membership in the defendant company are thus grouped into classes, those issued during the same year forming a class by themselves; and the policy holders of each class take the share of the reserve fund that would have been apportioned to other policy holders of that class but for the fact that they have ceased to be members. We think that the concluding paragraph of the section now under consideration may be properly construed as conferring upon members the right at these quinquennial periods, if they so elect, to call upon the board to revise its previous rate of

assessment, and to reduce it somewhat so as to conform more nearly to the actual mortality experience of the company if it appears that the previous rate of assessment has been unnecessarily high, and has increased the reserve fund beyond the amount necessary for the protection of policy holders. We are unable to regard the provision as depriving the board of directors of the power to levy an assessment which they deem necessary, in the exercise of an honest judgment, to pay accrued death losses, and to maintain the reserve fund at a proper level. This power should reside in companies of the class to which the defendant belongs at all times. It is the basis upon which they are organized, and we are unable to hold that the defendant company intentionally divested itself of that power. Aside from this view of the case, we may repeat, what has heretofore been said, that the contemporaneous construction of the contract by the parties thereto is of the highest value in settling its true interpretation in those respects, where its construction is doubtful, and the evidence shows that the board of directors of the defendant company had constantly exercised the power of changing the rate of assessment, whenever they deemed it necessary to do so; and that this asserted right was not challenged by the deceased at any time during the 14 years that he remained a member. He may have been induced to become a member by the belief that he could obtain insurance on the co-operative and mutual plan at a much lower rate than in the old-line companies, who do business with the expectation of making a profit for their shareholders; and in this respect he does not seem to have been mistaken. He may also have expected to obtain insurance at a much lower rate than was in fact charged after his policy had been in force for several years and death losses became frequent. But it is quite evident, we think, that he fully understood and assented to the theory upon which the defendant proposed to conduct its business, namely, that those who became members must, in any event, pay the actual cost of insurance, whatever it might be, or retire from membership; and that the managing officers reserved to themselves, and would exercise, the power of making assessments from time to time for such amounts as they deemed necessary to pay accrued and accruing death losses, and at the same time maintain an adequate reserve or emergency fund. Our conclusion is, therefore, that mortuary call No. 96 was not invalid for the reason last assigned and considered.

The trial court, in directing a verdict for the defendant company, analyzed the testimony that had been introduced for the purpose of showing a waiver of the forfeiture which was incurred by reason of the nonpayment of mortuary call No. 96 on March 3, 1898, and, as the court's analysis of the evidence on that point is not criticised, we may well adopt it. From such analysis it appears that in the course of the 14 years which elapsed while the deceased remained a member his dues were paid on the day of maturity except on five occasions, and that in the meantime he paid something more than 70 assessments. The five assessments that were not paid on the precise day of maturity were paid on the next succeeding day with one exception, where the payment was made on the second succeed-

ing day; and in every instance but one a receipt was issued to the member, which specified that it was issued on the condition that he was then in good health, and that the receipt of the assessment on the day after it was due should not be regarded as a precedent for the receipt of future assessments after they were due; or, in other words, that it should not be regarded as a waiver of the provision requiring the payment of assessments on the day of maturity. The one payment that had been accepted after maturity, and was not accompanied by a receipt as last specified, was made in 1894, but thereafter all payments were made promptly, or the payments were accepted on the conditions last above stated. The trial court held that this did not establish a course of dealing from which it could be legitimately inferred that the defendant intended to waive the provision in its policies requiring payment of assessments on the day of maturity, or from which it could be inferred that it had consented that assessments might be paid subsequent to maturity without reference to the member's bodily condition. This ruling, we think, was clearly right, and the opposite view is not urged with much apparent confidence that it is tenable. From the course of dealing in question we think that no reasonable person could have been led to believe that a member of the company had the right to pay his assessments after as well as on the day of maturity. The company's conduct showed, as we think, conclusively that it intended to insist upon the stipulation that assessments should be paid punctually on the day of maturity, and that it would not vary therefrom, except as an act of grace, when the member was in good health. Counsel for the plaintiff in error complains of the introduction of the evidence of two witnesses showing what occurred between the deceased member and agents of the company when the former was asked to pay the last mortuary call and refused to do so, but, without reference to that evidence, which tended to show that he well understood that the failure to pay would result in a forfeiture, we think that there was no substantial evidence tending to establish a waiver. The result is that the judgment below must be affirmed, and it is so ordered.

MISSOURI, K. & T. RY. CO. et al. v. TRUSKETT

(Circuit Court of Appeals, Eighth Circuit. October 27, 1900.)

No. 1,366.

1. CARRIERS—DELAY IN TRANSPORTATION OF STOCK—MEASURE OF DAMAGES.

In an action against a railroad company to recover damages for an alleged unreasonable delay in the transportation of cattle, it is not error to take as the basis for computation of damages the difference in the market price of the cattle in the market to which they were being shipped, where their destination was known to the defendant, although its contract covered their transportation only over its own line, and their delivery to a connecting carrier for the remainder of the shipment.

2. EVIDENCE—COMPETENCY OF EXPERT WITNESSES—MARKET VALUE OF CATTLE.

Stockmen who for 10 years have been engaged in shipping and selling cattle in the principal markets, and are familiar with the grading of cattle

therein, and with prices as given in the market quotations, are competent to testify to the value in such markets at a given time of a particular shipment of cattle, of whose quality and condition they had personal knowledge.

3. CARRIERS—DELAY IN TRANSPORTATION OF STOCK—DEFENSES.

A railroad company cannot be exonerated from liability for an unreasonable delay in the transportation of stock on the ground that a heavy dew rendered the track slippery and impeded the progress of the train; such an occurrence being an ordinary one, against the effect of which it was the duty of the company to provide.

4. APPEAL—AFFIRMANCE—STATUTORY DAMAGES.

The provision of Mansf. Dig. § 1311 (Ind. T. Ann. St. 1899, § 813), adopted and in force in the Indian Territory, which requires an appellate court, upon the affirmance of a judgment for the payment of money, which has been superseded, to award against the appellant 10 per cent. damages on the amount superseded, is obligatory on the United States court of appeals for the Indian Territory.

5. CARRIERS—DAMAGES FOR DELAY IN SHIPMENT—INTEREST.

An action against a railroad for delay in the transportation of stock, by reason of which the shipper suffered damage, is one for breach of contract, and interest is recoverable on the amount of the loss from the time compensation therefor was demanded.

In Error to the United States Court of Appeals in the Indian Territory.

Clifford L. Jackson, for plaintiffs in error.

S. M. Porter, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought more than eight years ago by H. A. Truskett, the defendant in error, against the Missouri, Kansas & Texas Railway Company, one of the plaintiffs in error, to recover damages incident to an alleged unreasonable delay in the transportation of about 180 head of cattle from Stevens Station, in the Indian Territory, to Paola, Kan. The case did not reach a trial in the lower court until four years after the action was instituted, when it resulted in a verdict and judgment in favor of the plaintiff below for the sum of \$893.66. The assignment of errors is very voluminous, embracing, as it does, 47 specifications of error. But many of the specifications are not noticed in the briefs, and no notice will be taken by this court of those which have been practically abandoned by failing to argue them.

In the course of the trial below there was some controversy at first as to whether the cattle were shipped to Chicago, Ill., by way of Paola and Kansas City, in pursuance of a verbal contract between the carrier and the shipper, or from Stevens Station, in the Indian Territory, to Paola, in pursuance of a written contract. It is conceded that the delay of which complaint is made occurred between the last-mentioned points on the line of the defendant's road. Before the last-mentioned controversy was determined by the trial court, some evidence had been introduced tending to establish an oral agreement for the transportation of the cattle to Chicago; and some evidence had also been introduced as to the market value of the cattle at Chicago, Ill., at the time when they should have ar-

rived. Complaint is made in the first instance because the plaintiff below was permitted to introduce any evidence as to the market value of the cattle in Chicago. Before the trial in the lower court was concluded that court ruled definitely, and so charged the jury, that the cattle were in fact transported by the carrier in pursuance of a written contract binding it to transport them to Paola, and it accordingly withdrew from the consideration of the jury all the evidence which had been introduced tending to show an oral agreement for the transportation of the stock to Chicago. When it came to instruct the jury as to the quantum of damages, it advised them "that in arriving at the amount of such damages they must not consider any evidence as to the market value of the cattle at Chicago, Ill., unless they should find from the evidence that the cattle were to be shipped to and sold only in that market; but if the jury should find from the evidence that the cattle were to be shipped to and sold only in Kansas City, Missouri, they must confine themselves to the evidence with reference to the markets and value of the cattle at that place." As heretofore stated, the evidence clearly showed that the delay in transporting the cattle of which complaint was made occurred wholly on the defendant's line of road, before they had reached Paola; and the theory of the court in giving the instruction aforesaid appears to have been that, although the contract of the carrier only called for the transportation of the stock to Paola, yet, if there had been unreasonable delay in reaching the latter point, and the carrier knew when it received the stock that the cattle were destined to Chicago, and were to be there sold, the market value of the stock at the latter place at the time they would have arrived but for the unreasonable delay on defendant's road might be considered in assessing the damages. We are of opinion that this view of the case was correct, and that no error was committed in admitting testimony relative to the value of the cattle in Chicago, inasmuch as the jury were advised that such testimony must be ignored unless the cattle were destined to be sold in that market only. There was testimony in the case which had a strong tendency to prove that the plaintiff intended to market his stock in Chicago, and that the carrier was advised of that fact. On the other hand, there was no testimony tending to show that Paola was a cattle market, and that the shipper expected to sell the cattle at that place. In view of the evidence, it is obvious that he either intended to sell the cattle at Kansas City or Chicago, and the carrier was doubtless well advised of that fact when it received them for transportation. Under these circumstances, we think that the trial court properly admitted evidence of the market value of the cattle both at Kansas City and Chicago, and properly advised the jury that in assessing the damages the market value thereof should be considered at that place where the shipper contemplated selling them when he made the contract for their transportation. If the defendant company was guilty of an unreasonable delay in transporting cattle over its own road, which it knew were destined to the Chicago market, it cannot complain of the introduction of evidence

tending to show what was their market value at the latter place at the time when they would have arrived but for its own neglect.

The admissibility of the evidence in relation to the market value of the cattle at Chicago is challenged for another reason; that is to say, because the plaintiff below held the stock at Kansas City for one day after its arrival at that point before forwarding the same to Chicago. It is said that he had no right to detain the stock for an unreasonable length of time at an intermediate point, if he intended to market the stock at Chicago, and then charge the loss incident to a decline in prices to the defendant company. This proposition may be conceded as sound law, and so the trial court instructed the jury, telling them, in substance, that, if the plaintiff desired to market his cattle in Chicago, he had no right to delay them in Kansas City in order to test the market there, and then charge to the defendant any fall in the market price at Chicago while the cattle were so delayed at Kansas City. The fact seems to be that owing to the unusual time consumed in transporting the cattle from Stevens Station to Paola, Kan., they were very much in need of rest, feed, and water when they reached Kansas City, and had to be detained for some time before they could be prudently forwarded to Chicago. Exactly how much time was necessary to give them the needed rest and care the evidence does not disclose. The time consumed was not so long as to justify a court in holding, as a matter of law, that by reason of the delay all evidence as to the decline in the market value of cattle at Chicago was inadmissible. We think that the jury were properly allowed to decide how far the plaintiff had disabled himself from charging the defendant with the loss incident to the decline in the market price of cattle at Chicago by the length of time the stock had been detained at Kansas City.

It is next urged that neither the plaintiff below nor his brother should have been permitted to testify as to the market value of the cattle either at Kansas City or Chicago. This objection is founded upon the assumption that they were not sufficiently acquainted with the value of cattle at either of those places, or the condition of the market thereat, to express an opinion as experts. We are not able, however, to assent to this proposition. These witnesses, according to the testimony, had had fully 10 years' experience in handling and shipping cattle. They had shipped cattle repeatedly during that period to the Kansas City market, and were familiar with the different grades of cattle, and had made it their business, like other stockmen, to keep themselves posted as to the value of different grades of cattle by consulting the market reports and conferring with commission men who were engaged in buying and selling stock in each of the aforesaid markets. They had far more knowledge concerning the value of cattle than is possessed by the average individual, and for that reason they were entitled to express an opinion on the various points concerning which they were interrogated, namely, as to the market value of such stock as theirs on various days in July, 1892, after it was shipped, and as to the extent to which their cattle had shrunk in weight and value as a result of hard usage on the

train, and also as a result of the unusual delay in transporting them. The cross-examination which these witnesses underwent to demonstrate their incompetency to testify on these points did not, in our judgment, establish their incompetency, but, at most, only tended to detract somewhat from the weight which should be accorded to their statements.

Some testimony was adduced in the course of the trial which tended to show that during the night following the receipt of the cattle the defendant's track between Stevens Station and Paola, Kan., was rendered slippery by a heavy dew, which impeded the movement of the train, and occasioned the delay of which the plaintiff complains. On the strength of this testimony the defendant company asked the court to declare that if the train was delayed by a heavy dew, and the jury so found, there could be no recovery. Error is assigned because of the refusal of this instruction. We apprehend, however, that a common carrier of freight or passengers is bound to provide engines of sufficient weight and power to overcome the effects of a heavy dew, and that, if an unreasonable delay in the transportation of property or persons ensues from such an ordinary event as the fall of a heavy dew, it cannot shield itself from liability by the plea that its default was attributable to an act of God. A carrier must exercise enough diligence to overcome the effects of a dew falling upon its track, no matter how heavy the precipitation may be. It is only one of those ordinary manifestations of the power of nature against the effects of which human foresight may and should provide.

It is finally claimed that an error was committed by the trial court in allowing interest on the amount of the recovery from August 3, 1892, which, as we infer, was the date when a claim for damage was preferred, and that the court of appeals in the Indian Territory erred in adding a penalty of 10 per cent. upon the theory that the appeal was frivolous or vexatious. Concerning the penalty that was imposed by the court of appeals, it is quite sufficient to say that it was incumbent on that court to award the penalty on the affirmance of the judgment below, by virtue of section 1311, Mansf. Dig. (section 813, Ind. T. Ann. St. 1899), as this court held in *Railroad Co. v. Elliott* (C. C. A.) 102 Fed. 96. And, concerning the allowance of interest by the trial court, it is to be observed that, as this action was brought to recover damages for a breach of the implied contract of the carrier to transport the cattle over its road with reasonable celerity, we perceive no reason why the actual loss which was sustained by the shipper as far back as July, 1892, should not bear interest from the date when the claim for damage was preferred. Nothing short of the actual amount of such loss, and interest thereon from the time it was demanded, will fully compensate the shipper for the breach of the agreement, and he is entitled to full compensation. In an action against a common carrier for failure to transport property in accordance with its contract, the general rule is to allow as damages the value of the property, with interest upon such value from the time when it should have been delivered, if it is not delivered at all. *Railroad Co. v. Estill*, 147 U.

S. 599, 622, 13 Sup. Ct. 444, 37 L. Ed. 292, and cases there cited. When the property is delivered by the carrier, but a loss has ensued to the shipper from a failure to deliver it within a reasonable time, no reason is perceived why interest on the amount of the loss may not also be allowed from the time compensation for the loss is demanded. In actions of pure tort, which do not sound in contract, as where the property of a third party is destroyed or injured through the negligence of a carrier, the usual practice is, as this court said in *Eddy v. Lafayette*, 4 U. S. App. 247, 252, 1 C. C. A. 441, 49 Fed. 807, to leave the allowance of interest on the damages which may be assessed to the sound discretion of the jury. But, as the case at bar is founded upon a breach of contract, it may well be distinguished from the case last cited.

No other questions have been argued in behalf of the plaintiff in error which we deem it profitable to discuss. The case was tried somewhat irregularly, but all of the irregularities appear to have been waived by the action of the parties, and it is too late to challenge them in this court. Finding no error in the record, the judgment below is affirmed.

CARSON et al. v. COMMERCIAL NAT. BANK OF INDEPENDENCE, KAN.,
et al.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1900.)

No. 1,361.

APPEAL AND ERROR—RECORD—QUESTIONS PRESENTED.

An assignment of error based on the refusal of an instruction submitting to the jury a question of fraudulent intent in including in a mortgage certain items of indebtedness of a third party to the mortgagee raises no question which can be considered, where the bill of exceptions does not set out the evidence, but merely gives its substance, and contains a recital that there was evidence tending to show that such indebtedness had previously been assumed by the mortgagor, and that there was no evidence tending to show that its inclusion was with any fraudulent purpose.

In Error to the Circuit Court of the United States for the District of Kansas.

W. H. Rossington (Charles Blood Smith and Clifford Histed, on the brief), for plaintiffs in error.

W. C. Perry and N. T. Guernsey, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was before this court on a former occasion, and is reported under the following title: *Commercial National Bank of Independence, Kansas, v. Pirie*, 49 U. S. App. 596, 27 C. C. A. 171, 82 Fed. 799. The former writ of error was prosecuted by the defendants in the trial court, while on the present occasion the writ of error is prosecuted by the plaintiffs in that court; the second trial having resulted in a verdict in favor of the Commercial National Bank and George T. Guernsey, who were the defendants below, and are the defendants in error here.

Inasmuch as the nature of the controversy and the facts out of which it arose are fully stated in our former opinion, we deem it unnecessary to restate them, but refer to what was said in that behalf on the former occasion.

The second trial of the case was conducted in substantial conformity with the views of this court as expressed in its former opinion. The action being in trover for the conversion of personal property, and not a suit by the plaintiffs below to recover the purchase price of goods by them sold, it was necessary for the plaintiffs below to show a fraud entitling them to rescind the contract of sale; and there was no evidence of fraud, other than a fraud consisting in the purchase of the goods with a preconceived intent on the part of the purchaser, R. T. Webb, not to pay for the same. To this effect the trial court charged the jury on the second trial, and such direction was entirely proper, because no fraudulent representations were made when the property in controversy was purchased of the plaintiffs as this court formerly held in *Bank v. Pirie*, supra. If the right to rescind on the ground that the goods were purchased with a preconceived intent not to pay for them was established, the next issue to be determined was whether either of the defendants (that is to say, whether the Commercial National Bank or George T. Guernsey, both of whom held mortgages on the goods) was a bona fide purchaser; and this inquiry, as a matter of course, was only relevant in the event that the plaintiffs first established their right to rescind the contract of sale on the ground last above stated. This view was also adopted by the trial judge on the second trial.

With respect to the issue whether the defendants below were bona fide purchasers of the goods from Webb, the original vendee, the trial judge instructed the jury, in substance, that the Commercial National Bank could not be regarded as a bona fide purchaser, because the mortgage on the goods which was executed in its favor by Webb on June 10, 1892, was given for a pre-existing indebtedness, and because the bank, when it received that mortgage, gave no new or additional consideration. This instruction reduced the issues before the jury, on the assumption that the jury found that the plaintiffs were entitled to rescind the contract of sale, to the single question whether Guernsey was a bona fide purchaser under the mortgage executed in his favor contemporaneously with the mortgage executed in favor of the bank; and with respect to this question the trial court charged, in substance, that the jury might hold that Guernsey was not a bona fide purchaser, for either one of two reasons: First, if the jury believed that he paid or advanced no new consideration to Webb at the time the mortgage in his favor was executed; or, second, if they believed that Guernsey entered into a fraudulent conspiracy with Webb of the kind and character testified to by Webb on the second trial. These issues as to whether the mortgage in favor of Guernsey was made to secure simply a pre-existing indebtedness, and as to whether he had entered into a conspiracy with Webb to obtain goods from the plaintiff and not pay for them, were fully and fairly submitted to the jury by the instruc-

tions of the trial court. Relative to this subject the charge of the court was as follows:

"So far as Guernsey personally is concerned, he claims that he was required by Webb to pay him about \$700 in order to secure his mortgage, and that, having done so, his old notes and the cash payments amounted to \$5,000, for which he took a new note, payable on demand. Now, if this were done as claimed by Guernsey, and were done innocently and in good faith on his part, he would be a bona fide mortgagee for a valuable consideration, and the defendants would be entitled to a verdict. If, however, it was not done in good faith, but Guernsey, on the contrary, knew of the fraud practiced upon the plaintiffs, or if there was any fraudulent combination between Webb and Guernsey by which Webb was to have any secret profit in the transaction, or to receive secret payments of parts of the proceeds which should go to his creditors, then Guernsey would not be a mortgagee in good faith, whether he paid the \$700 or not; or if Webb, as claimed by him, repaid to Guernsey the \$700 mentioned, and this was done before the plaintiffs demanded the goods of defendants, Guernsey would not be an innocent mortgagee for value. If there was at any time prior to the giving of the mortgage a private understanding or agreement between Webb and Guernsey that, if the former got into financial difficulties, he should put his property into the hands of Guernsey to defeat any of his creditors, and that he and Guernsey were thereafter to divide the profits of such transaction, and if the mortgage to Guernsey was the result of such understanding or agreement, Guernsey's mortgage would be fraudulent and void."

Furthermore the trial court instructed the jury as follows:

"If you believe from the evidence that at the time of the execution of the mortgage to Guernsey the stock of goods and merchandise in the store was of different classes, and easily separable, and more than sufficient to secure the amount of debt then due Guernsey, and you further find that Webb executed said mortgage to Guernsey and obtained the payment of money from him with a direct intent to defraud, hinder, and delay his other creditors, and that Guernsey knew at the time of said fraudulent purpose and design on the part of Webb, and sought to aid him by the payment of said money, then and in that event Guernsey did not become a bona fide purchaser or mortgagee of said goods, for value, and could not hold the same as against the right of the plaintiffs to reclaim them."

We think, therefore, that the issue as to whether Guernsey could assert the rights of a bona fide purchaser, as against the plaintiffs below, who are also the plaintiffs in error here, was fully and fairly submitted to the jury, under instructions of which the plaintiffs in error are not entitled to complain.

The testimony on the second trial disclosed that the mortgage executed by Webb in favor of the Commercial National Bank, which was for the sum of \$8,229.28, embraced two items; one of them being a certificate of deposit for the sum of \$1,500, held by the last-named bank, that had been issued by the Cherryvale National Bank, of which Webb was the president, and the other being an overdraft of \$1,729.28, which the Cherryvale National Bank owed to the Commercial National Bank. There was testimony tending to show that Webb had orally agreed to pay to the Commercial National Bank all of the indebtedness that might at any time be due to it from the Cherryvale National Bank, and the bill of exceptions, which does not set out the testimony in full, but merely recites the substance of the evidence and what it tended to show, states, in effect, that the two items of indebtedness last mentioned were valid debts, and justly due to the Commercial National Bank, and that there

was no evidence in the case which tended to show that the inclusion of the two items of indebtedness aforesaid in the mortgage executed by Webb in favor of the Commercial National Bank was done for the purpose or with the intention of either hindering, delaying, or defrauding Webb's creditors. The point is made on the present appeal, and it seems to be the only one on which much reliance is placed, that the inclusion of these two items of indebtedness in the bank's mortgage rendered it fraudulent, and that the court should have instructed the jury, as it was asked to do, that if these items of indebtedness were knowingly included in the bank's mortgage, and this was done either to hinder, delay, or defraud Webb's creditors, it rendered both of the mortgages—the one in favor of Guernsey, as well as the one in favor of the bank—fraudulent and void, because both were executed at the same time, as a part of the same transaction. The difficulty that has been encountered in sustaining this contention is found in the bill of exceptions, in which it is recited that there was evidence showing that prior to the execution of the mortgage Webb had orally agreed to become individually responsible for all the indebtedness of his bank to the Commercial National Bank, and in which the trial court states definitely that there was no evidence that the two items of indebtedness were included in the mortgage for any fraudulent purpose. This court, as a matter of course, is bound by the statement of the trial court as to what the evidence before that court was, and as to what the evidence tended to show and did not show. Inasmuch as the evidence is not reported in full, and the parties saw fit to settle a bill of exceptions containing such statements relative to the effect of the evidence as we have before quoted, we are perforce bound thereby. It must accordingly be assumed to be true that the two items of indebtedness due from the Cherryvale National Bank to the Commercial National Bank were included in the latter's mortgage, because Webb had obligated himself to pay them by an oral agreement, and because both he and the mortgagee understood when the mortgage was executed that he was legally bound to pay them. This, we think, is the interpretation which must be placed on the bill of exceptions; and, accepting such to be the fact, the plaintiffs in error have no reason to complain of the refusal of their instruction, the substance of which we have stated above. The trial court was not bound to submit to the decision of the jury the issue relative to the intent with which the bank's mortgage was made to cover the two debts of the Cherryvale National Bank, if, as it certifies in the bill of exceptions, there was no evidence that it was done for any wrongful or fraudulent purpose, and if the fact be that Webb had made these debts his own by an oral agreement before the mortgage was executed. The rule seems to be that the fact that a mortgage is given for a larger sum than is actually due does not in itself render it fraudulent, without reference to the motives of the parties thereto. It is merely a badge of fraud, which may be explained, and, if explained consistently with honesty and fair dealing, will not impair the security taken. *Jones, Chat. Mortg.* § 92, and cases there cited. In the present case it appears that the

"padding of the mortgage," so termed, was explained to the satisfaction of the trial court, and that there was no evidence tending to show an improper motive. We are of opinion that the case was tried below on correct lines, so far as the present record discloses, and that nothing therein contained would warrant this court in disturbing the judgment. It is accordingly affirmed.

FELTON v. HARBESON.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 723.

1. MASTER AND SERVANT—FELLOW SERVANTS—TRAIN DISPATCHER AND TRAINMEN.

A railroad train dispatcher is a vice principal, and not a fellow servant, in his relation to trainmen, and the master is liable for an injury to a trainman which is the proximate result of the negligence of the dispatcher in giving orders for the movement of trains.¹

2. SAME—INJURY OF SERVANT—CONCURRING CAUSES.

A master is liable for an injury to a servant of which the negligence of a vice principal was a proximate contributing cause, although the negligence of a fellow servant was also contributory.

3. SAME—QUESTIONS FOR JURY.

A train dispatcher sent an order for the passing of two trains on a single-track railroad at a certain station, to be delivered to one of the trains at such station, in direct violation of a rule of the company which required such orders to be delivered to all trains at least one station from the point of meeting. A second rule required all trains, on approaching signal stations, to be under such control that they could be stopped before passing the signal board, if proper signal therefor was given. The regular train, which had not received the orders for meeting, could not be stopped by the engineer, after receiving the signal, until it had passed beyond the switch through which the opposing train was to enter, and a collision resulted. In which plaintiff's intestate, a fireman, was killed. *Held*, that the first rule must be regarded as prescribing an additional precaution deemed necessary by the company to insure greater vigilance and care on the part of engineers in approaching meeting stations, and that its violation by the train dispatcher could not be said, as matter of law, not to have been a proximate cause of the injury, even conceding that the collision would not have occurred but for the concurrent negligence of the engineer in failing to have his train under proper control, since such negligence may have been superinduced by his ignorance that he was to meet the other train.

In Error to the Circuit Court of the United States for the District of Kentucky.

C. B. Simrall, for plaintiff in error.

Alfred Mack, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. This was an action in tort for the negligent killing of Frank J. Schlosser, the intestate of the defendant in

¹ Who are fellow servants, see notes to *Railroad Co. v. Smith*, 8 C. C. A. 668; *Railway Co. v. Johnston*, 9 C. C. A. 596; and *Flippin v. Kimball*, 31 C. C. A. 286.

error, while a fireman in the service of the plaintiff in error. There was a verdict and judgment for the defendant in error. The intestate was killed by a collision at night between two freight trains while serving as fireman upon one of them. The colliding trains were respectively known as Nos. 36 and 37. The collision occurred at Blanchett, Ky., a station on the line of railroad operated by plaintiff in error. Train No. 36 was a north-bound freight, and entitled to the right of track. Train No. 37 was a south-bound freight, and was a "double-header"; that is, it was pulled by two engines, Schlosser being the fireman on the second engine. The trains were opposing trains, and were being moved under telegraphic orders from the train dispatcher at Lexington, Ky., who purposed that they should meet and pass at Blanchett. The contention of the plaintiff below was that the train dispatcher was guilty of negligence in sending a meeting order for these opposing trains which was not to be communicated to one of them (No. 36) until it should reach the meeting point, and that the collision occurred before No. 36 had received the order, and as a consequence of its failure to receive a meeting order before reaching the place of meeting. The insistence was that this method of giving a meeting order was in violation of rule No. 521, prescribed by the railroad company for the government of its train dispatcher and the movement of its trains, and that the rule thus prescribed was a reasonable rule, and its violation by the dispatcher negligence, for which the railway company was liable. Rule 521 was in these words:

"Meeting orders must not, under any circumstances, be sent for delivery to trains at the meeting point. There should always be at least one station between those at which opposing trains receive meeting orders."

The dispatcher sent a meeting order in duplicate for trains Nos. 36 and 37, which was in these words:

"No. 36 will get this order at meeting point, and meet No. 37 at Blanchett. No. 37 and No. 32 will meet at Hinton."

This order was sent to, and received by, train No. 37 at Williamstown, a station about eight miles north of Blanchett. The same order was sent to No. 36 at Blanchett, the meeting point, but was not received until after the collision. The obvious purpose of this rule was to give to meeting trains their meeting orders at least one station before either should reach the meeting point. Such a rule was calculated to insure a mutual understanding between trains, and enable each to govern itself accordingly. The rule required that train No. 36 should receive its meeting order at least one station before reaching the meeting point at Blanchett. If it had done so, it would have known that it would meet No. 37 at that station, and come under urgent obligation to avoid passing that station so as to block the entrance of No. 37 into the switch just north of the station which it was the duty of No. 37 to take.

District Judge Barr construed the rule as we have interpreted it. There was no error in this. The jury was instructed that the question as to whether a violation of the rule, so interpreted, was negligence, was for the jury; the rule being only prima facie evidence of what would be due care.

They were also instructed that the train dispatcher was a vice principal, and not a fellow servant, and that the plaintiff in error was liable for the proximate consequences of the negligence of the dispatcher. There was no error in this. *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, 31 U. S. App. 213.

At the close of all the evidence the plaintiff in error asked for a peremptory instruction, which was denied. It is now urged that there was no evidence upon which the jury could reasonably find that the negligence of the plaintiff in error in the manner of giving the orders for these trains to meet at Blanchett was the proximate cause of the collision, and that the court erred in not so instructing the jury. The evidence did establish that a red signal light was showing as No. 36 approached Blanchett which could be seen by train No. 36 for a distance of about 18 telegraph poles. If this was not changed to white after the train whistled for the station, it signified, under the well-established rules of the company, that the train must be stopped before any part of it should pass the signal board, and that the conductor and engineer should then proceed to the telegraph office for orders. The rules required that signal stations should be approached with the train under such control as that it might be brought to a full stop if the red light was not changed to a white one after the train had called for the board. The evidence also established that the engineer saw this red signal light as soon as it could be seen, and that he at once whistled for the station. The red light not being at once changed to white, so as to authorize him to pass the station without stopping, he shut off steam, and endeavored to stop the train before passing the signal board. The speed of the train was at the moment not less than 25 miles per hour; the grade slightly descending; the train was unusually long and heavy; it did not succeed in stopping until the engine had passed about 300 feet north of the signal board, when, and as it stopped, it came into collision with train No. 37, which was approaching the station to take the siding in order that No. 36 might pass on the main track. The evidence also tended to show that if an effort had been made to get the train under control when the red signal light was first seen, instead of waiting to see whether it would be changed to a white light, it could have been stopped before passing the signal light, as required by the rule. The evidence showed that on this occasion the engineer of No. 36 made no effort to bring his train under control until he saw that the board was not changed to a white light in response to his station call, which was when he had run about eight or nine telegraph poles after first seeing the signal board and was within eight or nine poles of the board.

But there was also evidence that on this occasion the engineer commenced to stop at the place where engineers customarily and usually begin to stop when approaching Blanchett with a red light showing. It is now contended that, if the engineer on No. 36 had obeyed strictly the rule requiring him to approach every signal station with his train under such control as to enable him to stop if he does not receive a clear signal light after calling for the board, this collision would not have occurred, although the train dispatcher had

not given him notice to meet No. 36 at Blanchett, and that this negligence of the engineer was the negligence of a fellow-servant of the intestate, and the sole proximate cause of the collision. The same contention is advanced as to negligence of engineer of No. 37, it being argued that that train approached Blanchett from the north with full knowledge that it would there meet No. 36, and that the evidence establishes that it did not approach the station under such control as required by the rule of the company, and that the negligence of the engineer of No. 37 in this respect was the proximate cause of the collision, and not the negligence of the train dispatcher. It is enough in respect to the point made on the negligence of the engineer of No. 37 to say that there was a decided conflict as to whether he did not use all proper precautions required by the rules and by his knowledge of the fact that he was there to meet No. 36. It was clearly a question for the jury as to whether he in any way contributed to the collision.

Returning to the negligence of the engineer on No. 36, it is well settled that he was the fellow servant of the trainmen on No. 37. If his negligence was the sole proximate cause of the collision, there can be no recovery against the plaintiff in error. But, if his negligence be conceded as established by the undisputed evidence, still, if the negligence of the train dispatcher, who was a vice principal, contributed in producing the collision, the plaintiff in error is liable, although the negligence of a fellow servant was also contributory. *Railroad Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266.

The case went to the jury upon the question as to whether the negligence of the train dispatcher, concurrently with the negligence of the engineer of No. 36, caused the collision, or whether the negligence of the train dispatcher proximately contributed thereto. The question of proximate negligence is ordinarily a question for the jury, upon all the facts and circumstances of the case. As said by the court in *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 24 L. Ed. 259:

"It is not a question of science or legal knowledge. It is to be determined as a fact in view of the circumstances attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end; that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 W. Bl. 892."

It is altogether probable that, if the rules regulating the approach and stopping of trains at signal stations had been strictly observed, No. 36 would have been stopped before passing the entrance to the siding north of the signal board at Blanchett, and all evil consequences from the train dispatcher's negligence thereby avoided. But can we say, as matter of law or undisputed fact, that the negligence of the latter did not co-operate to bring about the collision? The rule of the company requiring that meeting orders should be given to each train at least one station in advance of the meeting point was framed doubtless with a view to secure greater vigilance and caution in approaching meeting points in consequence of this knowledge and mutual understanding of the meeting trains.

The rule is but supplementary to the rules governing the approach of all trains to telegraph signal stations. The latter rules apply regardless of the question as to whether it is a meeting point. The rule as to notice of meeting points may well be regarded as a wise precaution in addition to the rules governing the approach to and stopping at signal stations, especially when the road is a single-track road, as that operated by the plaintiff in error was. In view of the standard of due care enforced by the plaintiff in error, might not a jury well infer that, if the engineer of No. 36 had been warned that he would meet No. 37 at Blanchett, he would have exercised greater vigilance and care in bringing his train under control and in stopping it before passing the switch or siding, which he would then know the opposing train must endeavor to take in order to give him the right of track? The plaintiff in error did not regard the signal board order to stop as sufficiently guarding against the danger to opposing trains at meeting points. Why? The inquiry must be answered according to the deductions to be drawn from the common understanding of the probable effect in arousing a higher degree of vigilance and caution as a consequence of receiving a warning as to the meeting points of opposing trains on a single-track railroad. Did all the facts constitute a chain of events so connected as to make a natural whole, or was the negligence of the engineer of No. 36 a new and independent cause, wholly unaffected by the primary negligence of the train dispatcher? If the negligence of the engineer of No. 36 in failing to get his train under such control as to enable him to bring it to a full stop before passing the signal board was negligence wholly disconnected from the primary fault of the train dispatcher, it was an intermediate, independent, and efficient cause for the collision which would constitute the sole proximate cause of Schlosser's death. But if, on the other hand, the negligence of the engineer of No. 36 was in part superinduced by his ignorance that he was to meet No. 37 at Blanchett, the original fault of the train dispatcher may be considered as reaching to the effect and proximately contributing to it. The circumstances did not so indisputably demonstrate that the causal connection was not proximate as to justify the court in taking the case from the jury. *McDonald v. Railroad Co.*, 20 C. C. A. 322, 74 Fed. 104; *Telegraph Co. v. Zopfi*, 19 C. C. A. 605, 73 Fed. 609; *Railroad Co. v. Sutton*, 11 C. C. A. 251, 63 Fed. 394; *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. The judgment is accordingly affirmed.

TUTT v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 809.

1. RAILROADS—INJURY TO PERSONS ON TRACK—LICENSEES AND TRESPASSERS.

A railroad company owes no duty to mere trespassers upon its tracks, except to avoid unnecessary injury to them after they are discovered on the premises; but where there exists a license to the public to go upon or across the tracks at a particular place, either express or implied, the com-

pany is bound to use reasonable care to avoid injury to those whose presence there it may reasonably anticipate.

2. SAME—IMPLIED LICENSE—QUESTION FOR JURY.

Plaintiff, a child 6 years old, was run against and injured by cars being switched in the yards of defendant railroad company while he was crossing the tracks. There was no public crossing at the place of injury, but it was in a thickly populated part of a city, the tracks were not fenced, and no watchman or warning signs were maintained; and testimony was introduced by plaintiff tending to show that the place had long been used by children and others in crossing to and from a canal beyond, where boats passed and sometimes stopped. It was for that purpose that plaintiff had crossed the tracks with an older sister, and he was returning when injured. There was also evidence which made it a question of fact whether defendant was guilty of negligence in the operation of the train, which would render it liable for the injury, provided plaintiff was not a trespasser. *Held*, that notwithstanding evidence that defendant had instructed its employes to keep persons away from the tracks, and that children had several times been driven away, it was a question of fact for the jury whether, under all the circumstances, plaintiff was there under an implied license which imposed upon defendant the duty of exercising care to discover his presence and avoid his injury.

In Error to the Circuit Court of the United States for the District of Kentucky.

From the petition and the various amendments thereof, we gather the plaintiff's cause of action to be based upon the following allegations: Plaintiff was an infant 6 years of age, and on the 20th day of January, 1898, while crossing certain tracks of the defendant company at a point in the city of Louisville, west of Twelfth street, between said street and Thirteenth street, by the backing of a train of cars upon and against the plaintiff, through the gross carelessness of the defendant and its agents, plaintiff was thrown down and severely injured. The tracks at the place of injury were left open and uninclosed, and this in a thickly-settled neighborhood, where many children of tender years are attracted by boats passing on a near-by canal. That plaintiff, being attracted by childish curiosity, went upon and across said tracks. That the place aforesaid, at the time of the injury, and for many years prior thereto, with the knowledge and consent of the company, had been used by persons passing to and from said canal and other places. The company pleaded the general issue, and also alleged that the accident resulted from contributory negligence of plaintiff. The testimony tended to establish on the part of the plaintiff that the injury happened between Twelfth and Thirteenth streets, at a point in the yard of the defendant company where there are a number of tracks, perhaps 10, running about parallel. North of these tracks the Louisville & Portland Canal is situated, there being a tract between the northern tracks and the canal of 50 or 60 feet in width. Opposite this point, boats are frequently passing, and sometimes stop. Two tracks lie to the north of the track upon which the injury was received. At the time of the injury, plaintiff, a little over 6 years of age, and a sister, 9 years of age, had crossed over the tracks with a view to going to the canal to see a boat, and were returning when the boy was hurt. The sister, preceding the plaintiff, had crossed over the north track of the defendant company; and the plaintiff, when about to leave the track on the south side thereof, in the attempt to cross was caught between two cars, thrown down and severely injured, resulting in the loss of a leg. At the time, the defendant company was placing a number of cars on a certain delivery track, upon which track were standing, nearest the approaching train, two cars, then an open space, beyond which were three other cars. Fourteen cars were being pushed in on this track, without signal or warning, and without a brakeman upon or near the front end of the train, and were pushed against the three cars, in the operation running upon the plaintiff in the manner stated. Plaintiff's testimony also tended to show: That children had frequently passed over this part of the tracks in the yard, attracted by the boats passing through the canal. Not only

children, but others, were in the habit of passing there. That this passageway had been used before the tracks were constructed, and that the use continued thereafter. There is no fence or barrier of any kind separating the tracks from High street, where plaintiff lived; being a short distance south of the tracks. That section of the city is thickly populated. There is no sign or warning against trespassing. Children and grown people were accustomed to pass over that part of the tracks and yards in considerable numbers nearly every day. There was no watchman in the yard for the purpose of keeping people out, or warning them against approaching trains. On the part of the company, testimony was introduced tending to show: That there was no particular path crossing the yards. No business was transacted upon the canal bank. People go there to observe the passing boats. People are not licensed to cross, and orders had frequently been issued to keep people off the tracks and out of the yards. That the children were frequently driven out, but would return; witnesses testifying that "you could not keep them out." That the train at the time of the injury was moving slowly. That the switchman was in his proper place, so as to communicate signals to the engineer. That the switch foreman was on the south side of the train, and could not see the children. That it was not customary, under the circumstances, to keep a brakeman on the front car of an approaching train, though one witness testified in behalf of the defendant that proper management required a brakeman in that position, in order to avoid injury. Upon these issues, and testimony tending to show the facts stated, the circuit court instructed the jury to return a verdict for the defendant, and this action of the court is brought into review here.

Matt O'Doherty, for plaintiff in error.

E. F. Trabue, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

It may be conceded that the railroad company had, as against trespassers, an exclusive right to the occupation and use of its tracks within its yards, as well as of its tracks at other points, and that to persons trespassing it owes no duty, except to avoid injuring them unnecessarily after they are discovered upon the premises. This right is essential to the operations of the company in carrying on its business, and no other or higher duty arises unless the facts show that the person injured is upon the tracks with the express or implied consent of the railroad company. If the person is a licensee, the company is obliged to use reasonable care to avoid injury to one sustaining that relation; the reason of the doctrine being that where the company has the exclusive right to the use of its tracks, and has neither impliedly nor expressly licensed persons to be there, it has no reason to expect them, and consequently is under no obligation to be on the lookout, or to avoid injury to such persons. But where they may be expected to be, and where an implied license has arisen from the conduct of the company, it is bound to use care commensurate with the circumstances to avoid injury to such persons. Whether the circumstances are such in a particular case as to give rise to this implied license is a question to be decided upon the facts as they may arise in each instance. Where it is claimed that no such license has been extended, and but one inference can be reasonably drawn from the circumstances, and that showing the person to be a tres-

passer, the question becomes one of law. Where, however, there is testimony showing that a license, either expressed or implied, arises from the circumstances, the question becomes one of fact, to be submitted under proper instructions to the jury; and the question in this case is, was there such a situation shown as made it clear, as a matter of law, that the boy, at the time of his injury, was a trespasser, or had the circumstances given rise to such an implied license as made the question one to be submitted to the jury? If the boy was a trespasser, there is no testimony in the case to show that he was willfully or wantonly injured. If a trespasser, there arises no higher duty on the part of the railroad company than would result in a like situation towards an adult. We have recently had occasion to examine the doctrine of implied license, and the duty of the employer to the licensee, in the case of *Ellsworth v. Metheney* (decided by this court Oct. 2, 1900) 104 Fed. 119. In that case we applied the doctrine of this court as laid down by it in the case of *Felton v. Aubrey*, 20 C. C. A. 436, 74 Fed. 350, to the case then developed. In the *Aubrey* Case the doctrine of implied license and the duty owing the licensee were very fully examined, and the cases reviewed, in the opinion of the court, given by Judge Lurton. In that opinion it was pointed out that the duty to one crossing the premises of another might be different in a case where the condition of the premises was the only matter complained of, and one where the active conduct of the proprietor upon the premises resulted in injury. In the one case, there being no obligation to put the property in a particular condition because of visitors, and in the other, where persons had been permitted for a considerable time to visit the premises, a duty may arise on the part of the proprietor to refrain from such active conduct as would interfere with the safety of persons who may be expected to be found thereon. The very full examination of the authorities in this connection in *Felton v. Aubrey*, supra, renders it unnecessary to do more than state the doctrine of that case, and apply it to the developments of the proof herein.

"If the evidence shows that the public had for a long time customarily and constantly, openly and notoriously, crossed a railroad track at a place not a public highway, with the knowledge and acquiescence of the company, a license or permission to all persons to cross the tracks at that point may be presumed. Persons availing themselves of such implied license would not be trespassers, and the railroad company would come under a duty in respect to such licensees to exercise reasonable care in the movement of its trains at points where it was bound to anticipate their presence."

It is argued that this doctrine applies only where a definite and fixed crossing has been established, to be likened unto a public crossing. We do not think the doctrine should be thus limited. In the present case, if, in the space between the streets and the land adjacent to the canal, people were continuously crossing without effectual means to prevent them, or proper warnings to desist therefrom, a license may result, and a situation be created where a duty may arise to those who may be expected to be found on the premises. We do not inquire whether the testimony was such as to create this implied license, but whether it was of sufficient

weight to carry that question to the jury. In determining this proposition, the facts must be taken in their most favorable construction to the plaintiff. Here was a place which, the testimony tended to show, had long been used by people and children crossing and recrossing to and from the canal. No attempt has been made to fence against trespassers. No watchmen were on duty. No notices were posted warning trespassers of danger. It is true that there was testimony on the part of the defendant that people, especially children, were driven away, and that the company had instructed employes to keep all such persons off its premises, and upon this proof it is claimed the jury should find that there was no implied license to the plaintiff to cross the tracks. We think, however, that there was enough in the use of the premises, in the lack of warning, and other circumstances to which we have referred, to fairly carry that question to the jury, and that it was not, as held in the court below, to be resolved in favor of the defendant, as a question of law, but should have been submitted to the jury under proper instructions. If the jury should find, under the circumstances, that the boy was not a trespasser, but was upon the grounds of the company under an implied license, then we think the question of negligence should have been left to the jury. The plaintiff's testimony tended to show that the approaching cars had no brakeman upon them; that no warnings were given; that no means were taken to avoid collision with persons who might be expected to be found upon the tracks of the company; that the boy had passed through the opening from the canal, and was returning, when, without warning, the cars were pushed against him. Under such circumstances, it might properly be left to the jury to determine whether such management was negligence.

As to the contributory negligence of the boy, there is nothing in the case to require a different conclusion than we have herein reached. It is familiar law that a child, under such circumstances, is required only to use that degree of care which may be expected of one of its age and experience.

Upon the whole case, we are of opinion that there was sufficient conflict in the testimony to have required the submission of the issues to the jury, and that the learned judge erred in treating the matter as one of law, to be solved in favor of the company. The judgment will be reversed, and the cause remanded for further proceedings consistent with this opinion.

HODGES et al. v. KIMBALL et al.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1900.)

No. 364.

1. TRIAL.—DIRECTION OF VERDICT.

Under the rule of the federal courts it is the province of the trial judge, before submitting a case to the jury, to himself determine whether the evidence produced by the party on whom rests the burden of proof, conceding it the greatest probative force to which it is fairly entitled under

the law of evidence, is sufficient to justify a verdict in his favor, or to sustain such verdict if returned, and, if not, it is the duty of the judge to direct a verdict for the other party.

2. MASTER AND SERVANT — ACTION FOR KILLING OF SERVANT — ISSUES AND PROOF.

In an action against a railroad company to recover for the death of a brakeman who was killed in coupling cars, on the alleged ground that the cars were defective and out of repair, the burden does not rest upon the defendant to prove proper inspection; nor does the failure to make such proof tend to establish the plaintiff's case, which must rest on proof of negligence on the part of the defendant, which was the proximate cause of the injury.

3. SAME—RAILROADS—INSPECTION OF CARS.

Where a railroad company has established proper rules for the inspection of cars by its employes, it cannot be assumed, in the absence of proof, that such rules were not observed, for the purpose of charging the company with negligence and liability on account of an injury to an employe resulting from a defective car.

4. SAME—ASSUMED RISKS—RAILROAD BRAKEMEN.

A brakeman in the service of a railroad company, a part of whose duty it is to couple cars, assumes the risk of injury from coupling cars of different construction as one of the hazards of the employment, where he knows, or must be presumed to know, that cars of such different constructions are in use on the road.

5. SAME—KILLING OF BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

A brakeman was directed by the conductor to loosen the brakes on standing cars, which were to be attached to the train, and was told that another brakeman would make the coupling. A rule of the company required brakemen to use a stick in making couplings, and to avoid going between the cars, and each brakeman was furnished with a stick for such use. Notwithstanding such orders and rule, the brakeman undertook to make the coupling, and with his hands, and for that purpose went between the cars, and was killed. *Held*, that upon such facts there could be no recovery against the railroad company for his death.

In Error to the Circuit Court of the United States for the Western District of Virginia.

For opinions, see 87 Fed. 545, and 91 Fed. 845.

Robert Burrow (Isaac Harr and Burrow Bros., on the brief), for plaintiffs in error.

R. M. Page (Jos. I. Doran, Fulkerson, Page & Hurt, on the brief), for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

PURNELL, District Judge. Plaintiffs' intestate lost his life on March 30, 1895, in the nighttime. The accident occurred on the Maritime spur track of the Thacker coal mines, near Thacker station, at a point where coal is loaded into the cars of the Norfolk & Western Railroad by dumping the coal from tipples. This method of loading coal is necessarily a dirty, grimy operation, and the air at such points in the coal region is filled with coal dust, which settles over all objects. A locomotive with one coal car attached was being backed up the spur track to be coupled to eighteen cars loaded with coal, standing on the track, coupled together. The conductor directed Lusk, the decedent, a brakeman who had been in the service of the defendants for some months, to let off the

brakes on the rear end of the cut of cars standing on the track, informing him that Brakeman Hazelett would make the coupling between the car attached to the engine and the standing cars. Notwithstanding this direction, Lusk gave the signal to slack back, and undertook to couple the cars, he being on the fireman's side of the train. In his attempt to make the coupling it is probable that his head was caught between a nut on the end of a truss rod on the end of one car and the bumper on the other car, and he received injuries—the right temple being crushed in—from which he died in a short time. There was a curve at the point where the coupling was attempted to be made, Lusk going between the cars from the outside of the curve. A bumper was missing from the end of one of the cars between which he entered. The bumper was missing from the side of the car on the inside of the curve, the side opposite that upon which he entered. The car in question had been inspected at Valleycrossing, a station of defendant's in Ohio, on the 26th day of February, 1895, and was found to need some draft-timber bolts, and held for those repairs, which were duly made. It was at the same time carded because of a cracked wrought drawbar, one split side sill at end, and one cracked end sill. The defects for which it was carded were not such as to cause it to be put out of service; but, Valleycrossing being a point for the interchange of cars with other roads, the carding of the defects was to protect the receiving company in the event that the parts that were cracked gave out; in other words, to show the actual physical condition of the cars when delivered. The drawbar bolts were repaired, and the N. & W. car No. 5,347 left Valleycrossing March 11, 1895. The car passed through Kenova, a divisional point of defendant's road, on March 12, 1895. The whereabouts of the car was not shown from that date until the date of the accident. The defendants provided for a regular system of inspections at divisional points, and inspections by conductors and brakemen when trains stopped for water or for other trains. It does not appear when or from what cause the bumper became missing. It was in evidence that the bumpers of the two cars that were being coupled were not similarly spaced on the cars, and thus did not meet each other evenly; and a witness testified that he was present when a test was being made by bringing the same two cars together at the point of the accident 10 days thereafter, and that the bumpers passed each other. A rule of the defendant's required the use of coupling sticks by brakemen. Such stick was issued to decedent. There was also testimony that the proper position in making the coupling was for the brakemen to stoop so as to bring his head below the end sills of the cars. The N. & W. car No. 5,347 was a coal gondola. The weather at the time was snowy and rainy. The bumper, or deadwood, was of cast iron.

Four charges of negligence are made, as follows: In providing a car with an impaired, rotten, and defective deadwood or bumper; in failing to provide sufficient deadwood or bumpers on one side of one of the cars; in that the end sills of the car to which said bumpers had been attached were old, rotten, split, and otherwise

defective, by reason whereof the bumpers and handholds which had been thereto attached had fallen off and become so loose as to be unfit for the purposes for which they were made; and in that the dead blocks or bumpers on said cars were so inappropriately placed as they would not meet and strike each other in such a way as to prevent the cars from going together. After all the testimony had been heard, upon motion of defendant's counsel the trial judge held plaintiff was not entitled to recover, and instructed the jury to find for defendant. Plaintiff excepted to the ruling of the court. A verdict was returned in accordance with the instruction of the court, and judgment rendered thereon. This is the only exception in the record, for which plaintiff assigns nine reasons for error. The first is that there was sufficient evidence to warrant a verdict for plaintiff; second, because the evidence did not warrant the trial judge in reaching the conclusion that defendant had exempted itself from liability by sufficient and proper inspections of the defective car which caused the injury to plaintiff's intestate; third, because the conclusion of the trial judge that there had been sufficient and proper inspections of the defective car ignored the theory of plaintiff that the inspections of the car were carelessly and negligently performed by defendant; fourth, because the action of the trial judge ignores the theory of the plaintiff that the defects in the car which caused the death of plaintiff's intestate are shown to have existed for such length of time prior to the accident as that defendant is chargeable with knowledge of the same; fifth, because the conclusion of the trial judge that the inspections of the defective car causing the accident were sufficient in number, time, and character was based solely on the evidence of one witness, and ignores other and more reliable testimony to the contrary; sixth, because the conclusion of the trial judge that an inspection on March 12th, before the killing on March 30th, was all that could be reasonably required of defendant, ignored a rule of defendant which required conductors to "see that the couplings and brakes of the cars of their trains are in good order before starting," and the duty of inspecting the defective car at Thacker before being coupled to the balance of the train was on the conductor, and, if inspection had been made, the defect would have been discovered in time to prevent the killing of plaintiff's intestate; seventh, because the question of sufficiency and frequency of inspections of the defective car should have been submitted to the jury; eighth, because there was material evidence which tended to establish the negligence alleged in each count of plaintiff's declaration and amended declaration, and it was, therefore, error to withdraw the consideration of the case from the jury; and, ninth, because it was error to hold that it was not negligence in a railroad company to have cars of its own with bumpers or dead blocks of unequal height, or so placed that they would pass, instead of meeting and striking each other.

The argument was almost exclusively of the facts, and it is a source of regret that plaintiff's counsel have not favored this court with a statement from their standpoint. A clear statement of facts by

both parties assists the court in arriving at a fair summary. When all agree on a fact, it may be taken as settled, and those disputed may be more satisfactorily determined. This is of greater importance to parties and counsel who, in a case like the one at bar, seek a review of the testimony and a new trial because of a decision of the trial judge that a proper case has not been made to entitle the plaintiff to a verdict. Appellate courts will not look into voluminous records, and sift from the chaff of testimony the kernels of evidence, to find possible theories upon which a jury might have returned a verdict. There is a constant effort in actions for damages, especially against corporations, to have questions of law, science, and art, questions which it requires years of training and experience to properly solve, submitted to juries, many members of which have not had the opportunity to even consider. When against railroads, questions of civil and mechanical engineering, tests of machinery, effect of steam and complicated appliances of which many jurors, called into the jury box probably for the first time, in many cases from a rural district where the hum of machinery and the music of the looms are never heard, are as uninformed as was the old lady who, upon hearing the pumping of the air brake for the first time, in the goodness of her heart, imagined and remarked that the poor engine was "so tired."

Trial by jury of questions of fact is the best method that has been conceived or suggested. It is the glory and boast of our system of jurisprudence. But the questions submitted to a jury should be questions of fact such as the jury can understand. The courts are constantly drawing the distinction and laying down the rule of demarkation. If every question raised is to be submitted to the jury, as frequently contended and occasionally decided, the trial judge becomes a useless appendage, and the idea of selecting these officers from a profession learned in law, experienced in solving controversies, who have devoted the best years of their life to study, and controlling their natural passions and prejudices while serving the interests of others, loses its force and effect. A layman could serve as well. The trial judges constitute the conservative element in the system, in whom the people, the source of all power, have, and must have, confidence. Vested with great powers, appeals and reviews by higher courts are checks and safeguards against error, mistake, and, what is very rare, an abuse of authority. "Trial by jury, in its primary and usual sense of the term, at common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer with authority to cause them to be summoned and empowered to administer oaths to them and to a constable in charge; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge, empowered to instruct them on the law, and to advise them on the facts, and (except on acquittal on a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted and so seldom contested that there has been little occasion for its

distinct assertion." *Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873.

The exception presents the very important question when is it the duty of the trial judge to direct a verdict, and the more specific question, did the trial judge err, in the case at bar, in so directing a verdict? The rule is thus stated by Chief Justice Fuller in *Treat Mfg. Co. v. Standard Steel & Iron Co.*, 157 U. S. 675, 15 Sup. Ct. 718, 39 L. Ed. 854:

"But it is well settled that where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant."

In *Pleasants v. Fant*, 22 Wall. 116, 22 L. Ed. 780, which case was followed by the trial judge, Mr. Justice Miller says:

"No doubt there are decisions to be found which go a long way to hold that, if there is the slightest tendency in any part of the evidence to support plaintiff's case, it must be submitted to the jury; and in the present case, if the court had so submitted it with proper instructions, it would be difficult to say it would have been an error of which the defendant could have complained here. But, as was said by this court in the case of *Improvement Co. v. Munson*, 14 Wall. 448, 20 L. Ed. 867, recent decisions of high authority have established a more reasonable rule that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. * * * It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor. That is the business of the jury. But, conceding to all the evidence offered the greatest probative force, which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside, and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should find a verdict in favor of the plaintiff, that verdict would be set aside, and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be that, if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

This doctrine has been followed by numerous decisions of the federal courts: *Montclair Tp. v. Dana*, 107 U. S. 162, 2 Sup. Ct. 403, 27 L. Ed. 436; *Railroad Co. v. Woodson*, 134 U. S. 621, 10 Sup. Ct. 628, 33 L. Ed. 1032; *People's Bank v. Aetna Ins. Co.*, 74 Fed. 507, 20 C. C. A. 630; *Sloss Iron & Steel Co. v. South Carolina & G. R. Co.*, 85 Fed. 138, 29 C. C. A. 50. It is too well settled to require a further citation of authority. These and many other authorities effectively dispose of the general question raised by the exception.

As to the specific question. The first reason given for error includes in its decision all the others, which are but more detailed statements of a general proposition. The specific allegations, as set out in the record, do not allege as negligence the failure to provide for or make proper inspections of defendant's cars. The alle-

gations of negligence were all as to the absence of the deadwood or bumper and handholds or grab irons; hence the second to seventh reasons assigned for error have no force or application, unless the inspections were so carelessly and negligently made, or not made, as to bring home to defendant a knowledge of the defect, and that defect was the proximate cause of the injury. Inspections were provided for under sufficient rules. As far as the evidence shows, the rules were observed. To say they were not is conjecture. Verdicts cannot stand on conjecture.

The eighth assignment of error or reason for error is equally untenable under the rule. That there was material evidence which tended to show negligence, etc., is not sufficient under the rule as laid down. Was it sufficient to the judicial mind? Having looked upon the witnesses, observed their demeanor upon the stand, their manner of testifying, would the court have permitted a verdict to stand? Was it sufficient evidence—not testimony—to warrant a verdict? Not in the mind of counsel or bystanders, but in the mind of the court, superintending and presiding at the trial, to permit a verdict to stand? If not, then there was no error.

The ninth assignment or reason for error is fully answered by the rule laid down by the supreme court in *Kohn v. McNulta*, 147 U. S. 238, 239, 13 Sup. Ct. 298, 37 L. Ed. 150. The rule governing the duty of an employer to an employé is essentially different from that governing the duty of a railroad to passengers. The argument of plaintiff seems to proceed on the theory that the burden is on the defendant to prove frequent inspections, and rebut a presumption of negligence, but there is no better settled principle than that he who alleges negligence must prove it. It cannot be inferred from an unproved fact. The question is not, as stated, did the absence of the handholds and bumper cause the accident? But was the absence of the bumper and handholds such negligence on the part of defendant, the proximate cause of the injury, as to render defendant liable in damages? Every accident on a railroad resulting in injury to an employé does not necessarily entitle him or his personal representatives to damages. The accident must be the result of negligence on the part of the railroad company, and that negligence must be the proximate cause of the injury. This is familiar learning for which authority need not be cited. Plaintiff's intestate was an employé of defendant, not a passenger, or one disconnected with the company; and a different rule applies than would had he not been an employé. An employé assumes risks necessarily incident to his employment, and is not entitled to damages for injury as others who do not assume such risks. The N. & W. car No. 5,347 was inspected under the rules of the company at Valleycrossing, Ohio, March 11th, and again at Kenova on March 12th; and there is no evidence to show it was not inspected by the conductor and crew when the train stopped for water or passed other trains. So far as the evidence shows, the absence of the bumper was not observed until the accident, March 30th. The decedent knew, or should have known, the system and regulations of his employers as to inspections. The employé assumes the risks of the customs and methods

of the business of his employer, the hazards incident thereto. Proper inspections seem to have been provided for and had. When was the bumper broken off? The evidence does not disclose. Some of the witnesses express opinions, it is true; but these witnesses are not found to be experts in such matters, and their opinions may be entitled to weight or not. Bumpers may be broken off at a single coupling at any point. Their purpose is to receive the jars of the cars coming together, and it is common knowledge that in coupling freight cars these jars are sometimes violent from the nature of the business. Cast-iron bumpers and wrought-iron bolts cannot be made so as to resist all blows and all pressure. The car was inspected at the last divisional point. The evidence does not show where it was after that (18 days) to the time of the accident. It may have been on a side track, or at other points, out of use. We might infer many things as reasonable as the inference the jury was to infer, without evidence. Having provided for inspections of cars at divisional points, and by the conductors and brakemen at stopping points, the defendant had discharged its duty to its employes; and, unless it is shown that such rules and regulations were so carelessly and negligently complied with by those charged with the duty, the company is not liable. *Railroad Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Railroad Co. v. Rhodes*, 18 C. C. A. 9, 71 Fed. 145. In the first-cited case, at page 691, 152 U. S., page 758, 14 Sup. Ct., and page 601, 38 L. Ed., the relation of employer and employe is discussed by the chief justice, delivering the opinion of the court, and the rule as to what care is required of the employer defined. The rule is sustained in many decisions; among others *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; *Hough v. Railroad Co.*, 100 U. S. 215, 25 L. Ed. 612; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; *Railroad Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Same v. O'Brien*, 161 U. S. 451, 16 Sup. Ct. 618, 40 L. Ed. 766; *Iron Co. v. Weiss*, 40 C. C. A. 270, 100 Fed. 45. The absence of the handholds or grab irons does not appear in any sense to have been the proximate cause of the injury. The evidence is that these irons were missing from the opposite side of the car from which decedent entered. If they had been on the car on that side, they could not have aided him. The act of congress, which is not referred to, in either brief or invoked by plaintiff, requires railroads doing interstate commerce to provide handholds or grab irons in the ends and sides of freight cars (27 Stat. 531), but a failure to provide such grab irons does not excuse a brakeman from a failure to use ordinary prudence in a particular case, where he observes the absence of such appliances; nor does this act change the rule as to the liability of the master where the failure to comply with the statute was not the cause of the injury. *Railroad Co. v. Baker*, 33 C. C. A. 468, 91 Fed. 225.

The other allegation of negligence—"having the bumpers so placed they would not meet and strike each other in such a way as to prevent the cars from going together"—is the risk of a brakeman

engaged in coupling cars. That the bumpers did not come together was testified to by a witness after a test, while others present at the test said nothing about it. This, if true, is a charge of faulty construction, a patent defect, and one of the risks assumed by a brakeman. In *Tuttle v. Railroad Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114, in delivering the opinion of the court, Mr. Justice Bradley, quoting Judge Cooley with approval, said:

"The rule is now well settled that in general, when a servant, in the execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself." And adds, after further quotation: "This accurate summary of the law supersedes the necessity of quoting cases, which are referred to by the author and by every recent writer on the same subject. * * * Tuttle, the deceased, entered into the employment of defendant as brakeman in the yard in question, with a full knowledge (actual or presumed) of all these things,—the form of the side tracks, the construction of the cars, and the hazards incident to the service. Of one of these hazards he was unfortunately the victim. The only conclusion to be reached from these undoubted facts is that he assumed the risks of the business, and his representative has no recourse for damages against the company."

To the same effect is the language of Mr. Justice Brewer in delivering the opinion of the court in *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, 37 L. Ed. 150. The syllabus of the case is:

"A servant of a railroad company, employed in coupling freight cars together, who is well acquainted with the structure of the freight cars of his employer, and also those of other companies sending freight cars over his employer's road differing from his employer's cars in structure and in the risk run in coupling them, assumes, upon entering upon the service, all ordinary risks run from coupling all such cars."

Of what, then, did the negligence alleged, of which there was sufficient evidence, consist, to entitle the plaintiff to a verdict? The inspections were amply provided for, and there is no evidence of a failure to make such inspections, or that they were so negligently made as to make the employer liable in damages. The absence of the handholds was not the proximate cause of the injury. The fact that the bumpers did not meet and strike each other when a test was made is not sufficient, and the absence of the bumper was not such negligence and the proximate cause of the injury as to render defendant liable in damages. There was some testimony tending to show lack of care, disregard of rules and orders on the part of plaintiff's intestate, which contributed to the accident and injury, but a finding of contributory negligence is only essential to an antecedent finding of negligence on the part of defendant. In the view the court takes of the case, this is unnecessary. It is not proved—and the burden of proof is on the plaintiff—that either or all the defects complained of were the proximate cause of the injury, and defendant had such knowledge of such defects as would make it liable in damages. Plaintiff's intestate, like many others, was an unfortunate victim of risks he assumed in accepting extra-hazardous employment. Similar accidents frequently occur, and of men in such positions it may more truly than of any others be said in the midst of life they are in death. When the employer has discharged every duty, complied with the prescribed rules, dam-

ages will not assuage the grief of those to whom the victim was dear; and to give them is unjust, a species of oppression and judicial confiscation. Time alone can heal the wounds. There was no reversible error in the action of the trial judge, disclosed by the record. The judgment is therefore affirmed.

GOFF, Circuit Judge, concurs in the judgment of affirmance.

SIMONTON, Circuit Judge (concurring). I fully concur in the conclusion reached by the court. The evidence establishing beyond question that Samuel L. Lusk, the intestate of the plaintiffs, when he undertook to couple the cars, had been informed that another hand had been instructed to perform this duty; that he also was aware that under the rules of the company all couplings must be made with a stick, and that going between the cars must be avoided,—notwithstanding this, he took upon himself, without orders, to do the coupling, and in doing so, instead of using a stick, he attempted to do it with the hand. His own acts were the proximate cause of his injury. He put himself in a position in which he had no business to be, and attempted to discharge the duty of another. In doing this he violated the rule of the company adopted for the prevention of the very thing which happened. He voluntarily put himself, without cause, in a position of peril, and enhanced his danger by nonobservance of the rule. The court below could not have done otherwise than it did in instructing the jury. Affirmed.

HILL et al. v. NORTHERN PAC. RY. CO.

(Circuit Court, D. Washington, N. D. November 5, 1900.)

1. RELEASE—IMPEACHMENT IN ACTION AT LAW.

A written release, intentionally executed by a plaintiff, on payment by defendant of an agreed sum in settlement of the cause of action, cannot be impeached in an action at law in a federal court on the ground that the plaintiff was induced to accept the terms of settlement, and to execute the release, by false and fraudulent representations.

2. FEDERAL COURTS—CONFORMING TO STATE PRACTICE—EQUITABLE ISSUES IN ACTIONS AT LAW.

Rev. St. § 914, requiring the practice in the federal courts in actions at law to conform as nearly as may be to the state practice, does not render a state statute permitting equitable issues to be litigated in an action at law applicable to the federal courts in such state, which maintain the distinction between actions at law and suits in equity, nor is the rule different because a suit has been removed from a state court.¹

Action at law to recover damages for the death of the husband and father of the plaintiffs, caused by an injury to the deceased while he was in the employ of the defendant as a brakeman.

In its answer to the complaint, the defendant denies the negligence charged, and pleads as an affirmative defense a complete settlement of the demand

¹ Conformity of practice in common-law actions to that of state courts, see notes to *O'Connell v. Reed*, 5 C. C. A. 594, and *Insurance Co. v. Hall*, 27 C. C. A. 392.

for damages herein, and payment of the sums of money which the widow of the deceased agreed to accept as compensation to her in her own right, and to her for the benefit of her minor daughter, who appears as her co-plaintiff; that said settlement was upon the petition of the widow as guardian of her child, approved and ratified by the superior court for Pierce county; and that for the consideration of said payments the widow, for herself and as guardian for her co-plaintiff, executed and delivered to the defendant separate written releases of the claims now in suit. The amended reply to said answer admits the facts alleged in the answer relating to the settlement and the execution of releases, but in avoidance thereof alleges that the widow was induced to give her assent to the settlement, and to accept the money paid by the defendant, and to execute the releases by certain representations made to her of facts tending to exculpate the defendant, which were and are false and fraudulent, and that she can prove the falsity of said representations by competent witnesses upon the trial of this action; that she would not have given her assent to the settlement if such representations had not been made, and that she did not know at the time of the settlement that said representations were false, or that any evidence could be obtained to prove the contrary state of facts. Argued and submitted upon a demurrer to the amended reply. Demurrer sustained.

Lewis, Hardin & Albertson, for plaintiffs.

Struve, Allen, Hughes & McMicken, for defendant.

HANFORD, District Judge (after stating the facts). The demurrer to the amended reply raises the question whether, under the laws of the United States governing the practice of courts in an action at law, a full settlement of the controversy and a written release of the plaintiffs' demand against the defendant can be impeached and annulled for false and fraudulent representations by which the plaintiff in the action was induced to accept the terms of settlement and execute the release. In their argument counsel for the plaintiffs urge that, under the Code of Civil Procedure of this state, a release of a right of action may be avoided in an action at law in the manner proposed in this case, and this is true; and they also urge that under section 914, Rev. St. U. S., the procedure in common-law actions in this court must conform to the practice of the state courts, and hence they have the same right to litigate the issue of fraud, and impeach the settlement and release, which they would have if the case had remained in the state court in which it was commenced. If the proposition, as stated, is true, it must logically lead to the result that in all the code states where legal and equitable relief, or either, may be demanded and obtained in a single action, section 914, Rev. St. U. S., has the effect to abolish the distinction between actions at law and suits in equity in the federal courts; but the contrary intention is clearly expressed by the words of the section referred to. The jurisdiction and practice of the federal courts as courts of equity is preserved, and the forms and modes of procedure in common-law actions is made to conform to the practice of state courts, only so far as may be consistently with the organization and limited jurisdiction of the federal courts. *Robinson v. Campbell*, 3 Wheat. 212, 4 L. Ed. 372; *Fenn v. Holme*, 21 How. 481, 16 L. Ed. 198; *Hooper v. Scheimer*, 23 How. 235, 16 L. Ed. 452; *Sheirburn v. De Cordova*, 24 How. 423, 16 L. Ed. 741; *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873;

Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Furnace Co. v. Witherow, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853.

This defense to the action is an executed contract, and proceedings to set it aside should be in equity, because the court, in relieving the plaintiffs from the obligation of their contract after it has been executed, must exert extraordinary power. "Canceling an executed contract is an exertion of the most extraordinary power of a court of equity." *Delaine Co. v. James*, 94 U. S. 207-214, 24 L. Ed. 114.

The fact that the cause was commenced originally in a state court, and removed into this court by the defendant, does not affect the question. The law which gives the right to remove a case into the national forum entitles the parties to whatever advantage and subjects them to whatever disadvantage there may be on either side in litigating, according to the procedure of the national courts in which the distinction between actions at law and suits in equity is preserved. 18 Enc. Pl. & Prac. 361, 362.

Passing, now, to consideration of the question as one of practice under the laws of the United States, I deem it not improper to remark that an issue as to false representations, inducing a party to release a cause of action, should not be submitted to a jury in connection with evidence of an injury alleged to have been caused by a wrongful act, whereby the party accused of making the false representations will be practically precluded from controverting the original tort by the fact of having actually rendered compensation. The effect of a payment in consideration of a release from the plaintiff's demand, as an admission of liability, can scarcely be avoided in any case; and if a party claiming damages can obtain money by executing a release, and then, while retaining the money, avoid the release by charging false representations, and in the same proceeding bring to bear upon the minds of the triors the force of an implied admission of negligence or other wrong causing an injury, the practice of settling claims for damages without litigation, which has become common in this district, will cease, and sufferers from accidental injuries as a class will not be gainers thereby. No person will contend that a release of a right of action induced by fraud and deceit ought to bar an action to enforce the original liability when the party defrauded proceeds in a fair way to have it annulled, but, in order to come as near as may be to impartial justice in all such cases, proceedings to enforce the liability ought to be stayed until the issue of fraud has been determined in a separate proceeding. I concede that a party should not be heard to complain when caught in his own trap, but this argument is only good in cases in which the charge of fraud is sustained by the evidence. It is easy to charge fraud in any case, and the court should be governed by a general rule, which will give hope of justice in all cases. I consider that the supreme court of the United States has given a just rule applicable in the decision of this question. The rule makes a distinction between cases where the execution of a written instrument has been obtained by trick or fraud, to which the assent of the party executing it was not given intentionally, and cases where in-

struments have been executed intentionally and understandingly, but where the mind of the party has been affected and assent secured by means of false representations and deceit, and holds that in cases where the execution of an instrument has been obtained by fraud or trick, without the assent of the party executing it, the instrument is entirely void, and should be disregarded in an action at law in which a plea of non est factum has been interposed, but in cases of the other class written instruments intentionally executed are only voidable at the option of their makers, and effect must be given to them as valid instruments until they are annulled by a judicial decree in a direct proceeding for the purpose. *Hartshorn v. Day*, 19 How. 211, 15 L. Ed. 605; *George v. Tate*, 102 U. S. 564-571, 26 L. Ed. 232. The decision in the case of *Railway Co. v. Harris*, 158 U. S. 326-333, 15 Sup. Ct. 843, 39 L. Ed. 1003, is in harmony with the previous decisions of the supreme court, and my attention has not been called to any case in which the supreme court has departed from the above rule. With all due respect for the decision of the circuit court of appeals for the Sixth circuit in the case of *Wagner v. Insurance Co.*, 33 C. C. A. 121, 90 Fed. 395, this court must be bound by the law as it has been declared by the highest court in this country.

The same effect must be given to this instrument as to a sealed instrument, for the reason that in this state "the use of private seals upon all deeds, mortgages, leases, bonds, and other instruments and contracts in writing" has been "abolished." 1 Ballinger's Ann. Codes & St. (Wash.) § 4523. The settlement and release pleaded in the answer and admitted by the reply was executed with all the formality required by the laws of the state, and since the legislature has, by the enactment above referred to, abolished private seals as a means of solemnizing the execution of written contracts, no distinction can be recognized between sealed instruments and other writings which the parties executing them have intended to make valid. Demurrer sustained.

HALE v. TYLER.

(Circuit Court, D. Massachusetts. July 25, 1900.)

No. 877.

1. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—RIGHT OF RECEIVER TO MAINTAIN ANCILLARY SUITS.

A special receiver, appointed by a Minnesota court for that purpose, can maintain ancillary suits in a federal court of another jurisdiction to enforce the statutory liability of nonresident stockholders in an insolvent Minnesota corporation, notwithstanding the decision of the supreme judicial court of Massachusetts in *Hayward v. Leeson*, 57 N. E. 656.

2. ACTION ON FOREIGN JUDGMENT.

In an action on a judgment of a sister state, it is not necessary to show that service was had on the residents of such state.

3. DEMURRER—ASSIGNMENT OF CAUSES.

Assignments of causes of demurrer which relate purely to matters of form, and which do not directly point out the defects objected to, are insufficient.

4. PLEADING—SURPLUSAGE.

Where the most important parts of an apparent surplusage in a pleading are mere matters of inducement, they will not be stricken out.

At Law. On demurrer to declaration.

John O. Coombs and M. H. Boutelle, for plaintiff.

H. W. Chaplin and Charles Warner, for defendant.

PUTNAM, Circuit Judge. The underlying subject-matter of this suit is the same as that determined by the circuit court of appeals for this circuit in *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747, in which the opinion was passed down on May 31, 1899, reversing the judgment of the circuit court for this district, whose opinion was passed down on September 13, 1898, and is reported in 89 Fed. 283. The present case comes before the court on demurrer, containing, under the Massachusetts practice, 40 different assignments of alleged defects in the plaintiff's pleadings.

On examining the various assignments, we find that the majority of them must be assumed to have been stated for the purpose of inducing a reconsideration by the appellate tribunals, because, with reference thereto, we find ourselves concluded by the adjudication of the circuit court of appeals in the case already referred to. This is directly the fact with reference to assignments 1, 3, 4, 5, 7, 8, 9, 10, 11, and 16, and also, probably, with reference to some other assignments which have not been particularly brought to our attention in the argument at bar. It is also indirectly the fact with reference to assignments, 2, 17, 18, 19, 20, 21, 23, 24, 25, 26, 31, and 38, as all these relate to matters which are covered by the judicial proceedings in Minnesota, which were held, in the opinion of the circuit court of appeals referred to, to be conclusive, in the absence of fraud, as against both resident and nonresident stockholders. Assignments like No. 15 are ineffectual, in view of the fact that, with reference to judgments in superior courts of judicature, like that in Minnesota on which the present cause is based, it is not necessary to show that service was made on residents; but such judgments are presumed to be valid. Assignments like No. 39, which relate purely to matters of form, and do not put their fingers directly on the defects objected to, are clearly insufficient under all systems of pleading, whether at common law or under the statutes of Massachusetts. With reference to assignment 13, the plaintiff has set out fully the judicial proceedings in Minnesota; and, the circuit court of appeals having determined in *Hale v. Hardon* that those proceedings are the basis of this class of suits, and it not being necessary to burden pleadings with allegations of matters of law, the plaintiff, in that particular, has clearly made it appear on what he rests his right of action.

In view of what we have said about No. 13, it is apparent that the matters referred to in Nos. 27, 28, and 29 do not create any duplicity or repugnancy according to the test which the law applies, because they all concern mere matters of surplusage of such a character that they are not grounds of demurrer. If the defendant will, by a proper motion, point out any matters of surplusage which may embarrass her defense, and will support the same by a careful brief, sufficient to en-

able the court to perceive easily and clearly the justice of her objections, we will consider the propriety of requiring the plaintiff to strike out the parts objected to. The court, however, suggests that, perhaps, on careful consideration, the most important portions of this apparent surplusage will be found to be mere matter of inducement, which, according to the customary rules of pleading, may be justified. The assignments to which we have not referred have not been pressed on us in argument.

As we have said, the most important points relied on by the defendant are necessarily overruled on the strength of the decision of the circuit court of appeals in *Hale v. Hardon*. We have, however, found it proper to consider whether the opinion of the supreme judicial court of Massachusetts in *Hayward v. Leeson*, passed down on June 15, 1900, and reported in 57 N. E. 656, has so far changed the status as to require us to hold that the decision of the circuit court of appeals is no longer applicable. We are clear, however, that there is nothing in *Hayward v. Leeson* which will justify us in sustaining the demurrer. That suit, as it appears, was brought in Massachusetts by Hayward, who had been appointed a receiver, by some court in Tennessee, of the East Tennessee Land Company, an insolvent corporation. He was authorized by his appointment to collect, take possession of, preserve, and care for the assets of the corporation, and to dispose of the same under the order of the court. He was also directed to prosecute suits in the courts of Massachusetts of the class to which *Hayward v. Leeson* belongs, for the purpose of recovering from the promoters of the corporation assets which it was claimed they had unlawfully withdrawn. He was directed to proceed in those suits either in his own name as receiver, or in the name of the East Tennessee Land Company, or jointly in his name as receiver and in the name of the East Tennessee Land Company, as he might be advised by counsel, and in accordance with the rules of practice in the Massachusetts courts. The supreme judicial court of Massachusetts held that none of the proceedings in Tennessee operated as an assignment to the receiver of the choses in action in litigation in Massachusetts, and it quoted the language of Mr. Justice Gray in *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 236, 10 Sup. Ct. 1013, 34 L. Ed. 341, that the utmost effect of the appointment of a receiver is to put the property into his custody as an officer of the court, but not to change the title, or even the right of possession. Therefore *Hayward v. Leeson* decided that the receiver could not sue in his own name in Massachusetts.

The receiver in *Hale v. Hardon*, and in the present suit, would seem to have even less color for a standing in a court of common law to maintain a suit at common law, than the receiver in *Hayward v. Leeson*. Of course, if there were a statute of Minnesota creating a right of action against corporate shareholders, and vesting it, when created, in an official of the state, or an officer to be appointed by the court, or in any other person who would make avail of it for a remedial purpose, so that such right of action originated with, and first vested in, the person so named, there can now be no question that, under article 4, § 1, of the constitution, requiring full faith and credit to be given in each state to the public acts of every other state, the courts

in every other state would be bound to protect the right of action in behalf of, and also in the name of, the person in whom it was vested. But, as observed in our opinion in *Hale v. Hardon*, the statutory provisions of Minnesota relating to this topic are exceedingly crude and obscure; and this fact has given rise to such a contradictory and complicated condition of judicial decisions in that state as to render it very difficult, if not practically impossible, for any foreign judicial tribunal to work out fragmentary proceedings in reference thereto. The grounds of this observation have been fully set out by the supreme court of Wisconsin in its opinions in *Finney v. Guy*, passed down on March 20, 1900, and reported in 82 N. W. 595, and in *Bank v. Benson*, passed down on April 27, 1900, and reported in 82 N. W. 604. The supreme court of Wisconsin evidently accepted the view of Judge Colt, expressed in *Hale v. Hardon*, to the effect that the remedy given by the laws of Minnesota is of such peculiar nature that it cannot be worked out in incidental suits at law like this at bar. Even that court overlooked the fact that the observation made by one of the judges of the supreme court of Minnesota in *Hanson v. Davison*, 76 N. W. 254, which is the sole authority in Minnesota supporting an incidental action at common law of the character of this at bar, either within or without the jurisdiction of the Minnesota courts, and which is very plainly inconsistent with other expressions found in earlier opinions of the supreme court of that state, was not necessary to the conclusion reached in *Hanson v. Davison*, and was, therefore, a dictum. In consequence of these complications, we fall back on the findings given in the judgment of the district court of Hennepin county in Minnesota, which the plaintiff made the basis of his proceedings in *Hale v. Hardon*, and also in the present suit. Those findings recognized no right of action against stockholders vesting in any person except the creditors of the corporation. Among other things, that judgment contained the following: "That each of said stockholders was liable upon such stock to said creditors"; "that plaintiff" (who was a judgment creditor) "and said intervening creditors" "recover accordingly from each of the several stockholders defendant"; "and that W. E. Hale be appointed receiver for collecting and enforcing for and in behalf of said ascertained creditors," and so on. Thus the judgment which the plaintiff makes the basis of his suits expressly stated and found that the rights against the stockholders were vested in the creditors; and that the stockholders were liable to them, and that Hale was appointed receiver only in their behalf. There is nothing in this judgment, nor in the constitution or statutes of Minnesota, which, either in terms or impliedly, gave to Hale, the receiver, any original right of action. On the other hand, there are other things in the statutes and decisions of the courts of Minnesota which sustain the findings of the district court to the effect that the right of action vests in the creditors, and in no way in the receiver. Among the rest is the express language of Gen. St. Minn. 1894, c. 76, § 5907, to the effect that, in proceedings against directors and stockholders, when it appears that the corporation is insolvent, and has no property or effects to satisfy creditors, "the court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and

stockholders, and enforce the same by its judgment, as in other cases." This provision has special application to the case at bar, because, by prior proceedings, the assets of the corporation had been sequestered by the courts in Minnesota, and the suit which furnished the basis of *Hale v. Hardon* and of the present action was a bill brought by a judgment creditor, in behalf of himself and other creditors, for the purpose of enforcing the liability of the stockholders, and for no other purpose. Therefore, as there were no assets of the corporation the title to which could vest in a receiver, and as the right of action against stockholders, according to the findings of the district court, vested in the judgment creditor who filed the bill, and in the other creditors in whose behalf the bill was filed by him, and as, by the express terms of section 5907, already referred to, the court was not required to appoint a receiver, it followed that *Hardon* was constituted such under the general equity powers of the court, and merely as its hand to assist it in realizing rights of action which vested, not in the receiver, but in the creditors. Such being the case, *Hale* apparently belongs to the class of receivers before the supreme judicial court of Massachusetts in *Hayward v. Leeson*; but this does not change the status from what it was before the circuit court of appeals in *Hale v. Hardon*, or assist the defendant in the present cause.

The question is whether, in a common-law court, the rules of the common law as to parties can be disregarded. The fact was accepted by the circuit court in *Hale v. Hardon*, especially in its references to *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184, that the rules of the common law concerning this topic prevail in Massachusetts. The circuit court also accepted the fact that, under sections 721 and 914 of the Revised Statutes, the practice, pleadings, and modes of procedure in the circuit court for the district of Massachusetts must be made to conform to those of the state of Massachusetts "as near as may be." This applies with full force to the question of parties. *Pritchard v. Norton*, 106 U. S. 124, 130, 1 Sup. Ct. 102, 27 L. Ed. 104; *Albany & Rensselaer Co. v. Lundberg*, 121 U. S. 451, 454, 7 Sup. Ct. 958, 30 L. Ed. 982. It must be assumed that the circuit court of appeals, in its adjudication in *Hale v. Hardon*, had all these matters in mind, as well as the circuit court. Therefore, inasmuch as *Hayward v. Leeson* declared no rule which was not known to be in force in Massachusetts, we have no right to assume that, if that suit had been decided before the action of the circuit court of appeals, the result would have been other than it was; and, consequently, we would not be justified in so applying *Hayward v. Leeson* as to turn aside the effect of the result on appeal in *Hale v. Hardon*.

The demurrer is overruled. The plaintiff's declaration is adjudged sufficient. The defendant may answer to the merits on or before the 1st day of September, 1900.

In re BROWNE et al.

In re PHOENIX MILLS CO.

(District Court, E. D. Pennsylvania. November 20, 1900.)

Nos. 775, 776.

BANKRUPTCY—LIENS—POWER OF COURT TO SUPERVISE—ENFORCEMENT.

The bankrupt act does not vest a court of bankruptcy with any power to interfere with a creditor holding property of the bankrupt in pledge to secure his debt, and having a valid lien thereon, within the meaning of section 67d, in the exercise of the power of sale of such property given by the terms of his contract, where there is no claim that such power will be exercised in a fraudulent or oppressive manner.

In Bankruptcy. Petition by receiver for restraining order.

John Dickey, Jr., for receiver.

John Douglass Brown, Jr., Geo. Stuart Patterson, Edwd. L. Perkins, Morgan & Lewis, T. De Witt Cuyler, and John G. Johnson, for creditors.

McPHERSON, District Judge. Certain creditors of these bankrupts hold promissory notes for a large amount, secured by the pledge of wool; the notes being in the ordinary collateral form, and giving the creditors power to sell at public or private sale without previous demand or notice. The receivers aver that the power of sale is about to be exercised, and that the bankrupts' equity in the pledged property will probably be sacrificed unless the court intervenes, and so controls the exercise of the power that the receivers are given an opportunity to obtain purchasers for the wool at a full and fair value. The petition asks for an order forbidding the creditors to sell until after, say, 10 days' notice to the receivers that a sale is intended. A temporary restraining order was issued, forbidding a sale under any circumstances, and it is now to be determined whether the court has the power to make the order prayed for, or any other order interfering with the creditors' right to sell.

I do not pass upon the question, whether the court may interfere to prevent a fraudulent or oppressive exercise of such a right. No such exercise is threatened in the present case. It is agreed that the creditors intend to deal fairly with the property pledged, and will make an honest effort to sell for the best prices that can be obtained. This being so, I am of opinion that the bankrupt act gives the court no authority to intervene between these creditors and their exercise of the right to sell given by the collateral notes. Each of these creditors has a lien, which I must assume, in the absence of evidence to the contrary, was given and accepted in good faith for a present consideration, and not in contemplation of, or in fraud upon, the statute; and such liens are declared by clause "d" of section 67 to be unaffected by the act. The phrase "unaffected by the act" may perhaps be too broad. Other sections do affect such liens in some respects not now material, but the general meaning of the phrase is clear. Such liens are left as the act finds them, and (passing the question whether the court may interfere in the case of a

fraudulent or oppressive enforcement) they may be proceeded upon according to their terms.

It was argued that clause "h" of section 57 gives the necessary power to restrain and regulate the creditors' right to sell. The material part of that clause is as follows:

"The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct. * * *

Assuming that this clause intends to do something more than provide for a method of determining the value of securities held by secured creditors, if such creditors desire to ascertain and to prove a possibly unsecured balance of their claims, I cannot avoid the conclusion that the court is only permitted to intervene when the agreement between the bankrupt and the creditor fails to provide a method by which the value of the securities may be ascertained,—again reserving the question of the court's power in the case of a fraudulent or oppressive conversion. This clause seems to me to be explicit. The value of such securities is to be ascertained "by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors." If there be no such agreement, the clause then goes on to say that the value is to be ascertained "by such creditors and the trustee, by agreement, arbitration, compromise or litigation, as the court may direct." The supervision of the court is thus confined to the ascertainment of value where the bankrupt and his creditor have themselves failed to deal with this subject. In such an event the court may direct how the value is to be ascertained, and may choose among the methods of "agreement, arbitration, compromise or litigation," supervising and controlling either form of proceeding.

Clause 7 of section 2, giving the court power to "cause the assets of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided," and clause 15 of the same section, giving power to "make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act," must, of course, be read in connection with the rest of the statute, and are necessarily qualified by such provisions as are to be found in clause "d" of section 67, concerning liens, and by clause "h" of section 57, concerning the method of ascertaining the value of securities held by creditors.

In each case the restraining order is now dissolved, and the petition of the receivers is refused.

In re MILLER et al.

(District Court, W. D. New York. August 18, 1900.)

No. 2,027.

1. BANKRUPTCY — ACTS OF BANKRUPTCY — SUFFERING OR PERMITTING PREFERENCE.

To constitute an act of bankruptcy, under Bankr. Act, § 3a, subd. 3, by suffering or permitting, while insolvent, a creditor to obtain a preference through legal proceedings, and not having discharged such preference at least five days before a sale or final disposition of the property affected, it is not necessary in all cases that an actual levy on property should have been made; but the payment of money to the sheriff holding an execution, by the debtor or another by his direction, the money being his, and its application by the sheriff on the execution, is a final disposition of property, which completes the preference, within the meaning of the statute, by giving the judgment creditor an advantage over other creditors.

2. SAME—PROOF OF INSOLVENCY.

The inability of a partnership to meet its matured obligations, together with its dissolution, and the transfer of practically all of its property to creditors, either by way of payment or security, leaving other debts unpaid, are facts sufficient to establish its insolvency.

3. SAME—PETITIONING CREDITORS—CREDITOR WHO HAS OBTAINED A PREFERENCE.

A creditor of an insolvent, who, without fraud, has collected a portion of his debt on execution, is not thereby estopped from joining in a petition to have the debtor adjudged a bankrupt; but, before such adjudication will be made, where he is one of the three petitioning creditors required by the statute, he will be required to surrender the preference obtained by means of his judgment and execution, by paying the money collected thereon into court.

4. SAME—AMENDMENT OF PETITION

Where, on a hearing before a referee on the issues joined on a petition in involuntary bankruptcy, the testimony of the alleged bankrupts discloses an additional act of bankruptcy, not specified in the petition, an amendment will be deemed to have been made to include such act.

In Bankruptcy.

Fred L. Eaton, for petitioners.

Joseph R. & Dana L. Jewell, for alleged bankrupt Miller.

Creighton S. Andrews (Frederick W. Stevens, of counsel), for alleged bankrupt Wood.

HAZEL, District Judge. The petition herein was filed on the 22d day of December, 1899, and, the alleged bankrupts having answered, the issues were referred to Vernon E. Peckham, Esq., referee, to ascertain and report the facts. The referee has made report of the facts, and the matter now comes before the court upon the petitioners' motion to confirm the referee's report, and upon exceptions filed. The first act of bankruptcy alleged in the petition to have been committed herein by the respondents is under section 3a, subd. 3, by which it is provided that acts of bankruptcy by a person shall consist of having "suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such

preference." The referee found that the alleged bankrupts suffered and permitted, while insolvent, judgment to be obtained against them as partners, and proceedings supplementary to execution to be issued thereon, and by and through such proceedings gave creditors an advantage over other creditors of the same class. It may be doubted whether this finding, standing alone, is sufficient to base a finding of the act of bankruptcy. In *re Stevens*, 4 Ben. 513, Fed. Cas. No. 13,391; In *re Rome Planing Mill* (D. C.) 96 Fed. 812, 3 Am. Bankr. R. 123. The evidence, however, shows that judgment was recovered on or about the 29th day of September in favor of the Quaker City Fruit Company, one of the petitioners herein, and execution was issued thereon; that there was paid, to apply on the execution, the sum of \$180.96; and that as to the balance the said execution was returned unsatisfied. It appears that the aforesaid sum of \$180.96 was paid by a Mr. Andrews, who had collected this amount from debtors of the respondents, and the money so collected was in his possession at the time the execution was issued, or came into his possession soon thereafter. It is strenuously insisted by the alleged bankrupts that not only must a preference be obtained through legal proceedings while the alleged bankrupts are insolvent, but that there must have been a sale or disposition of property from which the debtors have not redeemed, and that the debtors have until five days before a sale in which to vacate or discharge the preference; that in the case at bar there was no levy on the property which the alleged bankrupts were called upon to discharge, and the debtors could not discharge or vacate any levy unless there was some levy made to discharge.

It seems to me that the payment of money to apply on the execution issued was a technical levy. The deputy sheriff having the execution in charge called on each of the alleged bankrupts, and had a conversation with them regarding their property, and was informed by them that Mr. Andrews had in his possession money belonging to them, which he had collected from debtors of the alleged bankrupts. One payment of \$100 was made to the deputy sheriff by Mr. Andrews, to apply on the execution, and other payments were subsequently made by him. By section 1405 of the New York Code of Civil Procedure it is provided that "the personal property of the judgment debtors not exempt, by express provisions of law, from levy and sale by virtue of an execution are bound by the execution from the time of the delivery thereof to the proper officer to be executed," and, where the personal property bound by the execution is money, it need not be sold to apply it on the execution. It may be taken and credited on the writ. Section 1410, Code Civ. Proc. N. Y. The amount paid to the sheriff by Mr. Andrews belonged to the defendants in the action, although it was in the possession of another. I think that the application of the money herein by the sheriff on the execution was a final disposition of property. The alleged bankrupts directed its payment and its application on the judgment recovered against them by the petitioner, the Quaker City Fruit Company. This was a preference, within the meaning of section 3a, subd. 3. It gave to the judgment

creditor an advantage over other creditors. The referee found that on August 16, 1899, the debtors were unable to meet the demands and obligations which had accrued against them. They had no ready means to meet their debts, and on that day executed a chattel mortgage upon certain personal property to secure Helen M. Wood, the wife of one of the respondents, for her indorsement of four promissory notes,—three of \$100 each, dated May 3, 1899, and one of \$400, dated July 11, 1899; there being no date of maturity given for the first three notes, and the fourth note being due and payable on December 1, 1899. The inability of the alleged bankrupts to meet their obligations, the execution of the chattel mortgage, followed by the dissolution of the partnership on December 1, 1899, and the transfer of property to L. Y. Miller, are the strongest evidence of insolvency. The evidence sustains the finding of the referee that the alleged bankrupts, being indebted to one L. Y. Miller, father of Henry C. Miller, respondent, transferred, to be applied on such indebtedness, personal property amounting to the sum of \$264.59, and that at the time of said transfer the respondents owed said L. Y. Miller the sum of \$130.09. In this manner all of their property belonging to the partnership was disposed of, except bills receivable, on account of which \$474.47 was collected. All of these facts not only establish insolvency, but also show a disposition to give preference. It was held in *Warren v. Bank*, 10 Blatchf. 493, Fed. Cas. No. 17,202, that a debtor knowing himself to be insolvent, who allows an action to proceed to judgment and execution, the effect of which will be to give a preference by legal process, commits an act of bankruptcy. The debtors suffered and permitted a preference to be obtained by the recovery of the judgment, and the issuing of an execution thereon, at least five days before final disposition of the property affected. It has been frequently held that payments to creditors made by an insolvent are preferences, within the meaning of section 60b of the bankruptcy act, if made within four months prior to the filing of the petition, and even though made without intention to prefer. In *re Knost*, 1 Nat. Bankr. N. 403.

Had a voluntary petition been filed after the issuing of execution, the court, on application, would have stayed the sheriff, and thus the general creditors would have been benefited. The Quaker City Fruit Company is one of the petitioners herein, and the balance unpaid on its judgment against the alleged bankrupt is \$227.88; the amount stated in the petition to be owing to J. H. Gail, creditor, is \$321.25, and Snyder & Son, creditors, \$30.70, unsecured claims,—making in all the sum of \$579.83. By section 59b of the bankruptcy act it is provided that “three or more creditors who have provable claims may file a petition to have a person adjudged bankrupt.” The claim of the Quaker City Fruit Company becomes a provable claim when it surrenders its preference. The prosecution of the action at law commenced by it for the recovery of the debt is not a bar to proceedings against the debtor in bankruptcy. In *re Henderson* (D. C.) 9 Fed. 196; *Coxe v. Hale*, 10 Blatchf. 56, Fed. Cas. No. 3,310. It has been held that a creditor who has given his consent to the act is estopped from thereafter urging it as an act of bankruptcy.

But in the case at bar, the preference obtained by the judgment creditor not being fraudulently obtained, the creditor is not estopped from filing a petition. The fact, however, of the enforcement of the judgment and the payment upon the execution enables this judgment creditor, unless the amount paid is surrendered, to obtain a greater percentage of his debt than any other creditor; and therefore, in order to maintain its petition, such preference so obtained by it must be surrendered. *Coxe v. Hale*, supra; *In re Hunt*, 5 N. B. R. 433, Fed. Cas. No. 6,882; *In re Rado*, 20 Fed. Cas. 153; *In re Piper*, 2 N. B. R. 7; *In re Broich*, 15 N. B. R. 11, Fed. Cas. No. 1,921. By section 57g of the bankruptcy act it is provided that "the claims of all creditors who have received preference, shall not be allowed, unless such creditors shall surrender their preferences." The trustee is empowered by section 60b of the act to avoid a preference, and he may recover the property or its value from the person receiving such preference. *Electric Co. v. Worden*, 39 C. C. A. 582, 99 Fed. 400, 3 Am. Bankr. R. 634. The practice laid down in *Re Rado*, supra, was to dismiss the petition unless an amendment thereto was made, surrendering the preference. In this proceeding, however, the judgment creditor who has received a partial payment on his execution has elected a remedy open to him in the bankruptcy court. He is bound to surrender to the trustee, as provided by section 60b, the preference received by him, and rely for his payment upon dividends in bankruptcy. Compare *In re Rogers Milling Co.* (D. C.) 102 Fed. 687. Therefore, before an order adjudicating *Henry C. Miller and Elias V. Wood* can be entered, the *Quaker City Fruit Company* will be required to pay into court the amount of money received by it to apply on the execution issued in the action commenced by it against the alleged bankrupts.

Upon the hearing before the referee, evidence was received, under objection, that the alleged bankrupts, being indebted to one *L. Y. Miller*, father of respondent *Miller*, had transferred over to said *L. Y. Miller* certain property to be applied on such indebtedness, and that such application was made within four months of the time of filing the petition. The contention in regard to the admission in evidence of this transfer is that it tends to introduce a new act of bankruptcy, not specified in the petition; and therefore, there being no amendment to the petition, no act of bankruptcy on this finding of the referee can be made. I think that the amendment to the petition must be deemed to have been made. The petitioners learned of this act of bankruptcy from the testimony of one of the alleged bankrupts on the trial. In the *Lange Case* (D. C.) 97 Fed. 197, 2 Nat. Bankr. N. 85, it is laid down that amendments of this character are allowed to be inserted in the petition, if applied for before the trial; and where such an amendment is not applied for before the trial, and it appears that the alleged bankrupts were not surprised, and the evidence was derived from them, the amendment will be deemed to have been made.

In view of the conclusions reached, it is unnecessary to review the other acts of bankruptcy alleged to have been committed, or any of the other findings of the referee. No error on the trial appears of

record, to authorize a denial of the affirmance of the report of the referee. Upon deposit of the sum of \$180.96, the amount of the preference obtained by the Quaker City Fruit Company, judgment creditor, with the clerk of this court, an order may be entered adjudicating Henry C. Miller and Elias V. Wood bankrupts, as prayed for in the petition.

In re KAUFMANN.

(District Court, E. D. New York. November 8, 1900.)

BANKRUPTCY—PROVABLE DEBTS—CONTRACT TO PAY FOR WIFE'S SERVICES.

Laws N. Y. 1896, c. 272, § 21, which enables a wife to contract with her husband respecting her property and the "acquisition" of property, and "to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts * * * as if she were unmarried," does not change the rule established by decision in that state, which renders invalid a contract by which a husband agrees to pay his wife for her services, and such a contract does not create a debt provable in bankruptcy against the husband, although the services of the wife were rendered outside her domestic duties.

In Bankruptcy. On claim of the bankrupt's wife as a creditor.

Edward J. Welch, for Hannah Kaufmann.

Baggott & Ryall, for objecting creditors.

THOMAS, District Judge. It appears in this matter that the wife was employed by the husband in his business, for which he promised to pay her a definite reasonable sum per week, and that she in turn employed a servant to fulfill the domestic duties which otherwise the wife should have done or aided in doing. It is alleged that the payment to the servant was made out of the wife's separate estate, but there is no evidence before the court that she had a separate estate, and hence it is inferable that she paid the domestic servant out of the money which her husband paid her. Under *Blaechinska v. Howard Mission*, 130 N. Y. 497, 29 N. E. 755, 15 L. R. A. 215, *In re Callister*, 153 N. Y. 294, 47 N. E. 268, and *Conger v. Corey*, 39 App. Div. 241, 57 N. Y. Supp. 236, a contract of the nature here urged would be invalid, and the question arises whether Laws N. Y. 1896, c. 272, § 21, have necessitated a conclusion different from that reached in the cases cited. The new statute provides:

"A married woman has all the rights in respect to property, real and personal, and the acquisition, use, enjoyment, and disposition thereof, and to make contracts in respect thereto with any person including her husband and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts as if she were unmarried; but a husband and wife cannot contract to alter or dissolve the marriage and to relieve the husband from his liability to support his wife."

This statute, among other powers, has given a married woman the rights of an unmarried woman respecting her property and the acquisition thereof, and "to make contracts in respect thereto with any person, including her husband," and to carry on business, and "to exercise all powers and enjoy all rights in respect thereto and in

respect to her contracts." The word "thereto," as first used, refers to the wife's property, its acquisition, use, etc., and the word, as used later, refers immediately to the power given "to carry on any business," etc.; and the power "in respect to her contracts" refers to contracts covering any subject-matter mentioned in the enabling act. The statute obviously intends to enable the wife to contract with the husband respecting the acquisition of property, but does it enable the wife to acquire property by agreeing to render him a service outside of her domestic duty? If so, it would enable her to acquire property by contracting with him respecting her domestic service. There is a wide distinction between a power to acquire property by a contract with the husband and a power to create property, which shall be her own, by an agreement that she shall be paid for services that the law intends that she shall render gratuitously, if at all. In other words, a contract with the husband for the acquisition of property does not include a contract to convert her personal service to her husband into property. The question is not what the law should be, but what it is. It has been interpreted plainly by the highest court of the state, and something more definite than the present statute is required to change the rule established. The wife's claim should be disallowed.

In re GILLETTE et al.

(District Court, W. D. New York. October 8, 1900.)

No. 2,109.

1. BANKRUPTCY—PREFERENCES—KNOWLEDGE OF DEBTOR'S INSOLVENCY.

A bank is chargeable with notice of the insolvency of a debtor from whom it receives a payment, and that such payment constitutes an unlawful preference under the bankruptcy act, where its president had knowledge of such insolvency, gained while acting for the bank in the matter of such indebtedness.

2. SAME — CREDITORS OF PARTNERSHIP — RECEIVING PAYMENT OF INDIVIDUAL DEBT OF PARTNER.

Where a bank holding notes of a firm and also of an individual partner, with knowledge that both were insolvent, received payment of the note of the partner from proceeds of firm property, such payment constituted a preference, which, under Bankr. Act 1898, § 57g, precludes the bank from proving its debt against the firm in bankruptcy unless it surrenders such preference.

3. SAME—INVOLUNTARY PROCEEDING—RECEIPT OF PREFERENCE BY PETITIONER.

Under Bankr. Act 1898, § 59b, which provides that "three or more creditors who have provable claims" against a debtor which amount in the aggregate to \$500 above the value of securities held may petition to have him adjudged a bankrupt, a creditor who has received a preference within the provision of section 57g has not a "provable claim" which makes him eligible as a petitioner until he has surrendered such preference; and where there are only three petitioners, of whom he is one, the objection is jurisdictional, and is not waived by a failure to make it in the answer, but may be raised at any time, and no adjudication will be made on such petition unless the preference received is surrendered to the court.

4. SAME—PROCEEDING ON PETITION—NOTICE TO CREDITORS.

No power is vested in a court of bankruptcy by Bankr. Act 1898 to compel a creditor to become a petitioner in an involuntary proceeding, nor is

it the province of the court to serve notice on creditors who have not appeared of the proposed dismissal of a petition because of the insufficient number of eligible creditors joining therein.

5. SAME—INVOLUNTARY PETITION—ESTOPPEL OF CREDITOR.

A creditor of a firm, who, with others, advised a sale of its property for a certain sum, and the distribution of the proceeds among the creditors pro rata, by way of compromise, is not thereby estopped from joining in a petition in bankruptcy against the debtors which alleges the transfer of the property as an act of bankruptcy, where after such transfer the proceeds were diverted by the debtors to other purposes than that proposed.

In Bankruptcy. On motion to confirm report of special master appointed to ascertain and report to the court the facts touching the acts of bankruptcy alleged to have been committed by Ralph W. Gillette and Louis Prentice, and by the firm of Gillette & Prentice, with his conclusions thereon.

William C. Watson, for petitioner.

Wade & Stevenson, for respondents.

HAZEL, District Judge. This is an involuntary proceeding in bankruptcy. The petitioning creditors are Dunn, Salmon & Co., a corporation, the Bank of Batavia, a banking corporation, and D. Armstrong & Co., a co-partnership. The special master to whom the matter was referred to take proof and report has found that the firm of Gillette & Prentice have committed acts of bankruptcy while insolvent, and within four months previous to the filing of the petition, in this: that the alleged bankrupt, Gillette, on or about the 3d day of January, 1900, conveyed and transferred to William E. Webster, his brother-in-law, who acted in behalf of Sarah A. Showerman and Jennie R. Showerman, a material part of the property of the firm (being stock of goods and fixtures owned by the firm), with intent to hinder, delay, and defraud the creditors of the firm; that said firm has committed a further act of bankruptcy, in that while insolvent, and within four months previous to the filing of the petition, the said firm, through the alleged bankrupt, Gillette, on or about the 3d day of January, 1900, conveyed and transferred to the Bank of Batavia, one of the petitioners herein, the sum of \$4,000 (being a part of the property of the firm of Gillette & Prentice), in payment of the individual debt of said Gillette, with intent to hinder, delay, and defraud the creditors of the firm. After the most careful consideration of the evidence in this case, I have no hesitation in sustaining the report of the special master in reference to the acts of bankruptcy committed by the alleged bankrupts. The Bank of Batavia had previous knowledge of the insolvent condition of the firm of Gillette & Prentice when it accepted payment of the note. The facts are substantially as follows: A few days before the payment of the note to the bank the president of the bank became aware of the insolvent condition of the alleged bankrupts. January 2, 1900, Mr. Armstrong, one of the petitioners herein, the president of the bank, and Gillette talked over the financial affairs of the alleged bankrupts. After discussing the amount of the assets and other property, the aggregate of which was not sufficient to pay their debts, a settlement of 50 cents on the dollar was recommended by the president of the bank,

representing the Bank of Batavia, one of the petitioners herein, and Mr. Armstrong, representing D. Armstrong & Co., also petitioners herein. The stock and fixtures inventoried \$7,200, and were claimed to be of the estimated value of \$4,320. The liabilities at this time were estimated at \$5,300. January 3, 1900, Webster bought the property for \$4,000, with money received from Mrs. Showerman and her daughter, who are mother-in-law and sister-in-law, respectively, of Gillette, and paid the sum of \$4,000 to Gillette, who immediately thereafter paid the note at the bank, instead of using the money received in an endeavor to compromise with his creditors, of which there was talk between two of the petitioners herein and Mr. Gillette and Mr. Webster. January 4, 1900, the petition herein was filed to have the firm of Gillette & Prentice adjudged bankrupts. The indebtedness of the Bank of Batavia, upon which it claims the right to petition herein, is a note of \$2,300 due and owing by Gillette & Prentice as partners.

It is insisted on the part of the Bank of Batavia that it accepted the sum of \$4,000 to apply on an individual note of Gillette, in the ordinary course of business, and without any knowledge of the facts, and that the bank had no alternative; that, when payment of this note was tendered by the maker, it was obliged to accept such payment, and cancel and deliver up the note, as it did. It seems to me that the negotiations existing between the president of the bank and Gillette and Webster a few days before the petition herein to adjudicate Gillette & Prentice bankrupts was filed gave sufficient knowledge to the Bank of Batavia of the insolvency of Gillette & Prentice. The circumstances attending their negotiations give rise to more than a suspicion of possible insolvency. The bank had more than reasonable cause to believe that Gillette & Prentice were insolvent. The facts and circumstances of their financial condition were brought home to the bank, and the president of the bank sufficiently interested himself in the financial condition of the debtors to place himself in communication with other debtors and endeavor to effect a compromise. In re Eggert (C. C. A.) 102 Fed. 735, 4 Am. Bankr. R. 449. It follows that the Bank of Batavia is chargeable with that knowledge of the facts which such inquiries as its president made should reasonably be expected to disclose. In Re Conhain (D. C.) 97 Fed. 923, 2 Nat. Bankr. N. 148, the court said:

"Where a bank holds several notes of a bankrupt, and payments have been made within four months before the filing of the petition in bankruptcy, and after the petitioner became insolvent, and those payments have been so applied that one of the notes is left wholly unpaid, the bank cannot assume the position of an unpreferred creditor as to this wholly unpaid promissory note; for the prohibition contained in section 57g is not limited to the particular debt or chose in action on account of which a preference has been received, but it refers to creditors who have received a preference, and provides that the claim of such creditors shall not be allowed unless they surrender the preference received."

The distinction between the Conhain Case and the case at bar is that here the note paid was an individual obligation of Gillette, while the indebtedness claimed by the bank to be a provable claim is a promissory note made jointly by the alleged bankrupts. The

money paid, however, to the bank was the proceeds of the partnership property owned by Gillette & Prentice; and such a transfer is fraudulent and void as to the creditors of the firm, unless the firm was at the time solvent, and sufficient property remained to pay the partnership debts. *Menagh v. Whitwell*, 52 N. Y. 146. The proceeds of the sale of partnership property, where an adjudication in bankruptcy is had, must be appropriated to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus is added to the assets of the individual partners. Section 5f of the bankrupt act. Proof of the claim of the partnership estate against individual estates, and vice versa, is permitted. Both the individual estates and partnership estate may be marshaled, so as to prevent preferences, and secure an equitable distribution of the property of the several estates. Section 5g. The transfer of the partnership interest by Prentice to Gillette does not deprive creditors of the right to hold partnership assets for payment of their claims; and creditors having claims against an insolvent debtor who is a member of a co-partnership cannot, where the debtor has been adjudicated bankrupt, receive dividends from partnership assets until the co-partnership creditors have been paid in full. *In re Wilcox* (D. C.) 94 Fed. 84, 2 Am. Bankr. R. 117. I am of the opinion that the payment of \$4,000 to the bank was an unlawful preference, which gave to the Bank of Batavia a greater percentage of its debt against Gillette, as an individual, than any other creditor.

An important question in this case, however, and which was not presented to the special master, is whether the Bank of Batavia, which has accepted and retains an unlawful preference, may petition to have the said Gillette & Prentice, from whom such unlawful preference was obtained, declared involuntary bankrupts. By section 59b of the bankrupt act it is provided that:

"Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

It is argued with much force that the true intent of the act contemplates that where a petition is filed by three creditors, and for any reason it is claimed that one of such creditors is disqualified from uniting in that petition, that fact must be set forth by answer, in order that the facts denied may be submitted to the special master for examination; that the answer in this case, by not denying that the petitioners have provable claims against the co-partnership assets, admits the allegation, and it is too late, after the master has made his report and all the evidence has been taken, to raise this question; and that the Bank of Batavia has a provable debt against the co-partnership assets, whatever may be said of its claim against the individual assets of Gillette. Under the act of 1867, a person who committed an act of bankruptcy was adjudged a bankrupt on the petition of one or more of his creditors, the aggregate of whose debts provable under the act amounted to at least \$250. When

under that act a person was adjudged a bankrupt, his assignee was empowered to recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to the act; and the person receiving such preference, having reasonable cause to believe that fraud under the act was intended, was not permitted to prove his debt in bankruptcy. It is generally held by the decisions that a creditor who has given his consent to an act is estopped from thereafter urging it as an act of bankruptcy. *In re Israel*, 12 N. B. R. 204, Fed. Cas. No. 7,111; *In re Schuyler*, 2 N. B. R. 249, Fed. Cas. No. 12,494; *In re Williams*, 14 N. B. R. 132, Fed. Cas. No. 17,706. Creditors who had been fraudulently preferred were not counted, in determining whether a sufficient number had joined in the petition. *In re Israel*, supra; *In re Hunt*, 5 N. B. R. 493, Fed. Cas. No. 6,883; *Clinton v. Mayo*, 12 N. B. R. 39, Fed. Cas. No. 2,899; *In re Rosenfields*, 11 N. B. R. 86, Fed. Cas. No. 12,061. *In Re Rado*, 6 Ben. 230, Fed. Cas. No. 11,522, it was held that:

"A petition in involuntary bankruptcy which states the giving to the petitioner of an unlawful preference in respect to a debt, but does not surrender the preference, will be dismissed."

Section 59b and section 60 of the act of 1898 are similar to the provisions of the act of 1867, in the point under discussion, except that under the act of 1898 three or more creditors who have provable claims are required to petition to have a person adjudged an involuntary bankrupt, while under the former act one or more persons were required for this purpose. By the amendment of 1874 jurisdiction is given in involuntary proceedings only in cases where a fourth in number and a third in value of the creditors unite in the petition. By section 57g of the present act it is provided, as we have seen, that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences"; and it is held that an innocent creditor may keep a preference which he receives, but he is not permitted to share in the distribution of the bankrupt's estate unless the preference received by such creditor is surrendered. *Electric Co. v. Worden*, 39 C. C. A. 582, 99 Fed. 400, 2 Nat. Bankr. N. 434. But compare *In re Smoke* (D. C.) 104 Fed. 289, 4 Am. Bankr. R. 434; *In re Alexander* (D. C.) 102 Fed. 464, 4 Am. Bankr. R. 376; and *In re Piper*, 2 Nat. Bankr. N. 7. The fact, therefore, that three or more creditors who have provable claims may file a petition to have a person adjudged a bankrupt is strictly a jurisdictional one. The authorities under the act of 1867 bear out this contention. *In Re Mason* (D. C.) 99 Fed. 256, 2 N. B. R. 425, the court said:

"Want of jurisdiction over the subject-matter may be taken advantage of at any time, and it may be collaterally attacked; but, where the objection goes merely to want of jurisdiction of the person or thing, there may be a waiver of the objection or restriction as to the manner and time of making it."

And in *Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637, 2 Am. Bankr. R. 383, Judge Taft said:

"Where petition in an involuntary proceeding is answered without objection to its form, by such answer the parties have waived all formal and modal defects in the petition which do not reach to the jurisdiction of the court."

The petitioning creditors in involuntary proceedings must come within the provisions of section 59b of the bankrupt act. It is necessary that three creditors unite, and show that their claims, in excess of the value of securities held by them, amount to over \$500. If this is not done, jurisdiction is not conferred on the court. In *re Rogers Milling Co.* (D. C.) 102 Fed. 687, 2 Nat. Bankr. N. 973, is a case analogous to the one at bar. The Rogers Milling Company within four months next before the filing of the petition gave a note of \$1,500 to the petitioning creditor. The debt upon which the petition was based was a separate and distinct debt from the note which was paid, but they were both promissory notes, and both in existence at the time the payment of the \$1,500 was made. This, it was held, was an unlawful preference, and therefore the creditor could not maintain a petition, as long as such preference was not surrendered; and the court, distinguishing the cases in point under the act of 1867, said:

"Only creditors who have provable claims may file a petition to have one adjudged a bankrupt, and the claims of any creditor are provable, under these decisions, as long as he may not hold an unlawful preference."

It was held by this court, in an unreported case, where the facts showed that a preference was obtained by a judgment creditor, that, the preference so obtained not being a fraudulent one, the creditor was not estopped from filing the petition. The judgment creditor did, however, by its preference, obtain a greater percentage of its debt than any other creditor; and therefore it was held that, in order to maintain its petition, such preference so obtained must be surrendered. It was required of the petitioner who had obtained the preference that, before an order adjudicating the alleged bankrupts could be entered, it pay into court the amount of money received by it. That ruling will be followed in this case. The Bank of Batavia cannot maintain its petition to adjudicate Gillette & Prentice bankrupts so long as the bank does not surrender the preference obtained by it.

I am asked by counsel for petitioners, if I come to the conclusion that an adjudication in bankruptcy cannot be had upon this petition, that the proceedings be not dismissed, but that an order to show cause be entered, and served upon creditors who have not petitioned, requiring one or more of them to enter their appearance and join in this petition. Such a proceeding, it is claimed, would be justified by section 59f, which reads as follows:

"Creditors other than original petitioners may at any time enter their appearance and join in the petition or file an answer and may be heard in opposition to the prayer of the petition."

No power is vested in the court by the bankrupt act of 1898, nor was any power vested in the bankruptcy court by any previous act, to compel a creditor to become a petitioner in an involuntary proceeding. It was said in *Neustadter v. Dry-Goods Co.* (D. C.) 96 Fed. 830, 3 Am. Bankr. R. 98, that:

"There is no right given to other creditors to come in and take the conduct of the case out of the hands of the original petitioners, and it cannot reasonably be presumed that congress intended to authorize different creditors to

come in successively and retry issues which have been decided, and in that way make the pendency of involuntary cases perpetual."

The alleged bankrupts cannot be deprived of setting up a defense to a new petition, nor ought they to be barred from contesting the right to petition of new parties.

It is insisted by counsel for the alleged bankrupts that D. Armstrong & Co., other petitioners herein, are estopped from claiming that the transfer to Webster was an act of bankruptcy, because that firm consented to and advised such transfer. I can find no evidence in the case that would justify holding that the creditors Armstrong & Co. have not the right to petition in this proceeding, or that they are precluded from so doing. The conversation between Gillette, Webster, and Armstrong was to the effect that a sale of the partnership assets for the sum of \$4,000 was advisable. Negotiations were then pending or under way to distribute the proceeds of the sale of stock of the firm of Gillette & Prentice to the creditors of the firm by paying them 50 cents on the dollar. This was not done. The proceeds of the sale of the property, as we have seen, were diverted to another purpose. If, however, any creditors affected thereby, not parties to this proceeding, deem themselves entitled to consideration by virtue of section 59g, they will be given an opportunity to enter their appearance and join in the petition within the time hereinafter limited.

Upon deposit with the clerk of this court of the sum of \$4,000, the amount of the preference obtained by one of the petitioning creditors, the Bank of Batavia, within 20 days from the entry and service of an order to that effect, an order of adjudication may be entered herein; otherwise, the proceeding is dismissed. Within such time limited, however, any innocent creditor may intervene herein, and the matter may then be disposed of in accordance with the provisions of section 59f of the bankrupt act.

In re DAMON et al.

(District Court, W. D. New York. October 22, 1900.)

No. 1,316.

BANKRUPTCY — FEES OF MARSHAL — SERVICE OF PAPERS REQUIRED BY RULES OF COURT.

Where, by a rule of a federal court, service of the petition and affidavits upon which an order to show cause is based is required to be made together with such order, and the marshal makes such service in a bankruptcy proceeding, he is entitled to charge and receive a reasonable fee therefor in addition to his fee for the service of the order under Bankr. Act 1898, § 52b, although the petition cannot be considered a writ within the meaning of Rev. St. § 829; and the same fee fixed by such section for the service of a writ, where it has customarily been charged and allowed by the court, must be regarded as reasonable.

In Bankruptcy. Review of question certified to district judge under general order 27 and district court rule 23.

Frederick O. Bissel, for trustee.

HAZEL, District Judge. On August 8, 1900, petition, affidavits, and order to show cause, issued out of this court, were served on six different persons by a deputy marshal. The petition prayed for the issuance of an order to show cause why the alleged bankrupts should not be enjoined and restrained from in any manner interfering with their property. Other persons in the petition named were directed by the order to show cause why they should not be restrained and enjoined from paying to the alleged bankrupts money owing to them, or delivering to them property in their possession, and owned by the bankrupts. The order restrains such persons from so doing until the return day of the order to show cause. All the papers upon which the order was granted, including the order to show cause, at the time of service were bound together under one cover, and indorsed, "Petition, Affidavits, and Order to Show Cause." The marshal made return of service of the petition, affidavits, and order to show cause, and certified that on the date of service he delivered to and left a true copy thereof with each of the persons served. Thereafter the marshal rendered a bill for services in making the service of four dollars for each of the parties served, being a charge of two dollars for the petition and affidavits and two dollars for the order to show cause. Objection is made to the charge of the marshal on the ground that by section 829, Rev. St. U. S., it is provided that a marshal shall be permitted to charge "for service of any warrant, attachment, summons, capias or other writ, except execution, venire or a summons or subpoena for witness, two dollars for each person on whom service is made"; that because a petition is not specially mentioned in the statute, and no fee prescribed by law for the service thereof, the marshal is not permitted to make a charge therefor. By section 52b of the bankruptcy act it is provided that "marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, * * * for the performance of their service in proceedings in bankruptcy, the same fees and account for them in the same way as they are entitled to receive for the performance of the same or similar service in other cases, in accordance with laws now in force or such as may hereafter be enacted fixing the compensation of marshals." It has always been the practice to serve the petition and affidavits with orders to show cause in state courts of New York (section 610, Code Civ. Proc.), and in the federal courts this practice prevails. Indeed, it is the rule to require service of the petition and affidavits on which an order to show cause in a pending action or proceeding is granted upon the person restrained or directed to show cause. Dist. Ct. Rule 57. In such case the order is the writ by which an act is required to be done or omitted. A writ is defined in Burrill's Law Dictionary to be "a judicial instrument by which the court commands some act to be done by the person to whom it is directed. * * * It is issued either at the commencement of an action or during its progress, directed to a sheriff or other ministerial officer or to the party intended to be bound by it, and commanding some act therein mentioned to be done at or within a certain time specified." Under the old English practice, writs were divided into original and judicial writs. The original writ was a mandate of the

court, constituting the foundation of the action, and the commencement of a legal proceeding. It was served upon the person named in the writ, and required his appearance in court or the performance of some act designated by the writ. Writs that were issued after the action was commenced were designated judicial writs, and were only issued out of the court in which the action was pending, or which issued the original writ. The question naturally arises whether a petition to the court in an action or legal proceeding is a writ when served upon the person named in the writ, for which a charge may be made for service pursuant to section 829, Rev. St. U. S. It cannot be claimed that the service of the petition and affidavits can be charged for as writs within the provisions of the Revised Statutes or within the definition of the word "writ." In the petition is contained the complaint or information on which the writ issues. The petition and affidavits accompanying the writ are served either by direction of the court or judge granting the writ, or are required to be served by customary rules and practice of the court. By section 918, Rev. St. U. S., the courts of the United States are empowered to make rules and orders directing the return of writs and process, and to so regulate the practice of said courts as may be fit and necessary for the advancement of justice and the prevention of delays in actions and proceedings. The requirement that petition and affidavits be served on the persons proceeded against is beneficial to all parties to the proceeding, and tends to prevent delays, and to promptly dispose of the subject-matter in issue. It was said by Judge Blatchford in *The Alice Tainter*, 14 Blatchf. 225, Fed. Cas. No. 196, in a case where the clerk of the court made a charge of one dollar for a calendar fee, and for which there existed no express statutory provision, that "this payment of one dollar to the clerk has always been required. It is not reasonable that the service should be performed without compensation." And the learned judge says, "Long acquiescence by the court and the bar go far to establish that the fee is a reasonable one." As we have seen, no fee is prescribed by law for the service of petition and affidavits, and yet by the rules of the federal courts all process shall be served by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose. Thus it appears that service of the nature performed by the marshal in this case, and for which the charge in dispute is made, is contemplated to be performed by him. The service of two distinct papers was necessarily made on each person enjoined. The marshal is required to make a return for each service made, and, in the absence of an express provision of law, he should be permitted to ask and receive a reasonable compensation for the services rendered. A fee of two dollars has been received and charged in other cases for the service of petition, and two dollars for the order to show cause. Those charges, having always been made in accordance with custom and practice of United States courts, must, therefore, be regarded as reasonable. The charge for the one is fixed by statute, and the other by custom and tacit concurrence. This question was so decided in *Re Burnell*, 7 Biss. 275,

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Fed. Cas. No. 2,171; *The Alice Tainter*, supra; *Swancoat v. Remsen* (C. C.) 76 Fed. 950; 6 Op. Attys. Gen. 59. In *Re Hellmar*, 4 Sawy. 163, Fed. Cas. No. 6,342, it was held that the order and petition constitute but one writ or process, and therefore but one charge may be made; but I am inclined to the reasonableness of the additional charge of two dollars for the service of the petition, including the affidavits, on each person necessarily served. So ordered.

In re TYLER.

(District Court, W. D. New York. September 20, 1900.)

BANKRUPTCY — TITLE OF TRUSTEE TO BANKRUPT'S PROPERTY — RECEIVER OF STATE COURT.

Code Civ. Proc. N. Y. § 2468, provides that the property of a judgment debtor vests in a receiver appointed in supplemental proceedings, who has duly qualified, from the time of filing the order appointing him, subject to the exception that, "(2) where the judgment debtor at the time the order is filed resides in another county in the state, his personal property is vested in the receiver only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county in which he resides." *Held*, that under such provision a receiver appointed in a county other than that in which the judgment debtor at the time resided, and a copy of whose appointment had not been filed in the county of the debtor's residence at the time the latter was adjudged a bankrupt, had acquired no title or claim to the personal property of the debtor as against the trustee in bankruptcy.

In Bankruptcy.

Frank L. Barnet, for bankrupt.

Henry W. Hall, for respondent.

HAZEL, District Judge. This is a motion to continue an order restraining Edward A. Woodward, as receiver of the property of Georgia C. Tyler, the bankrupt herein, Alfred Perrez, and Henry W. Hall, his attorney, from selling or disposing of any property or effects of said bankrupt, or in any way interfering with the same. Judgment was recovered against the bankrupt in the county of Monroe, N. Y., on the 19th day of June, 1899, and, execution being returned unsatisfied, was followed by the appointment of a referee in proceedings supplementary to execution. The judgment debtor was examined before the referee from time to time, and when the action was instituted, and during the time of such examination, was a resident of Monroe county, N. Y. On August 13, 1900, a receiver of all the personal property of the judgment debtor was appointed by the county judge of Monroe county. The order of appointment was duly served on the judgment debtor. The receiver qualified, and entered upon the discharge of the duties of his office, and took into his possession certain personal property belonging to the judgment debtor, the bankrupt herein. Subsequently, and on the 27th day of August, 1900, the judgment debtor was adjudicated a bankrupt, and at the time of such adjudication, and for six months prior thereto, the judg-

ment debtor was a resident of the county of Erie, N. Y. By section 2468 of the New York Code of Civil Procedure it is provided that:

"The property of a judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him; * * * subject to the following exceptions: (2) Where the judgment debtor at the time the order is filed, resides in another county in the state, his personal property is vested in the receiver only from the time when a copy of the order certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides."

The question now is whether the personal property of the judgment debtor is vested in the receiver, who has qualified, although no certified copy of the order of appointment was filed in the office of the clerk of the county where the defendant resided; or, such order not having been filed, should not the personal property now in the possession of the receiver be delivered to the trustee hereafter to be appointed herein, to be administered by him as a part of the assets of the bankrupt's estate? It was admitted on the argument that the plaintiff in the action knew of the change of residence of the defendant from Monroe county to Erie county, N. Y., and it does not appear, nor is it claimed, that a certified copy of the order appointing the receiver was filed in Erie county, where the judgment debtor resided at the time of the appointment; nor does it appear where the personal property was situated at the time it came into the possession of the receiver. Federal courts are reluctant to interfere with the discharge of the duties of a receiver appointed by a state court. It was held recently that "a federal court will neither interfere with property in the lawful custody of a state court, nor tolerate interference by a state court with property in its custody." In *re Russell*, 41 C. C. A. 323, 101 Fed. 249. But the property to be in the lawful custody of the receiver must be vested in him, as provided by law; and in the case at bar it vested in him only from the time when a copy of the order, certified by the clerk in whose office it was recorded, is filed in the county where the judgment debtor resides. A strict construction of this provision of the statute gives to the receiver no right of possession to the personal property of the bankrupt. The object of the statute obviously was to give notice of the rights of the receiver of the property to the judgment debtor that the receiver had a lien thereon, and that the property of the judgment debtor located in the county where he resides vested in him. It was not enough to file the notice of the appointment of the receiver with the clerk of the county where the judgment was entered. Title does not vest in the receiver until a certified copy of the order is filed with the clerk where the judgment debtor resides. *Nicoll v. Spowers*, 105 N. Y. 1, 11 N. E. 138; *Staats v. Wemple*, 2 How. Prac. (N. S.) 161. No action can be maintained to acquire possession of the debtor's property before the order of appointment as receiver is filed in the proper clerk's office, not only in the county where the judgment is recovered, but also in the county where the judgment debtor resides. It was so held in *Kimball v. Burrill*, 14 N. Y. St. Rep. 536. I think failure to file the order as required by subdivision 2, § 2468, of the Code of Civil

Procedure of the State of New York, is fatal; that the receiver has no claim to the property against the claim of the trustee in bankruptcy, and was not vested with title to the property of the bankrupt prior to the adjudication in bankruptcy. It follows, therefore, that the order heretofore granted restraining and enjoining the receiver of the property of the bankrupt from disposing or selling said property or interfering therewith must be continued. An order may be entered accordingly.

In re OSBORN.

(District Court, W. D. New York. August 27, 1900.)

No. 2,016.

1. **BANKRUPTCY—EXEMPTIONS—TOOLS OF MECHANIC.**

A baker is a mechanic, within the meaning of the exemption laws, and where the state statute (Code Civ. Proc. N. Y. §§ 1390, 1391) exempts "tools and implements of a mechanic necessary to the carrying on of his trade, not exceeding in value \$25," and in addition "working tools, * * * not exceeding in value \$250," a bankrupt baker is entitled to claim as exempt the tools and implements of his trade to the value of \$275.

2. **SAME—WAIVER OF EXEMPTION.**

The tools and implements of a baker were seized and sold on execution by a judgment creditor, who bought them in. The debtor was subsequently adjudicated a bankrupt, and the judgment creditor, whose judgment was only in part satisfied, surrendered the property so purchased, as a preference, to the trustee, and proved the entire judgment as a debt against the estate. Held, that the failure to claim his exemption as against the execution was not a waiver by the bankrupt of his right as against the general creditors, and that on the restoration of the property to his estate he was entitled to claim his statutory exemption therein under the bankruptcy act.

In Bankruptcy.

Horace McGuire, Jr., for trustee.

Abraham Benedict, for bankrupt.

HAZEL, District Judge. This is a review of an order made by Quincy Van Voorhis, Esq., deciding that certain property claimed by the bankrupt to be exempt is not exempt property, but is a part of the assets of the estate, and belongs to the trustee as such. The questions raised by the rulings of the referee are certified to the district judge for his opinion thereon. It appears that the property, tools, and implements of a baker, claimed as exempt, with other property then owned by the bankrupt, were sold by the sheriff by virtue of an execution issued to him upon a judgment recovered in the supreme court of the state of New York by Mary S. Osborn against the bankrupt. The plaintiff in that action became the purchaser at such sale, and the property was then and there delivered to her by the sheriff. The bankrupt made no claim that the property was exempt, made no objection to the sale, nor to the delivery of the property to the purchaser. Thereafter the defendant in that action was adjudicated a bankrupt in an involuntary proceeding. At the first creditors' meeting objection was made to proof of Mary S.

Osborn's debt upon the ground that, by reason of the judgment and execution sale, she had obtained a preference. Thereupon the judgment creditor proved for the full amount of her debt, offering to surrender to the trustee, when appointed, all the property purchased by her at the execution sale, or to pay the value of such of it as could not be surrendered to the trustee. After the appointment of the trustee, she did surrender to him all of the property which the bankrupt now claims to be exempt. The referee has decided that the bankrupt is not entitled to any of the property, so sold on execution, as exempt property, and holds that the plaintiff in the action acquired a valid title under the sheriff's sale as between herself and the bankrupt, and the property is still hers, unless it belongs to the trustee; that the bankrupt has no longer any claim upon it, and that the bankrupt act only invalidates a sheriff's sale in the interest of the general creditors of the bankrupt; it does not invalidate it as to the bankrupt himself; that it is at least doubtful whether any of the various articles of property in question would come within the description of "tools and implements of a mechanic," or "working tools," within the meaning of sections 1390, 1391, Code Civ. Proc. N. Y. I cannot agree with the decision of the referee.

The commonly accepted definition of a mechanic is "any skilled worker with tools; one who has learned a trade." The conduct of the business of baking requires skill and experience in that trade, and necessitates the use of implements and working tools. Implements and tools of the value of \$275, necessary to enable him to carry on his trade, are exempt. *In re Peterson* (D. C.) 95 Fed. 417, 2 Am. Bankr. R. 630.

By section 6 of the bankruptcy act it is provided that the bankrupt may have "the exemptions which are prescribed by the state laws." The bankrupt, being a householder, is entitled, under subdivision 6, § 1390, Code Civ. Proc. N. Y., to "tools and implements of a mechanic necessary to the carrying on of his trade, not exceeding in value twenty-five dollars"; and, under section 1391, he is entitled, in addition to the foregoing, to "working tools, * * * not exceeding in value two hundred and fifty dollars." By section 7, subd. 8, the bankrupt may make claim for such exemptions as he may be entitled to; and by section 47a, subd. 11, it is the duty of the trustee to "set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after his appointment." *In re Hopkins*, 1 Am. Bankr. R. 214; *In re Friedrich*, 40 C. C. A. 378, 100 Fed. 284, 3 Am. Bankr. R. 801; *In re Hill* (D. C.) 96 Fed. 185, 2 Am. Bankr. R. 798. The exemption claimed by the bankrupt, and the value placed thereon, is not binding upon the trustee. The provisions of the bankruptcy act make it the duty of trustees of bankrupt estates to guard and protect the interests of creditors in this regard. The bankrupt may make his claim for exemptions, but the trustee will set apart and estimate the value. Moreover, by section 70b, all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers, and, if any dispute arises between the trustee and the bankrupt or others interested in the distribution of the bank-

rupt estate as to such exemptions, it is the duty (section 2, subd. 11) of courts of bankruptcy to determine all claims thereto.

So it will be seen that the undervaluation by the bankrupt in his amended schedule of exemptions is properly safeguarded by the foregoing provisions of the bankrupt act. It is held that a practical method for the determination of disputes arising from valuation of property claimed to be exempt is to order the property in question sold, and the trustee to set apart to the bankrupt the proceeds to the extent of the amount allowed as exemption by the state laws. *In re Lynch* (D. C.) 101 Fed. 579, 4 Am. Bankr. R. 263 (Aug., 1900, advance sheets). See, also, *In re Richard* (D. C.) 94 Fed. 633, 2 Am. Bankr. R. 506.

The question whether the bankrupt has waived his right to the exemption by reason of the judgment recovered against him, and the sale on execution without protest or claim of exemption made, must, I think, be treated as arising after the attorney for the petitioning creditors objected to Mrs. Osborn proving her claim, on the ground that she had obtained a preference. Upon the surrender of the preference obtained by Mary S. Osborn, in order that her claim might be proved under section 57, all proceedings taken under her judgment became null and void. The property vested immediately in the trustee, and therefore became subject to all claims for exemptions afforded him by the bankruptcy act. It was held in *Re Martin*, 13 N. B. R. 397, Fed. Cas. No. 9,152, that a bankrupt's household furniture and other necessary articles sold on execution prior to the beginning of proceedings in bankruptcy are exempt, and he is entitled to them. In *Re Poleman*, 9 N. B. R. 376, Fed. Cas. No. 11,247, it was held that a bankrupt's waiver of his homestead rights in favor of a particular creditor does not confer on his general creditors any special rights or operate in their favor. In *Grow v. Ballard*, 2 N. B. R. 69, Fed. Cas. No. 5,848, it was held that, "where property of the insolvent is assigned with fraudulent preferences, in an action brought by the assignee to recover the property the value of property exempt from execution must be deducted, and the judgment entered up for the remainder." I am of the opinion that the waiver in favor of the bankrupt's mother, plaintiff in the action, cannot be made to inure to the benefit of the general creditor. A debtor may waive his exemption in favor of one creditor, and insist upon it as against another. In *re Camp* (D. C.) 91 Fed. 745, 1 Am. Bankr. R. 177; In *re Hopkins*, *supra*. Compare *In re Bragg*, 2 Nat. Bankr. N. 82.

I have examined the authorities cited by counsel for the trustee, but they have reference to the debtor's waiver of his exemptions as between the purchaser on sale under execution and the debtor, if he stands by and does not protest and claim his exemption. This is undoubtedly the law. But, as we have seen, the debtor may waive his exemption in favor of one creditor, and insist upon it as against another. In the view the court takes of the question presented, the decision of the referee is reversed. The trustee is required to estimate the value, and set apart to the bankrupt as exempt articles consisting of working tools not exceeding in value \$275.

In re LOCKS.

(District Court, W. D. New York. July 20, 1900.)

BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

A bankrupt had become insolvent several years before the passage of Bankr. Act 1898, and his stock of merchandise had been sold under a judgment confessed by him in favor of a creditor, and purchased by such creditor. For a number of years the bankrupt conducted the business as agent for the purchaser, receiving a salary, after which the stock was transferred to his wife, who gave notes therefor secured by a mortgage on her separate property. At the time of the filing of the petition in bankruptcy a large part of such indebtedness had been paid, presumably from the proceeds of the business, which was conducted by the bankrupt as agent for his wife. *Held*, that such facts were insufficient to warrant the refusal of a discharge on the ground that the bankrupt was guilty of a concealment of property in failing to schedule the stock of goods as his property, where no suit had been instituted by his creditors or by the trustee to impeach the wife's title, and there was not sufficient evidence of fraud to justify the court in directing the trustee to commence such a suit.

In Bankruptcy. On application for discharge.

W. F. Bishop, for bankrupt.

John B. Stanchfield, for creditors E. A. Dunham & Co.

HAZEL, District Judge. The confirmation of the report of the referee finding in favor of the discharge of the bankrupt is opposed on the ground of various fraudulent transactions in reference to disposition of his property. It appears that in 1893 the bankrupt was engaged in the business of buying and selling clothing at retail and conducting a men's furnishing store, selling both for cash and on credit. In August, 1893, his stock of goods and merchandise was seized by the sheriff of Schuyler county and sold upon an execution issued against the bankrupt in favor of one H. Rosenberg, to whom the bankrupt had confessed judgment, and upon a chattel mortgage given by the bankrupt to William H. Wait. The judgment in favor of Rosenberg was for about \$520, and the mortgage to Wait was for about \$1,500. The inventory of the goods by the sheriff shows them to be worth \$3,000. On sale the stock of goods and merchandise was purchased by Rosenberg and Wait for the aggregate amount of their two claims. After this sale had been consummated, the bankrupt continued to carry on the business as agent for Wait and Rosenberg. They continued for three months, until the amount of the Wait claim was paid. Thereafter the business was conducted in the name of H. Rosenberg, the bankrupt continuing to act as agent or manager. The stock was increased, and the bankrupt continued in the employ of Rosenberg at a salary of \$10 per week for about five years, when the stock in trade was transferred to the wife of the bankrupt for the sum of \$3,300, for which she gave her notes secured by mortgage upon certain real estate in the village of Watkins, N. Y., the title to which was in her. Two thousand dollars has since been paid upon the notes secured by the mortgage. These transactions and the attending circumstances are said by the objecting creditor to have

been transactions in fraud of the creditors of the bankrupt, and therefore the petition of the bankrupt to be discharged should be denied, and the trustee of the bankrupt directed to take proceedings to obtain possession of the property. It is urged that the wife of the bankrupt had no money of her own at the time of the sale to her; that the bankrupt was in continuous possession of the business and stock in trade since the time of his failure in August, 1893, and continued in possession after the purchase of the business by his wife; that the accumulations of the business, which at the time of the adjudication of the bankrupt amounted to about \$9,000, are the accumulations and property of the bankrupt; that his failure to account therefor in his schedule of assets is concealment within the meaning of the bankruptcy act; and that the property found in his possession, to wit, the stock in trade purchased by the wife, should be administered as part of the bankrupt's estate. I have carefully examined the testimony for the purpose of ascertaining if the contention of the objecting creditor is maintainable. The acts claimed to be fraudulent were committed by the bankrupt in 1893, and continuously thereafter to the time of the filing of his petition for adjudication; that is to say, the bankrupt continued to carry on the business as agent for the judgment creditor Rosenberg, and thereafter for his wife. There is no testimony which in any manner indicates that the sheriff's sale to Rosenberg and Wait was pursuant to any fraudulent intent. The property was seized by the sheriff by virtue of an execution in the action, and was sold in accordance with law, giving to other creditors the right to bid upon the property, and thus protect their interests. In the absence of purchasers or bidders, the property was bid in and purchased by the judgment creditor and the mortgagee to protect their claims at a fair valuation. It cannot be successfully urged that the judgment confessed by the bankrupt and the chattel mortgage to Wait were preferences within the meaning of section 3, subdivision 3, of the bankruptcy act. At that time the debtor was in failing circumstances, and it was lawful for him to confess judgment to a creditor, or to prefer a creditor by assignment, or to transfer to him property for a consideration, notwithstanding other creditors were unsecured or unpaid. The limitations or restrictions placed on a debtor by section 14, subsec. 2, of the bankruptcy act must be in contemplation of bankruptcy, and not mere insolvency. *Buckingham v. McLean*, 13 How. 151, 14 L. Ed. 91; *In re Goldschmidt*, 3 Ben. 379, Fed. Cas. No. 5,520; *In re Freeman*, 4 Ben. 245, Fed. Cas. No. 5,082; *In re Holz*, 1 Nat. Bankr. N. 204; *In re Stark*, 1 Am. Bankr. R. 180. It appears from an examination of the testimony of the bankrupt that various of his acts in regard to the management of the affairs of the business conducted by him as agent may be viewed with suspicion, and his cautious utterances on the witness stand indicate a desire to conceal his business methods. The transfer of Rosenberg to the wife of the bankrupt may also be viewed with some degree of suspicion. Fraud may very properly be proved by circumstantial evidence and the inferences legitimately deduced therefrom. Still it must be borne in mind that the defendant is entitled to judi-

cial consideration of the proofs, and to the application of the rule that the presumptions of the law are in favor of the innocence of the person accused. *Morris v. Talcott*, 96 N. Y. 100-107. During the time that the business was carried on by Rosenberg the bankrupt was examined in supplementary proceedings, and in 1894 a receiver of his property was appointed. It also appears from the testimony that the wife of the bankrupt had about seven or eight hundred dollars when she married the bankrupt, and "when he was a member of Locks Bros. he gave to her money, and she would save it." Money so saved was her separate property, to use as she saw fit. The wife gave her notes secured by mortgage upon her real estate in payment for the stock in trade, and \$2,000 was thereafter paid to apply thereon. There is no testimony from which it can be inferred that the real estate mortgaged to secure the notes given by the wife in payment on stock and merchandise was the real estate of the bankrupt, or that he had contributed any money towards the purchase price. The amount paid to apply on the notes was obtained, very likely, from the profits of the business; but, as the business belonged to the wife, she had a right to use the profits of the business as she saw fit.

The cases of *Knapp v. Smith*, 27 N. Y. 277, and, to the same effect, *Buckley v. Wells*, 33 N. Y. 518, cited by counsel, strengthen the position of the bankrupt. In the case first cited a well-known doctrine is laid down that "a married woman may acquire title to real and personal property by buying the same upon credit, and no interest therein would pass to her husband. If the vendor will take the risk of payment, the transfer was perfect. Having thus obtained property, she could manage it by the agency of her husband, and hold the profits and increase to her separate estate." The two houses and lots purchased by the wife of the bankrupt were purchased with her separate estate; the money that was paid down was her separate property; and it appears that \$100 was obtained from a brother, \$95 she had saved, and that a purchase-money mortgage was given to secure the balance.

The creditor had the right, before the enactment of the bankruptcy law, in an equitable action within the statutory limitation, to impeach the conveyance of the real estate to the wife, as he also had the right to test the validity of the judgment confessed to Rosenberg, and the transfer five years thereafter of the business and stock in trade to the wife of the debtor. It was held under the act of 1867, and it is so held now (section 70, subsec. 4, Bankr. Act), that it becomes the duty of the trustee, should he find any property which has been fraudulently transferred by the bankrupt prior to four months from the filing the petition in bankruptcy, and within the time during which an action may be brought by the statute of limitations, to have such transfer set aside. In that case the property does not vest in the trustee until there has been an adjudication setting aside the transfer. *Cookingham v. Ferguson*, 8 Blatchf. 488, Fed. Cas. No. 3,182; *Knowlton v. Moseley*, 105 Mass. 136; *Bradshaw v. Klein*, 2 Biss. 20, Fed. Cas. No. 1,790; *In re Grahs*, 1 Am. Bankr. R. 465. In this case I am entirely unable to discover any

facts that would warrant making a direction of this character to the trustee. It is well settled that the burden of proving that a bankrupt had knowingly concealed or fraudulently transferred property is on the objecting creditor. In *re Hill*, Fed. Cas. No. 6,482; In *re Herdic* (D. C.) 1 Fed. 242. I have examined In *re Welch* (D. C.) 100 Fed. 65. In that case the bankrupt was in control and management of a retail business, which he alleged was the property of his wife, but it appeared that he had transferred the building and stock in trade to his wife at a time when he was threatened with the enforcement of a large judgment against him, and that the wife had no money at the time. Nor do I find In *re Smith* (D. C.) 100 Fed. 795, a case in point. In that case the debtor mortgaged his stock in trade to a relative. The mortgage was immediately foreclosed, and the goods bid in by a stranger, who transferred his bid to a friend of the debtor, and the latter ostensibly sold the property to the debtor's wife. The purchaser handed the purchase money to the wife, and she to the officer making the sale. Both of these cases were plainly fraudulent.

An examination of the other questions presented in opposition to the discharge of the bankrupt shows that there are not sufficient reasons for withholding the bankrupt's discharge. The report of the referee is confirmed, and an order may be entered accordingly.

In re PETER PAUL BOOK CO.

(District Court, W. D. New York. August 10, 1900.)

BANKRUPTCY—ALLOWANCE OF COMPENSATION TO ASSIGNEE.

Under Bankr. Act 1898, § 64b, subd. 1, no allowance can be made by a court of bankruptcy to an assignee under a general assignment for services rendered as custodian of the property prior to the filing of a petition in bankruptcy against the assignor, even though such services appear to have been for the benefit of the general creditors, and the rule is the same although the bankrupt is a corporation which could not, under the act, have filed a petition in voluntary bankruptcy; but under such section the court may make a reasonable allowance to the assignee for services rendered and disbursements made in preserving the estate subsequent to the filing of the petition.

In Bankruptcy.

Loran L. Lewis, Jr., for trustee.

Thomas E. Shields, in pro. per.

HAZEL, District Judge. This is a review of an order made by Referee Hotchkiss allowing Thomas E. Shields, the general assignee of the bankrupt under the New York statute, the sum of five dollars per day for his services as custodian, from the filing of the petition herein, in addition to certain disbursements. The general assignment of the Peter Paul Book Company to Shields was made on November 27, 1899. The petition in involuntary bankruptcy herein was filed on December 18, 1899. The corporation was adjudged a bankrupt on February 8, 1900. The trustee qualified and

took possession of the estate on February 20, 1900. The questions raised by the rulings of the referee are certified to the district judge for his opinion thereon.

The question of an allowance for services as an assignee, rendered in voluntary assignment, was frequently before the courts in bankruptcy under the act of 1867, and almost universally it was held that an allowance to an assignee should be refused. Assignees, it was said, took the assignment subject to the contingency of its being avoided by creditors. In *Re Stubbs*, 4 N. B. R. 476, Fed. Cas. No. 13,557, both compensation and expenses were refused to a voluntary assignee. In *Burkholder v. Stump*, 4 N. B. R. 597, Fed. Cas. No. 2,165, it was held that "the allowance to a voluntary assignee of his charges and expenses ought to be refused where it could not be so guarded as to prevent the injurious duplication of charges." In *Re Lains*, 16 N. B. R. 168, Fed. Cas. No. 7,989, and in *McDonald v. Moore*, 15 N. B. R. 26, Fed. Cas. No. 8,763, the disbursements only were allowed. Under the present act, in *Re Pauly*, 2 Am. Bankr. R. 336, compensation as custodian and disbursements were allowed. The rule has been established in former cases, and no doubt it is the law now, that, where an assignment made under the state law was executed with an intent to defraud creditors, the assignee stands in the position of *particeps criminis*, and no allowance for either disbursements or services will be allowed. The Peter Paul Book Company, corporation, by its act of general assignment for the benefit of its creditors committed an act of bankruptcy (section 3a, subsec. 4), for which it was adjudicated an involuntary bankrupt on the petition of creditors. Under the act of 1867, any business corporation might become a voluntary bankrupt. The right to become a voluntary bankrupt under the act of 1898 is expressly denied a corporation by the language of the bankruptcy act itself. It is contended by counsel for the assignee that the debtor was precluded from becoming a voluntary bankrupt; that under such circumstances the execution of a general assignment for the benefit of creditors would not be analogous to the *Gutwillig Case*, 34 C. C. A. 377, 92 Fed. 337; that it is clearly distinguishable from a case where the assignor is an individual, who may become a voluntary bankrupt, and therefore compensation should be allowed in this proceeding to the assignee as such. To so hold would be an invitation to insolvent corporations to make general assignments for the benefit of creditors in order to obtain allowances for favorite assignees, resulting in the duplication of charges. This has always been guarded against. It is the duty of persons seeking relief in the bankruptcy court to proceed in the least expensive way to obtain the benefits of the act. The *Gutwillig Case*, *supra*, lays down the doctrine that "a general assignment for the benefit of creditors is void as against the trustee appointed in the subsequent bankruptcy proceeding, or as against the creditors of such debtor," and that "such an assignment or disposition of property is in fraud of creditors, who have the right to invoke the protection of the bankruptcy act." And it is declared to be "a general principle of bankruptcy laws not only to administer the assets of insolvent debtors on the basis of equality, but to

secure that result by giving to the creditors, and not to the debtor, the selection of the person to be intrusted with the administration."

The question of compensation to a person for services which tended to preserve the assigned property, and which services were rendered for the benefit of general creditors, in the light of the controlling decision holding general assignments to be void, is important. Section 3, subsec. 5, points out a simple and none the less effective way in which a person may make his insolvency known. A "person," by section 1, subsec. 19, is defined to include a corporation. It may be done by "admitting in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground." *In re Marine Machine & Conveyor Co.* (D. C.) 91 Fed. 630, 1 Am. Bankr. R. 421; *In re Bates Machine Co.* (D. C.) 91 Fed. 625, 1 Am. Bankr. R. 129. Compare *In re Empire Metallic Bedstead Co.* (D. C.) 95 Fed. 957, 2 Am. Bankr. R. 329. Such an admission by the president of the corporation, with the consent of the directors, doubtless would have speedily resulted in creditors filing an involuntary petition in the bankruptcy court, and at the same time in an application being made to take charge of and hold the property of the alleged bankrupt prior to adjudication, and pending a hearing on the petition. The petitioners making the application are required to give a bond with sureties, and by section 2, subsec. 3, of the bankruptcy act it is provided that receivers may be appointed to take charge of the property of the bankrupt after the filing of the petition, and until it is dismissed or the trustee has qualified. By section 2, subsec. 5, the court may authorize the business of the bankrupt to be conducted for limited periods by receivers, if necessary in the best interests of the estate. Had this course prevailed in the case at bar, the entire proceeding from the beginning would have been under the supervision of the bankruptcy court, and the legislative intent in regard to the administration of bankrupts' estates would then have been complied with. It manifestly was the intent of congress that the bankrupt's property should be administered in the courts of bankruptcy, and in the manner indicated by the act.

There is no authority in law for granting this allowance. Section 64b, subsec. 1, expressly prohibits it. *In re Giblom*, 2 Nat. Bankr. N. 60. The conclusion reached is that an allowance to an assignee under a general assignment for services rendered as custodian of the property prior to filing the petition in bankruptcy, even though it have the appearance of being rendered for the benefit of the general creditor, is not permitted by the bankruptcy act, and ought not be allowed. The bankruptcy court, however, is authorized to make an allowance for services rendered in preserving the estate subsequent to filing the petition. Section 64b, subd. 1. The referee has deemed it proper to make such an allowance. The amount allowed by him is \$5 per day, or \$320, and \$135 for disbursements. The assignee had possession of the property from the time of filing the assignment to the time of accounting to the trustee in bankruptcy. The business of stationer and book publisher went on uninterruptedly, and at a profit. The assets are \$18,000, and

the liabilities \$55,000. The allowance of the referee is for 64 days, from the time of filing the petition in bankruptcy. The allowance is confirmed, in addition to \$135 disbursements, and an order may be entered accordingly.

In re BRYANT.

(District Court, E. D. Tennessee, S. D. June 12, 1900.)

BANKRUPTCY — OBJECTIONS TO DISCHARGE — FRAUDULENT CONCEALMENT OF PROPERTY.

Objections to the discharge of a bankrupt, on the grounds that he had knowingly and fraudulently concealed property from his trustee, and had made a false oath in relation to the bankruptcy proceedings, were based on the facts that he omitted from the schedules, to which he made oath, a watch and chain, a desk, and an interest in the business of a partnership. The evidence showed that the watch and chain, which were of small value, were omitted by advice of his attorney, and they were worn by the bankrupt during all the proceedings, with no attempt at concealment; that the desk the bankrupt had verbally given to another some years before the bankruptcy proceedings, and it was in the possession of the donee; that the interest in the firm was purchased by the father of the bankrupt's wife with his own money, and given to her, although the bankrupt had exercised some control over the business. *Held*, that such evidence was insufficient to sustain the burden which rested upon the objecting creditor to prove by a fair preponderance of the evidence the acts of fraud and bad faith charged, in order to debar the bankrupt, under Bankr. Act 1898, § 14b, from the right to a discharge.

In Bankruptcy. On exceptions to report of a referee recommending the granting of a discharge to the bankrupt.

Report of D. L. Grayson, Referee:

In the Matter of the Specifications of Objection to Discharge Filed by Bank of Charleston.

To the Hon. C. D. Clark: The undersigned, to whom was referred the specifications of objection to the discharge of the said bankrupt, W. M. Bryant, and the evidence upon which the same are based, for a report thereon as to whether or not the discharge should be granted, in accordance with the rule of this court promulgated in such cases, herewith submits the following (said objections being five in number, being considered in the order in which filed):

(1) Concealment of Property. Section 14b, par. 1, of the bankruptcy act, makes the commission of an offense which is punishable by imprisonment under the statute a ground of objection to discharge. These offenses are defined in section 29, and the first ground of objection to this discharge is predicated upon the language of section 29b, par. 1, which makes it an offense to knowingly and fraudulently conceal, while a bankrupt, or after his discharge, from his trustee, any of the property belonging to his estate in bankruptcy. As a basis for this objection it is alleged that Bryant knowingly and fraudulently concealed, while a bankrupt, a gold watch, of the value of \$15; a gold watch chain, of the value of \$3; a desk, of the value of \$15; and an interest in the partnership firm of Hall Bros., of the value of \$500. On the 2d day of May last the referee filed an opinion in this case upon a motion made by the same creditor opposing the granting of the discharge herein, for an order requiring the bankrupt to schedule this property as a part of his assets, and to deliver possession thereof to his trustee. This motion, except as to watch and chain, was declined, for the reasons set out in said opinion, and an appeal prayed and granted to your honor for a review of said order of the referee. This first specification of objection, while it necessarily involves the same subject-matter as the order made by the referee and appealed from, presents it, however, in a different form (i. e. as a statutory ground of objection to discharge), and in

the identical words of the statute constituting the offense of fraudulent concealment of assets, thereby involving a construction and interpretation of said statute (section 29b) with respect to its application to and bearing upon the present case. For this reason the special master has overruled the objection made by said Bank of Charleston to his jurisdiction to act upon the specifications of objection herein filed in any aspect, to which it excepts. The master deems it unnecessary to review in detail the facts upon which this objection is based, since they are referred to at some length in the opinion heretofore filed, and it would subserve no useful purpose to repeat them here. It is sufficient to say that, to make a person guilty of the offense defined in this section and paragraph, this alleged concealment must have been both knowingly and fraudulently, and not knowingly or fraudulently. It is further held by the authorities that the concealment must have been willful and intentional, as well as knowing and fraudulent. In re Crenshaw (D. C.) 95 Fed. 632; In re Wetmore (D. C.) 99 Fed. 703. In the present case I am of opinion that the facts do not justify the conclusion that the alleged concealment was either fraudulent or willful, assuming it to have been knowingly made. The watch and chain in question, which have been together valued by the appraisers at \$7.50, were worn by the bankrupt openly upon his person at all of the various examinations and hearings had by the referee in his case, and the attention of counsel for objecting bank was first drawn to the existence of said watch and chain, according to his own admission, by noticing the bankrupt take the same from his pocket to see the time. This, in addition to the evidence of the bankrupt cited in said report filed May 2d, to the effect that when preparing his schedules he mentioned his possession of said watch and chain to his attorney, and asked him what about it, and his lawyer informed him he need not schedule it, for the reasons stated, satisfies me that the element of fraudulent intent is lacking in this instance. With respect to the desk, I think the same is true. The bankrupt testified that he acquired this desk in 1896, and told one Emmet Hall he might have it, and that it has since remained in Hall's store. In explanation of his failure to schedule it, he states that he no longer regarded it as his property, after making this statement to Hall. This transaction of gift, having occurred prior to the passage of the bankruptcy act, cannot be made the basis for the charge of fraudulent concealment, even though, being made without consideration, it would be voidable as to creditors, and might be recovered by the trustee. See In re Crenshaw (D. C.) 95 Fed. 632; In re Webb (D. C.) 2 Nat. Bankr. N. 289, 98 Fed. 404; In re De Leeuw (D. C.) 2 Nat. Bankr. N. 267, 98 Fed. 408. With respect to the alleged interest in the firm of Hall Bros., I have already set forth the facts as I see them, in the opinion heretofore referred to, and do not care to incur the record by useless repetition of them here. There is no question but what this interest is the property of one of three persons, viz. Culton, Bryant (the bankrupt), or Mrs. Bryant (Culton's daughter). Counsel for objecting creditor examined both Culton and Mrs. Bryant, and made both their witness. The former expressly states that he gave to and intended the interest acquired in the firm of Hall & Culton to go to his daughter, Mrs. Bryant. The latter is not interrogated at all upon this matter. It was Culton's property, purchased with his money; and his right to dispose thereof as he saw proper cannot be denied, and is in fact conceded. But it is contended by the counsel for the Bank of Charleston that Bryant has in legal effect reduced this property (assuming it to have belonged to his wife originally) to his own use and possession, in such sense as to make it an asset of his estate. Whatever might be said of the old hard rule of the common law, that recognized the right of the husband to appropriate to his exclusive use the separate property and earnings of the wife, it is sufficient to remark that this rule has, since the decision of the supreme court of Tennessee in the case of *Carpenter v. Franklin*, 89 Tenn. 142, 18 S. W. 484, been materially modified, and it is there held that "the creditor has no right, save through the husband," and cannot coerce the labor of the wife if the husband see fit to emancipate her earnings. If this be true with respect to the wife's earnings, there can be no distinction in principle between such a case and property acquired by the wife by direct gift from a party other than the husband. If the husband can make a separate estate in the wife by direct gift of personalty to her, as held in this

case, a fortiori her father can do so; and the gift in this case is of this kind, and I do not think the evidence justifies the assumption that Bryant has converted this property from an asset of his wife's to a title in himself. If Bryant can be said to hold the legal title to this interest, in any aspect of the case, a court of equity would charge him as trustee for the use and benefit of his wife, as the real and equitable owner, and the naked legal title in him would in no sense become an asset of his under the provisions of the present act. Counsel for objecting creditor seems to proceed upon the theory that all property which may be subjected by law to the payment of the creditor's demand against the bankrupt is necessarily an asset of the estate, and must be so regarded. This is not the law, nor is the liability or nonliability of any special property to subjection by legal process the touchstone for determining whether or not it is an asset in the bankrupt sense. If A. make a deed to B. of certain real estate, and B. fails to put it of record, it is liable to suit of A.'s creditors to the payment of his debts; but, if A. thereafter goes into bankruptcy, it does not follow that this realty is an asset applicable to the payment of debts. The question is purely one of title, and the trustee in bankruptcy acquires only such title as the bankrupt had as of the date of the adjudication (section 70a), except in the excepted cases therein mentioned. Bryant at no time acquired title to this interest originally owned by Culton, except it be through the alleged doctrine of reduction to possession. He paid no consideration for it, and Culton denies that the gift was made to him; and, for the reasons stated, I see nothing fraudulent in the failure to schedule this interest as his property. The argument as to the alleged reduction to possession, growing out of the management of the business by Bryant, and its legal effect, is fully met and answered by the decision in the case of *In re Freund* (D. C.) 2 Nat. Bankr. N. 236, 98 Fed. 81. In that case the evidence declared that the bankrupt operated the business under power of attorney from the wife, and treated it in all respects as his own; but the court held that this was not inconsistent with the theory of ownership in the wife, especially as it was not shown that the bankrupt had contributed any capital to the business.

(2) Made a False Oath in Relation to His Proceeding in Bankruptcy. This ground of objection is based upon exactly the same state of facts as the first; i. e. the failure to set out the watch and chain, desk, and firm interest in his schedule, and swearing to same as being full and complete. In the case of *In re Crenshaw* (D. C.) 95 Fed. 632, it is held that where the bankrupt more than four months before the commencement of proceedings transferred a stock of goods to his wife, and his schedule in bankruptcy stated he had no assets of any kind, yet, in the absence of evidence of intentional wrong on his part, his oath to the schedule was not such a false oath as would forfeit his right to discharge, notwithstanding the fact that such transfer was voidable as to creditors, since it was valid as to him. This case fully meets the case made at bar with respect to the transfer of the desk to Hall. Again, it has been held that the mere fact that a bankrupt has not listed certain property in his schedule is no ground for refusing to discharge. It must further appear that the omission was of such a character as to make the oath a false oath, or of such character as to amount to a knowing and fraudulent concealment of property from his trustee. In *re Hirsch* (D. C.) 96 Fed. 468. And the discharge cannot be refused on the ground that the bankrupt has made a false oath in relation to certain property unless it is proven that his contention that some one else was the owner of the property in question is untrue. In *re De Leeuw* (D. C.) 2 Nat. Bankr. N. 267, 98 Fed. 408. In the *Hirsch* Case, *supra*, the bankrupt had failed to list certain corporate stock standing in his name. It appeared that this stock was hypothecated for full value, and the court held that the omission to schedule it, not with any fraudulent intention, but under the honest belief that, being so pledged, it was no longer his, or was not worth including, was no reason for refusing a discharge. In the case of *In re Webb* (D. C.) 2 Nat. Bankr. N. 289, 98 Fed. 404, it was held that where the bankrupt, two years before filing his petition, transferred certain property to a creditor, to whom it had been pledged as security for a debt of equal amount, his omission of such property from his schedule of assets, did not make his verification thereof a false oath in a proceeding in "bankruptcy, such as to forfeit his right to discharge." It will be seen from the cases cited that the

omission of the property in question in this case, when taken in conjunction with the facts and evidence explanatory thereof, and the swearing to the schedules with such property not included, is, under the circumstances, no ground for withholding a discharge. The falsity of the oath, to make the party liable to this objection, must not only be technical, but with a fraudulent motive; and, as heretofore found, this element of fraudulent intent does not exist in the case at bar.

(3) Concealment of True Financial Condition. Neither of the charges contained in the above three specifications of objection are couched in the language of the statute (section 14b, subd. 2) upon which they are, and expressly purport to be, based, or in words of similar import. The fraudulent intent to conceal his true financial condition must be predicated upon a destruction, concealment, or failure to keep books of account or records from which his true condition might be ascertained. The charges contained in specifications 3, 4, and 5 make no mention of books of account, and are therefore legally insufficient upon their face as valid *prima facie* objections to the discharge of the bankrupt in this case; and the issues of fact raised by them have been heretofore passed upon, in the opinion filed by the referee May 2, 1900. It is therefore recommended that the petitioner bankrupt be discharged.

John C. Ramsey, for Bank of Charleston.

Arthur Traynor, for Wm. Bryant.

CLARK, District Judge. In this case, after due consideration of the case as it comes up on exceptions to the report of the special master, as well as the like consideration of the entire record of the case, I conclude that the exceptions to the discharge are not sustained by the evidence, as these objections proceed upon the ground of fraudulent concealment or fraudulently withholding parts of the bankrupt's property from his schedule, and making a false affidavit thereto. The burden is upon the creditor objecting, to sustain the charges made in that respect. These charges are of a character and reflect upon the bankrupt so seriously that they ought to be sustained certainly by somewhat cogent evidence, although a fair preponderance of the evidence would be sufficient. I conclude that the evidence relied on to sustain the charges is not sufficient, and the objections to the discharge are overruled, the report of the special master confirmed, and the discharge of the bankrupt allowed.

IN re RICHARD.

(District Court, E. D. Tennessee. November 1, 1900.)

BANKRUPTCY—TRUST FUND HELD BY BANKRUPT—MINGLING WITH GENERAL PROPERTY.

Money held by a bankrupt as guardian, which he had mingled with his own funds, thereby lost its identity as a trust fund; and the bankrupt cannot withhold property or its proceeds from his trustee on the ground that it was purchased with the money of his wards, but the wards in such case are merely creditors, who must share with the general creditors in the distribution of the estate.

In Bankruptcy. On question certified by referee.

I, D. L. Grayson, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose, pertinent to the said proceedings: The said bankrupt, H. W. Richard when examined at the first meeting of his creditors, admitted

that he had in his house and under his control the sum of \$150 in currency or notes, which he failed to schedule among his assets, claiming that said money was the net proceeds of sale of a small grocery business which he had been engaged in running up to a period of about 10 days preceding the filing of his petition, under the name of H. W. Richard, Agent, for his minor children, for whom he was guardian, and that said business was run and conducted by him upon capital belonging to his said wards, and that for this reason the proceeds of said sale were likewise the property of said children, and in no sense a part of his estate. The only proof taken upon this question was the testimony of the bankrupt himself, from which it appears that on January 6, 1896, the Mutual Life Insurance Company of New York paid to him, as guardian for five of his children, who were then minors, the sum of \$492.42; this being the proceeds of the surrender value of a certain life insurance policy upon his own life taken out for the benefit of his wife and said children, the wife having died before the policy was surrendered. This money, when received by said bankrupt, was deposited in bank by him in the name of H. W. Richard, guardian, but at various times thereafter, and down until July, 1896, was drawn out by him on checks, until the entire sum was withdrawn, and the account closed upon the bank's books. See exhibit furnished by bank. Subsequent to the closing of said account, it does not appear that any other bank account was kept of said guardianship fund, but thereafter, and until the date of the filing of this petition, all of said fund, except such portion thereof as was expended in the maintenance and support of said minors (and the amount of such expenditure for this purpose is not made to appear), was kept by the bankrupt about his own person in cash, together with any other moneys he received from other sources (he admitting that he had received other moneys from the proceeds of his own labor); and the two funds were kept mingled together as one, except that the bankrupt claims to have kept in a memorandum book a separate account of the trust fund, and to which was credited all profits earned as the result of various investments in eggs, clay peas, etc., which the bankrupt made from time to time before entering into the grocery business with said trust money. The said memorandum book was not produced before me, and no statement furnished showing the exact status of the trust fund at the date of the filing of this petition. In the summer or early fall of 1896 the said bankrupt purchased, for \$110 in cash, a small grocery business on East Ninth street, subsequently removing to Whiteside, and then to West Ninth street, where he sold out in October, 1899, to one J. J. Sullivan, for \$200; the remaining \$50, other than the fund of \$150 now in controversy, having been expended in paying the filing fees in this case and in household expenses. It appears, as before stated, that this guardianship fund has, since the withdrawal from bank, never been kept separate and apart from the other moneys of said bankrupt, but that the fund, as a trust fund, has long since lost its identity as such, on account of the intermingling of it with other moneys earned by the bankrupt on his own account. It further appears from his testimony that he made use of all of such moneys as a common fund out of which to pay obligations, whether of a trust or general character, and only kept a separate record of the trust fund in a memorandum book, which he failed to produce. I am of the opinion from this evidence that said trust fund has lost its identity as such, in the sense which would entitle the wards to follow it into property in which it had been invested (at least, to the exclusion of other creditors), and that the proceeds of the sale of said grocery business are not, for the reasons stated, the sole property of said minor children, of whom there are now three, the remainder having come of age, and having been settled with, but said trust fund must be paid into this court for the equal and joint benefit of all creditors, and that said minors occupy no better position than any other creditor with respect to said fund, but are only entitled to share in the same pro tanto with other creditors. I therefore order that said bankrupt pay into this court within 10 days from this date said sum of \$150, the proceeds of sale of said grocery business, admitted by him to be now in his possession and control at the date of filing of his petition. And the said question, at the request of the attorney for said bankrupt, is herewith certified to the Honorable C. D. CLARK, District Judge, for his opinion thereon.

F. O. Wert, for petitioner.
W. S. Small, for defendant.

CLARK, District Judge. In *Hosmer v. Jewett*, 12 Fed. Cas. 543 (No. 6,713), Judge Hall said:

"Money delivered to the bankrupt in trust, if earmarked or separately kept and retained as trust property, to be delivered or paid over in the same bills or coin in which it was received by the bankrupt, would not pass under the assignment, but would be considered 'trust property'; but an amount of money due from the bankrupt as trustee, and which could not be distinguished from any other moneys in his possession or under his control, or which was only due from him because he had used trust funds for his own purposes, or otherwise misapplied them, could not be considered as 'property' held by the bankrupt in trust."

This is undoubtedly the settled rule upon the subject. *Loveland*, Bankr. p. 324, and cases there cited. It is quite evident, in view of the law thus declared, that the conclusions at which the referee arrived are correct. His report is accordingly confirmed.

In re LOCKWOOD et al.

(District Court, S. D. New York. October 16, 1900.)

BANKRUPTCY—CONSENT ORDER FOR SETTLEMENT OF ESTATE—RIGHTS OF CREDITORS SUBSEQUENTLY APPEARING.

An order entered by consent of all known creditors in proceedings against an insolvent corporation for the settlement of the estate and distribution of the proceeds as therein provided, but not in accordance with any express provision of the bankrupt act, must be held subject to the rights of any unknown creditors who may appear within the time given by law and present their claims.

In Bankruptcy.

Jacob Marx, for petitioning creditors.
Sullivan & Cromwell, for creditors opposed.
Rollins & Rollins, for bank.

BROWN, District Judge. The order of May 10th did not provide for the settlement and distribution of the estate in a manner authorized by any of the express provisions of the bankrupt act. The mode of settlement and dismissal of the proceeding as proposed was justifiable only upon the consent of all known creditors, or by the provisions which that order contained, for the payment in full of the few known creditors who did not consent. I feel bound to hold that the parties concerned in adopting this method of settlement, took the risk of having its execution interfered with by any additional creditors who might appear within a year and before the provisions of the order were fully executed. Such creditors, proceeding regularly within the time limit of the act, are entitled to their day in court, and to their ratable share in any assets not already distributed. In cases of defunct corporations, the equitable right of such creditors to recognition is stronger than in individual bankruptcies, because

all future remedy of the creditor against the corporation whose assets are distributed, is worthless, though the debtor and the debt remain undischarged; while in individual bankruptcies the continued personal liability of the debtor, is at least of some presumptive value.

In the present case, moreover, there was no publication of notice of the proposed order of settlement and distribution of assets, as required by law in cases of distribution, which could serve as even constructive notice of that order to unknown creditors. So far, therefore, as the assets are not distributed, I must arrest the distribution until the claims of these creditors are liquidated, or found to be invalid. From the papers before me these claims seem to be of very doubtful substance; but it is not for me to pass upon their merits on this motion. They must be heard in the regular course of proceeding. No satisfactory reason appears for the long delay in presenting these claims to the referee, if they have any merit. But as they are presented within the legal period, they must be entertained and passed upon; but the proceedings for doing so ought to be as speedy as practicable.

In view of the special circumstances of the settlement and compromise agreed on, which was the basis of the order of May 10th, the partial execution of the order and agreement, and the fact that the parties cannot be wholly restored to their original positions, it is unnecessary to determine now just what dispositions ought to be made in case these claims, or either of them, are established for any amount, any further than to say, that the lien of the bank under its chattel mortgage on the property from which the existing funds were derived, so far as the mortgage was given for a present valuable consideration, should be reinstated, as against the proceeds remaining, so that the percentage of dividends to be distributed must necessarily be small.

An order for a stay may be entered with a provision for as speedy a liquidation of the claims as practicable.

WILLIAMS PATENT CRUSHER & PULVERIZER CO. v. ST. LOUIS
PULVERIZER CO. et al.

(Circuit Court, E. D. Missouri, E. D. November 22, 1900.)

No. 4,073.

1. PATENTS—INVENTION—CONSTRUCTION OF CLAIMS.

The fact that a patentee possibly did not appreciate every result of his invention, or failed to state its full scope in his specification, will not deprive him of the benefit of claims which are broad enough to cover it.

2. SAME—SUIT FOR INFRINGEMENT—EVIDENCE OF ANTICIPATION.

Oral testimony of witnesses that an unpatented machine, which is not before them or in court for inspection, operates in the same way and produces the same results as the machine of a patent, based on their recollection or upon a model produced, without any explanation of how, when, or by whom it was made, or for what purpose, and only identified with the machine in question by a general statement that it represents the construction of such machine, is not sufficiently certain to establish anticipation.

3. SAME—BURDEN OF PROOF.

A showing by a defendant that the owner of an unpatented machine, which is claimed to be an anticipation of the patented machine in suit, refused to permit it to be brought into court, and a disclosure of where it can be seen, do not relieve him of the burden of proving the anticipation by clear and certain evidence, or cast upon the complainant the duty of inspecting the machine and disproving anticipation. By an application to the court, its aid could be secured, either for the production of the machine, or to obtain a correct reproduction for use at the trial.

4. SAME—INFRINGEMENT—CRUSHING MACHINE.

The Williams patent, No. 489,236, for a crushing and pulverizing machine, was not anticipated and is valid. Claims 1, 2, and 3 construed, and *held* infringed.

In Equity. Suit for infringement of a patent. On final hearing. Bakewell & Cornwall, for complainant. Geo. H. Knight and W. M. Kinsey, for defendants.

ADAMS, District Judge. This is an action charging the defendants with infringement of claims 1, 2, and 3 of letters patent of the United States No. 489,236, granted to Milton F. Williams, August 31, 1897, and now owned by the complainant, for a new and useful improvement in crushers and pulverizers. Claim 1 reads as follows:

"(1) The combination, with a shaft, of hammer supports strung thereon; said supports being formed with projections; the projections of one support being staggered, relative to the next adjacent support, so that the projections of every other support align; through-bolts which pass through said projections, and hammers on said through-bolts and between the projections, said hammers being in line with the body portion of the support for the next adjacent hammer,—substantially as described."

Claims 2 and 3 are substantially like claim 1; claim 2 adding the element of supports acting as spacers for each other, and claim 3 adding the element of arranging the hammers in rows disposed longitudinally to the shaft. The invention of these claims, when analyzed in the light of the specifications and drawings, consists, plainly speaking, of a mill into which may be fed refractory materials for the purpose of crushing and pulverizing the same. The mill is made up of a frame or casing open at the bottom, and provided with journals on each sidepiece at their upper edge, on which a shaft running transversely with the casing is adapted to rotate. Upon this shaft are strung several hammer supports with projections, in close juxtaposition to each other, through which are pivoted heavy, rectangular pieces of iron, called "hammers." When this shaft is rapidly rotated or revolved the pivoted hammers, by the operation of centrifugal force, take a position radial to the shaft. Within the casing are arranged a series of iron bars, running transversely across the casing, leaving slight spaces between them, forming a half circle in shape, with its concave side uppermost. Against this circular, cage-like surface the ends of the hammers, in their revolution, co-act, and crush the material fed into the machine at one end of it, letting out the pulverized dust between the iron bars into appropriate receptacles underneath. The hammer supports referred to in the three claims under consideration are shown in the drawings of the patent to be triangular in shape, and so strung upon the shaft as to make

the points of the triangle or the projections of the patent in alternate supports staggered, or arranged at 60° in relation to one another. The effect of this arrangement is that there are six rows of hammers disposed around the supports, operating, by the revolution of the shaft, upon the body to be crushed and pulverized; and, if the nest of triangular supports be large enough to occupy the entire length of the shaft within the casing, manifestly there would be six rows of hammers operating throughout the whole width of the casing at each revolution of the shaft. While the triangular shape of the supports is alone shown in the drawings, and mainly referred to in the specifications, the patentee does not limit himself to that shape. He says:

"I have shown these hammer supports as being triangular shaped, but it will be understood that they could as well have four or more corners, and arranged in the same way to support the hammers, in which event there would be eight or more rows of hammers disposed around the supports."

The particular arrangement of these hammer supports and hammers is what constitutes the patentable novelty of the claims in question. The new and useful result claimed for this arrangement is that the entire space across the machine upon which the substances to be crushed can be placed is covered by, and acted upon by the hammer blows of, every two adjacent rows of hammers. What one row of hammers leaves unacted upon by reason of the space between the hammers of that row would be immediately caught and acted upon by the next coming row, when the hammers, by reason of the staggering of the supports, would act upon the spaces left by the first row. The third row of hammers, being in strict alignment with the first row, would act on the spaces left by the second row, and the fourth row of hammers, being in strict alignment with the second row, would act on the spaces left by the third row; and all the hammers, taken together, when there are six rows, would act at each revolution of the shaft three times upon all the surfaces containing material to be crushed upon the cage or bars below. The patentable novelty of this combination is not disputed by the defendants. In fact, their counsel conform to rule 19 of this court, and state their defenses to be anticipation and noninfringement only.

Before taking up these defenses, it is proper to refer to a contention of the defendants' counsel to the effect that the specification of the patent contemplates the use of hammers with twisted ends only. Attention is called to that portion of the specification reading as follows:

"In order that the several rows of hammers will cover the entire striking area by themselves, as above described, I twist the ends as shown, when it will be seen that the angle of the twisted end is sufficient to cause it to travel in a path equal to or greater than twice the width of the hammer. In this manner said hammers cover the entire area, whereas if they were straight the combined width would cover but one-half of the area."

The patentee then goes on and specifies the great utility of twisting the ends of the hammer. If no consideration be taken of the divers claims of the patent, it would seem as if the patentee might not have fully realized that his arrangement of staggered hammer

supports, without twisting the ends of the hammers, would permit any two rows of hammers to so act as to cover with their striking ends the entire width of the space to be acted upon. This is more apparent from a consideration of the whole specification, in which this effect is nowhere referred to. On the contrary, the patentee says:

"From the above it will be seen that the hammers of one row are staggered with relation to the hammers of the adjacent row, whereby the hammers of each row have a striking area covering the entire length of the row, which is equal to the length of the shaft occupied by these supports."

Then follows the description showing how each row will cover the entire striking area, already quoted. From these excerpts it looks as if the patentee was mainly intent upon such an arrangement and equipment of the hammers as that each row would strike upon the entire striking area to be acted on. But, notwithstanding the possible want of full appreciation of the effect of his arrangement of parts, it is clear that the patentee described the mechanism which would produce the same effect by the co-action of two rows of hammers as that which he says is produced by twisting the ends of the hammers. And, when reference is made to the claims of the patent, it is found that the first three claims in no manner involve the employment of hammers with twisted ends, while the fourth claim calls for twisted ends as an element of the combination of that claim. The first three claims are broad ones, calling for any hammers so arranged in longitudinal rows around the shaft, upon supports which are staggered with relation to each other, that the projection of every alternate support aligns. The fourth claim contains a limitation as to the hammers, namely, that they shall have twisted ends.

It thus appears that the application of the principle disclosed in the specifications and in the first three claims, broadly stated, produces the new and useful result which the patentee possibly thought could be best or alone produced by the additional element involved in the fourth claim. Does this possible want of appreciation of every result of the operation of his device deprive him of the benefits of the broad claims in question? I think not. To so hold practically nullifies the three claims in question, and deprives the patentee of the benefits of the broad discovery there claimed by him. This should not be done if any other reasonable construction can be given them. The patentee so described the construction of his machine as to clearly make any two adjacent rows of hammers, taken together in their operation, cover the entire area to be acted upon, and thus to perform the function which he says a single row equipped with hammers having twisted ends will perform. While I have said that possibly the patentee did not fully state the scope of his invention in his specification, I am confident that he nowhere discloses that it took the twisted ends of the hammers to produce the result which two rows of his hammers, taken together, produce. He says, "in order that the several rows [that is, each one of them] of hammers will cover the entire striking area by themselves," he twists the ends of the hammers. This is entirely consistent, or at any rate not inconsistent, with the full appreciation that any two rows, taken

together, would do it without twisting the ends of the hammers. The patentee having before described the arrangement of parts, by which any two adjacent rows of hammers would operate upon the entire striking area, in the part of the specification last quoted, seems to take up another problem, namely, how to so arrange his hammers that one row would cover the entire striking area. This, as already observed, is not at all inconsistent with the claims of the complainant's counsel that the patentee had theretofore exploited the method of covering the entire striking area without hammers with twisted ends, by the operation of two adjacent rows. The complainant in my opinion, is entitled to the construction as shown in claims 1, 2, and 3, notwithstanding the fact that the patentee did not, in his specification, describe fully and accurately all the beneficial effects of its operation.

It is said in *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073, 30 L. Ed. 1064, quoting from the case of *Andrews v. Cross*, 19 Blatchf. 294, 8 Fed. 269, as follows:

"It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent. * * * An inventor may be ignorant of the scientific principle, or he may think he knows it, and yet be uncertain, or he may be confident as to what it is, and others may think differently. All this is immaterial, if by the specification the thing to be done is so set forth that it can be reproduced."

In the case of *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, the court says:

"Doubtless a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him."

In the case of *McCormick Harvesting Mach. Co. v. Aultman, Miller & Co.*, 16 C. C. A. 259, 69 Fed. 371, it is said:

"It is not material that Gorman [the inventor] did not describe in full all the beneficial functions to be performed by the parts of his own machine, if those functions are evident in the practical operation thereof, and are seen to contribute to the success of the device."

To the same effect, also, are the following cases: *Tonduer v. Chambers* (C. C.) 37 Fed. 333; *Parsons v. Seelye*, 40 C. C. A. 486, 100 Fed. 455.

The next question for consideration is whether the defendants have shown that complainant's invention was anticipated. They first rely, and most strongly, upon the Bull English patent of 1883. This patent, as shown in the provisional specification, relates to improvements in pulverizers. The patentee describes the machine of his invention as follows:

"It consists of a hollow cylinder with closed ends, within which are hung from an inclined shaft a series of rollers, which are caused to swing round and rotate with the shaft, and strike and rub upon the inner surface of the cylinder as the shaft revolves."

At the outset, it cannot escape observation that Bull's machine has no apparent physical resemblance to that of complainant's; and while it is claimed that the model in evidence, as well as the drawings of the patent, show the action of the rollers to be the same as

the action of complainant's hammers, it is noticed that Bull, in his specification or description, in no wise shows the staggered relation of the rows of hammers, or any effect of that arrangement. On the contrary, his claim is that, by arranging the shaft at an angle in the cylinder, he "causes the rollers, when swinging or revolving round in the cylinder, to give a most effective grinding motion between the rollers and the inner surface of the cylinder." After a careful consideration of the drawings of the Bull patent, as well as of the model of the device of the patent in evidence, I do not believe the Bull machine can so operate as that any two adjacent rows of rollers will so act as to cover in their effective operation the entire transverse area of the cylinder to be acted upon. At any rate, I am sure the patent discloses no purpose to accomplish that result by the co-acting operation of the elements of the patent. It looks, rather, to the grinding effect to be occasioned by a deflection from a horizontal line of the shaft of the mill on which the rollers are strung. I am unable to find in this any anticipation of complainant's invention.

The next alleged anticipation relied on by defendants' counsel in argument is an unpatented structure claimed to have been sold in March or April, 1895, by the defendant the Schoellhorn-Albrecht Machine Company to John Gaffney. In determining the character, function, and operative effect of this Gaffney machine, it is first necessary to ascertain from the evidence, if possible, exactly what it is, and what are its elements. For this purpose a consideration of the evidence is necessary. The first reference to it found in the record is in connection with the examination of William Gruendler, an expert machinist. Without any explanation of how the model was made, when it was made, by whom it was made, or whether it was a correct representation of anything, counsel for defendants abruptly offers in evidence a model, and has it marked "Defendants' Exhibit A." The witness then, upon being asked whether that model, if enlarged into a machine, would perform the same work as complainant's machine, answers that it would. John Gaffney is then examined by the defendants, and testifies that he purchased a machine for pulverizing shale of Schoellhorn-Albrecht Machine Company in 1895. He then gives a general description of the machine, and is asked to look at the model, defendants' Exhibit A, and states that it represents the machine which he so bought, barring what he calls the "immaterial difference" that the shaft of his purchase was round, instead of square, as in the model. On the assumption of identity of the model with the machine purchased by him, Gaffney is then questioned at length concerning the elements, function, and operation of a machine enlarged from the model. H. S. Albrecht is then examined, and is shown defendants' Exhibit A, and is asked the following question: "State whether or not it represents the construction of the cylinder that your company sold to Mr. Gaffney." He answers that it does, and proceeds to give his views concerning the construction and operation of the machine enlarged from the model, and particularly of the machine sold by his company to Gaffney. Evidence is found in the record that the Gaffney purchase is now in existence at St. Louis, Mo.; that defendants did not have it in their possession; and that

they could not secure the consent of the owner to produce it in court for inspection. The foregoing is a fair sample, if not substantially all the evidence in the record identifying the Gaffney purchase with the device of the complainant's patent; and this evidence was all objected to, at the time the testimony was taken, as incompetent to prove anticipation. The grounds of the objection were fully stated, in substance, as follows: That there was no evidence tending to show by whom or when the model was made, for what purpose it was made, or that it was an accurate representation of any subsisting thing. Defendants' attention was thus timely called to the claim now strenuously urged by complainant's counsel, that such evidence was entirely insufficient to defeat complainant's patent. In my opinion the complainant's position with respect to this evidence is well taken. A preliminary showing should have been made, authenticating the model thus abruptly offered in evidence as a correct representation of the machine in question, before it was at all competent as testimony; and, as to all the evidence bearing on the alleged anticipation of complainant's invention by the Gaffney purchase, it may be appropriately said that it lacks that degree of certainty which renders it of any probative value. Three witnesses testified about the elements of a device, their co-action, function, and operative effect, without having the device before them or in court for inspection. The novelty of a device often depends upon a careful and discriminating examination of small and apparently inconsequential differences in construction between it and the prior art; and to permit witnesses to institute comparisons in their own minds, and state the result of such comparisons in general terms, to the effect that the unseen and unproduced machine operates in the same way as the machine of the patent, that the admitted difference in the structure between a circular and rectangular cylinder about the shaft is of no importance, and that the unproduced machine accomplishes the same results as the machine of the patent, would, if tolerated as satisfactory evidence, open the door to mistake, fraud, and deception. The supreme court of the United States, in the *Barbed-Wire Case*, 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 154, in considering the value of such evidence, observes as follows:

"We now have to deal with certain unpatented devices claimed to be complete anticipations of this patent, the existence and uses of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect, aside from the temptation to actual perjury, the courts have not only imposed upon defendants the burden of proving such device, but have required that the proof shall be clear, satisfactory, and beyond reasonable doubt."

This same subject was considered by this court in the case of *Kraatz v. Tieman* (C. C.) 79 Fed. 322, where the same thought is expressed, and where the authorities on the subject are collated.

Governed by the foregoing wholesome and salutary rules, I am unable to find from the evidence that the Gaffney purchase is an anticipation of complainant's invention. Defendants undertook to explain why the Gaffney machine was not produced in court. That

explanation is substantially this: That by their disclosure of the location of the Gaffney machine an opportunity was afforded the complainant to verify their conclusions. In my opinion, this circumstance cannot affect the conclusion reached. The burden is on the defendants to prove that the Gaffney machine is an anticipation. They cannot relieve themselves of their burden by suggesting to the complainant that there is a machine in existence which relates to the general art of complainant's invention, and requiring it to prove the negative proposition involved. Again, it is said that the owner of the Gaffney machine declined to permit defendants to produce it for use at this trial. This circumstance is of no avail, as the defendants might, if they so desired, have secured the aid of the court, either for the production of the machine, or to secure a correct reproduction thereof for use at the trial. Having failed to take any such steps, they cannot excuse themselves from producing competent evidence because the owners refused to permit its production.

These considerations dispose of the anticipation claimed to be found in the machine sold to Gaffney. While counsel for defendants mainly relied upon the foregoing as anticipations, there are several other patents pleaded by them, which were not strenuously urged in argument as anticipations. Without the aid of any expert testimony concerning them, sufficient consideration has been given them to satisfy me that none involve the invention of the three claims of the patent in suit.

The issue of infringement is simple. The defendants' device is admittedly the same as that of the patent, provided the twisted ends of the hammers is not a limitation applicable to the first, second, and third claims now in question. It has already been seen in discussing the invention of the patent that these claims are not subject to that limitation. A decree will be entered in favor of the complainant. Counsel may prepare it for submission to the court.

BADISCHE ANILIN & SODA FABRIK v. KALLE & CO. et al.

(Circuit Court of Appeals, Second Circuit. October 16, 1900.)

No. 70.

1. PATENTS—ANTICIPATION—PRIOR PUBLICATIONS.

A prior publication, referred to as an anticipation, must be given effect in accordance with what it actually communicates to the public, and expert testimony cannot be received for the purpose of showing that statements therein made were erroneous, and to give it the effect it would have if reconstructed so as to disclose matters which it might or should have stated, but which it in fact did not.

2. SAME—DYES—INDOINE BLUE.

The Julius patent, No. 524,254, for "Safranine Azo Naphthol Lake," a blue dyestuff prepared from safranine azo naphthol, and which is soluble in water, and constitutes a cheap and valuable substitute for vegetable indigo, held not anticipated, valid, and infringed as to claims 1, 2, and 4.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This case comes here upon appeal from an interlocutory decree of the circuit court, Southern district of New York (94 Fed. 163), sustaining a patent, finding infringement of claims 1, 2, and 4 thereof, and ordering an injunction and accounting. The relevant portions of the patent are as follows, the quotations covering everything therein contained which has been referred to by either side. United States letters patent No. 524,254, August 7, 1894 (application filed April 1, 1893), to Paul Julius, assignor to complainant, for "Safranin Azo Naphthol Lake," patented in England, No. 4,543, application March 13, 1891, issued January 2, 1892:

"The ultimate object of my invention consists in a new lake that may be produced as a pigment or upon fiber. It resembles vegetable indigo, in color and fastness against washing and light, so nearly as to form an artificial substitute for the same, such as has been sought for many years by chemists. In arriving at this new lake, I have made certain very essential intermediate discoveries or inventions, which I also desire to secure by this patent. Thus, I have discovered and recognized that a certain class of substances (safranin azo naphthol bodies), known as 'insoluble precipitates,' and regarded as worthless bodies, can be rendered soluble, and then constitute a most valuable dye, and I have proved this discovery by rendering them soluble (as hereinafter further explained), and have hereby enriched the dyeing industry with a cheap dye of most excellent properties, the application of which is founded on transforming it into the above said lake. The said insolubility of these safranin azo naphthol bodies, as hitherto obtained, was due to the presence of alkali and salts therein. These admixed impurities constitute a hindrance or obstacle preventing the solution of the bodies. I have further discovered that these phenolic azo dyes (the said safranin azo naphthol bodies) possess the character of bases, an exceptional characteristic possessed by no phenolic azo compound hitherto known. I have applied or used this surprising basic nature of these insoluble precipitates in two ways, viz.: First, I have taken advantage thereof to produce acid compounds or salts of the safranin azo naphthol bodies, whereby I destroyed the influence of the impurities hereinbefore referred to, to prevent the solution of the said bodies, and so obtained them in a soluble form, in a condition suitable for the use of the dyer; second, I have taken advantage of the aforementioned basic nature of the bodies to cause them to combine, when in soluble form, with tannic acid, and a metal such as antimony and iron, whereby I produced the valuable indigo-like lake.

"In the year 1885, a German patent, No. 38,310, was granted to the Leipziger Anilinfabrik Beyer & Kegel for the preparation of azo dyes by the combination of certain diazo safranines with naphthol sulpho acids. On account of their bad dyeing qualities, these proposed dyestuffs are worthless as such, and never came into commerce, and the patent was abandoned. The compounds resulting from the combination of the safranin diazo compounds with the unsulphonated naphthols have been mentioned in chemical literature as insoluble precipitates. They could not be applied in the dyeing industry, and have since been disregarded, and fallen into the rank of useless bodies, and were not included in the said German patent. * * *

"The following is an example of the manner in which my invention can be carried into effect, and the new dyestuff obtained. The parts are by weight. Make a one per cent. solution of safranin, taking one molecular proportion of the safranin used, say about seven (7) parts of safranin T, or about six and three-fifths (6.6) parts of pheno safranin, or about seven and seven-tenths (7.7) parts of dimethyl safranin. Diazotize by adding first a solution of sodium nitrite containing about fourteen (14) parts of that salt (one molecular proportion), and then twenty-three (23) parts of hydrochloric acid containing about thirty-three per cent. real acid (HCl). The solution during these operations must be kept cold with ice, and stirred. Next run the mixture into an ice-cold solution of about three (3) parts of naphthol—either alpha or beta—(one molecular proportion) in about one hundred and sixty (160) parts of water and twenty-five (25) parts of caustic soda solution, containing about thirty-five per cent. of sodium hydrate (NaOH), stir the mixture thoroughly for several hours, then filter off the blackish violet precipitate of safranin azo naphthol thus formed. Now wash well with cold water, prolonging this until the liquor running off is deeply colored, and shows that a soluble product has resulted.

The paste then remaining on the filter can be used in dyeing as such, or after making up to a standard strength. Or, without washing so thoroughly, my new dyestuff can also be prepared in the form of paste (in which form it best meets the requirements of dyers), as follows: Stir the azo body, obtained as above described, with a little water, and mix gradually with hydrochloric acid, until a test portion of the paste obtained is completely soluble in hot water. To prepare the new dyestuff from the quantities of safranine described in the above example, about two and one-fifth (2.2) parts of hydrochloric acid, containing about thirty-three per cent. of real hydrochloric acid (HCl), may be used at this stage of the process. The paste so obtained contains my new dyestuff in the form of a salt, and can be diluted or made up to a standard strength. Instead of hydrochloric acid, other acids may be used, such as acetic acid, sulphuric, nitric, oxalic, and tartaric acids; also salts which act as acids; but, of these, hydrochloric and acetic acids give the best results. * * * My new dyestuff, however prepared, is a soluble safranine azo naphthol body. It occurs in the dry form and in paste, and forms a dark-colored powder, with the slight metallic sheen giving a violet black paste. It is soluble in both hot and cold water, giving violet to blue solutions, insoluble in alkalies, soluble in alcohol, and practically insoluble, or very slightly soluble, in benzine. The dye can readily be recognized by its behavior on treatment with reducing agents, for safranine and amido naphthol occur in the reduction products. * * *

"I will now proceed to describe the new lake, and the manner of obtaining it: Example a. Dissolve about twenty parts of my new dyestuff in the form of powder (or the corresponding quantity of paste) in about two thousand parts of hot water, allow to cool, and then add a solution of about thirty parts of tannin in three hundred parts of water (or the equivalent quantity of an extract of sumac); finally add a solution of about eleven grams of tartar emetic in about one hundred and fifty parts of water, raise the temperature to the boiling point, and maintain this temperature for about fifteen minutes. Filter, while still hot, through a calico filter, wash well with about ten parts of cold water, press and dry the lake so obtained at a temperature of about seventy degrees centigrade.

"Example b. To obtain the lake on cotton fiber proceed as follows: Take the freshly boiled out goods, pass them six times through a boiling hot solution of sumac, and then leave them overnight in the liquid. Next wring out and pass about eight or ten times through a solution of antimony salt, wash well, and wring out. Now fill the dye vat with the necessary quantity of water, and add the amount of aluminium sulphate mentioned below, then enter the goods, and, after passing them through the liquid once or twice, remove, and wring them lightly by stretching. Add about one-eighth of the dye solution through a fine sieve, pass the goods again six times through the solution, then removing them, and, stretching as before, add again one-eighth of the dye solution, subsequently add a quarter of the dye solution, and finally the remainder thereof, manipulating in the same way. * * * The dyed goods are of a color resembling indigo, possess a degree of fastness to light and washing exceeding that obtainable with the ordinary aniline dyes, and comparing advantageously with indigo itself. The coloring matter may be applied so as not to bleed into the white. In addition to the valuable and novel degree of fastness of color possessed by the lake prepared according to this invention, whether on the fiber or otherwise, it may be recognized by the following very characteristic reactions: * * *

"What I claim as new, and desire to secure by letters patent, is: (1) As an article of manufacture, a coloring matter lake resembling indigo in color, which can be obtained by combining a soluble safranine azo naphthol body with a tanno metallic mordant, and which is very fast to light and washing. Upon suitable reduction, it shows the reactions of safranine; upon treatment with caustic soda, it shows the reactions of tannin; and it contains a metal, substantially as described. (2) As an article of manufacture, the herein-described blue dyestuff, which can be obtained from a safranine azo naphthol, and which may be recognized by the following characteristics: It is soluble in water; upon reduction with stannous chloride and hydrochloric acid, amido naphthol is produced; and upon reduction with zinc dust and acetic acid a safranine is

produced, substantially as described. (3) The process which consists in the treatment of a safranine azo naphthol with an acid until the body is rendered soluble in water, substantially as described. (4) The specific blue coloring matter (obtainable by rendering the safranine azo beta naphthol hereinbefore mentioned soluble in water), which possesses the following characteristics: It is soluble in water; gives a blackish green solution in sulphuric acid; and, on reduction, gives alpha amido beta naphthol and safranine proper, all substantially as described."

Claim 2 is for a dyestuff produced by the combination of diazotized safranine with alpha or beta naphthol. Claim 4 is for a dyestuff produced by the combination of diazotized safranine and beta naphthol. The chemical name of this dye of claims 2 and 4 is "Safranine Azo Beta Naphthol"; its commercial name is "Indoine Blue." Claim 1 is for the product (a lake) resulting from dyeing cotton mordanted with tannin and tartar emetic with the product of claims 2 and 4. Claim 3 is for a process of manufacturing the product of claims 2 and 4, and is not here in controversy; no charge of infringement is based upon it.

Henry P. Wells, for appellants.

Livingston Gifford, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). It would certainly seem a work of supererogation to undertake to add anything to the exhaustive discussion of the issues in this cause which is found in the opinion of Judge Coxe, sitting at circuit. 94 Fed. 163. Inasmuch, however, as the record is voluminous, the briefs and arguments most elaborate, it may be well to indicate, as briefly as the nature of the case will admit, the reasons why we concur in his findings and conclusions.

Certain propositions are now either expressly conceded by both sides or are undisputed upon the proof. A preliminary statement of them will somewhat simplify the discussion.

The "earliest date of invention" is January 2, 1892, the date of the filing of the complete specification for the British patent. The chemical product safranine azo naphthol was old; the patent asserting, and the complainant contending, however, that the literature of the art discloses no prior safranine azo naphthol available as an anticipation which was soluble in water. It will, of course, be readily understood that a dyestuff which is insoluble in water is not as available in the art as is one which is water soluble. "I agree with the statement," says one of defendants' witnesses, "that the nonsulphonated compounds, when once prepared, cannot be dyed on account of their insolubility." The product in suit belongs to a group of chemical compounds prepared by the action of a diazo compound and an oxy, that is a phenolic body, which are referred to in the prior literature as insoluble in water; but prior to the patent it had been found that by the introduction of a sulpho-acid group they could be so transformed as to be rendered soluble for application in dyeing processes. The chemistry of this transformation need not be discussed here. It is sufficient to say that all the witnesses recognize two distinct varieties of azo dyes of the kind under discussion,—the unsulphonated and the sulphonated. Moreover, the solubility secured by sulphonation is gained at the cost of rendering the product unfit for cotton dyeing generally.

There is no prior American patent, and although the answer, as amended, sets up a prior use at Buffalo, N. Y., no evidence was produced to establish it. There is no proof which would warrant a conclusion that the patentee at the time of his application did not believe himself to be the original and first inventor or discoverer. Therefore, under section 4923, Rev. St. U. S., testimony tending to show knowledge or use in a foreign country need not be discussed. It will be sufficient to inquire if there is proof that Julius' invention was, prior to January 2, 1892, "patented or described in a printed publication"; and that description must be such as to show that the article described in the patent can be certainly arrived at by following the description (*Atlantic Co. v. Parker*, 16 Blatchf. 295, Fed. Cas. No. 625), without the assistance of local prior knowledge or local prior use in the foreign country where the description is published.

Much time and space have been devoted to an effort to establish "prior use" in Germany. Since such prior use, if established, would be no defense, under section 4923, it is difficult to understand why the record is thus incumbered. The various patents or publications on which defendants rely are the following:

Holliday Patent.

British letters patent were granted April 14, 1881 (No. 1,637), to Thomas Holliday, of the firm of Read, Holliday & Sons, of Huddersfield, for an invention of "improvements in obtaining coloring matters for use in coloring cotton and other textile fabrics." This is the first printed publication on the subject of safraninazo naphthol as a coloring matter. The specification states:

"The improvements relate to the employment of the coal-tar color, known in commerce as 'safranin,' and which color I treat with nitrous acid, and combine the product with alpha or beta naphthol, or mixtures thereof, and which combination may be made in the presence of the fiber. As an example for carrying out these improvements, I prepare—First, a solution of, say, 2 parts of naphthol, 1 part of caustic soda, and 100 parts of water; secondly, a solution composed of 1 part of safranin in 1,000 parts of water, with two parts of muriatic acid, 22 degrees Beaume; to this latter solution add 10 parts of nitrite of soda solution, 30 degrees Beaume. I do not, however, confine myself to this means of azotizing, as other methods may be adopted. By mixing these respective solutions, the coloring matter will be precipitated. I prefer, in mixing these solutions, to add the second to the first, but this may be varied. The combination of the solutions in the presence of the fiber may be effected by first impregnating the fiber with the first-mentioned solution, and then with the second solution, and finally with an alkali, so as to fully develop the color. The order of the impregnations, as well as the strengths of the solutions, may be varied; care being taken that the azotized safranin, the naphthol, and the fiber are simultaneously present when an alkali operates to develop the color."

It will be noted that this patent calls for a combination to be "made in the presence of the fiber"; that is, the fiber is first impregnated with one constituent, and then with the other. This was at the time a common method for dyeing with colors which, in combination, were insoluble, and at that time no dyes were produced on the fiber save those which were insoluble in water. A direction, therefore, to dye in presence of the fiber may fairly be taken as a

declaration that the coloring matter is insoluble. The three experts who testified for the complainant all stated that they had repeatedly experimented, following the directions of this Holliday patent, and that the product was invariably insoluble in water. They were not cross-examined as to these experiments, nor did any witness for defendants contradict them in this particular. Therefore, although the Holliday patent does not expressly state whether its product is soluble or insoluble, it must be understood to be water insoluble, and, indeed, defendants' brief seems to concede this. The Holliday patent, therefore, does not describe a water-soluble safranine azo naphthol.

Chemische Industrie 1882, p. 7.

This is a mere reference to the Holliday patent. It is not separately discussed in appellants' brief, and is referred to here solely to indicate that none of defendants' alleged anticipations have been overlooked.

The Moniteur Scientifique.

In September, 1885, the firm of Beyer & Kegel applied for a German patent in manner following:

"Preparation of New Blue Coloring Matters.

"It is known that the safranines obtainable from primary amines can be transformed with nitrous acid into diazo compounds. We have now found that the combinations of these diazotized safranines with phenols or its sulpho acids form dyestuffs, which are distinguished by a dark blue, indigo-like shade. We give the following examples: (1) 32 kg. pheno safranine are dissolved in a sufficient quantity of water, mixed with about 25 kg. muriatic acid, and converted into the hydrochlorate of the diazo compound by adding an aqueous solution of 7 kg. of sodium nitrite. This diazo compound is then poured into an alkaline solution of 22 kg. B-naphthol, whereby the coloring matter is formed. (2) In order to prepare a corresponding dyestuff from the safranine which is obtained by oxidation of diamidotoluol and a mixture of o. toluidin and aniline, we proceed as follows: 35 kg. of the safranine referred to are dissolved in water, and transformed into the corresponding diazo compound, with muriatic acid and 7 kg. of sodium nitrite. If this diazo compound is allowed to run into an alkaline solution of 35 kg. B-naphthol monosulphonate of soda (for instance, of the soda salt of the so-called 'Schaeffer Acid'), a blue dyestuff is formed, dyeing mordanted cotton indigo blue shades. Quite analogous results are obtained with phenol, resorcine, B-naphthol, the other naphthol monosulpho acids, and naphthol di and tri sulpho acids.

"Claim: Process for the preparation of blue dyestuffs, which are formed by combination of diazotized safranines of the said class with phenols or its sulpho acids."

The German patent office asked for more detailed statements, which, presumably, were furnished. Inspection of this application shows that it dealt with two distinct products,—the nonsulphonated, example 1, and the sulphonated, example 2. Opposition developed, and the Holliday patent was cited, whereupon Beyer & Kegel wrote to the patent office:

"We have noted and convinced ourselves that * * * the firm Read, Holliday & Sons have taken an English patent for azo colors by combination of diazo safranine and naphthols, * * * and see from it that it is Holliday's only object to produce on the fiber the color insoluble in water from safranine and alpha and beta naphthol, or from mixtures of both. Now, according to our researches, two substances are formed by the action of diazo

safranines on the naphthols, one soluble in acid, and one insoluble, which can be separated by acids. Now, we use the coloring matter soluble in acid, whilst the insoluble one, which is probably identical with that of Holliday produced on the fiber, remains behind on filtration. But as now Holliday did actually first effect the combination of diazo safranines with naphthol, as we have convinced ourselves, we therefore withdraw our application for a patent for the combination of the diazo safranine with phenol, resorcine, alpha, and beta naphthol; but, on the other hand, there is probably hardly anything to be objected against the patenting of a process for the preparation of azo coloring matter from diazo safranines and the phenol or naphthol sulpho acids, such as are particularly mentioned in our patent application L 3,337 III., and the amines or their sulpho acids of the supplement patent L 3,337 III."

Thereupon the German patent office issued patent 38,310 to Beyer & Kegel for "process for the preparation of blue coloring matter by the combination of diazo safranines with naphthol sulpho acids"; the process set forth being that described in example 2 of the application supra. It contains a list of dyestuffs prepared under the patent, giving their shades, with a statement whether or not they are soluble in water,—presumably the further details required by the patent office. Inasmuch as the German patent, as issued, is confined to the sulphonated product, it is not available as an anticipation.

Applications for patents in Germany are confidential. They are not published, although their contents are divulged to persons seeking to oppose issue. For that reason this original German application is not set up as an anticipation. But in 1886 the *Moniteur Scientifique*, a French periodical, published what purported to be a copy of the German application of Beyer & Kegel. This translation need not be repeated here. It is substantially as set forth above, with the addition of a table or list of shades and constituents. In this list appears the following:

"Diazo safranine with:

1 Mol. alpha naphthol: Blue, insoluble in water.

" beta naphthol: Blue, violet, insoluble in water."

The "description in a printed publication," therefore, which the *Moniteur Scientifique* discloses is the description of a safranine azo naphthol insoluble in water, and therefore not an anticipation of the water-soluble product of the patent in suit. Defendants have introduced much testimony in a hopeless attempt to strike these words "insoluble in water" out of the description. There is no ambiguity in them which calls for expert enlightenment to interpret them. We have no hiatus to be filled by appeal to the general literature of the art. It would make no difference if the inevitable result of following the process of example 1 should be a water-soluble product. (The evidence by no means establishes this.) Nor would the knowledge or experience of any number of chemists (unpublished to the world) that the phrase was "erroneous," or "a mistake," or "an interpolation" change the situation. The "description in a printed publication" of the statute is to be found within the four corners of such printed publication. Judge Coxé tersely and accurately expresses the law and the reason for it in the following passage:

"The question is, what does the prior publication say? not what it might have said, or what it should have said. If prior patents and publications can

be reconstructed by extrinsic evidence to fit the exigencies of the case, the inquiry will no longer be confined to what the publication communicates to the public, but it will be transferred to an endeavor to ascertain what its author intended to communicate."

Table in Schultz's Book, 1887-1890.

There is a tabulation in Prof. Schultz's "Chemie des Steinkohlen-theers," in which appears the following:

Diazotized Base Safranine.

Combination with	Technical name.	Literature.	Shade.	Reaction with conc. H ₂ SO ₄	Remarks.
Phenol.			Red violet.	Bluish green, with H ₂ O first blue, then brownish.	
Resorcine.			Violet.	Green, with water first blue, then red.	
A. naphthol.		German patent No. 38,310.	Blue.	Brown, with H ₂ O green, blue, violet.	
B. naphthol.		German patent No. 38,310.	Blue.	Dirty green, with water blue.	

It is contended that the absence of any statement in the last column, headed "Remarks," and the statement of the shade, import that the product is water soluble. Judge Coxe dismissed this from consideration as being a mere skeleton, falling far short of the clear and precise statement required by the law. Upon its face it refers to the product of "German patent No. 38,310," and that, as we have seen, was confined to the sulphonated product. It is immaterial to inquire what German chemists might have supposed that Prof. Schultz meant, nor what he now says he meant, nor what he really did mean, nor whether the reference to the German patent is a "mistake," nor whether it is, in the opinion of chemists, "absurd." Schultz confined the "description in [his] printed publication," not to the chemical products referred to in Beyer & Kegel's application, but to those which they were content to cover by their patent. Such reference cannot now be stricken out, and the limits which he thus, intentionally or not, set to his publication, cannot now be disturbed.

Beyer & Kegel's French Patent.

This was issued October 31, 1885, for a "process for the production of dyestuffs derived from safranine." It covers process for both non-sulphonated and sulphonated products, in which respects it differs from the German patent. It contains no table or list giving shades and solubility of the different varieties of product. The material portion reads:

"(1) Dissolve 32 kg. of pheno safranine in the necessary quantity of water, add 25 kg. of muriatic acid [acide chlorhydrique], and form the diazo chloride by the addition of a watery solution of 7 kg. of nitrite of soda. By running

this diazo compound into an alkaline solution of 22 kg. of beta naphthol, the coloring matter is formed. (2) To produce a corresponding coloring matter from: * * * [safranin T], proceed in the following manner: Dissolve 35 kg. of the mentioned safranin in water, and transform the same into the corresponding diazo compound by means of muriatic acid and 7 kg. of nitrite of sodium. By adding the formed diazo compound to an alkaline solution of 35 kg. of the soda salt of beta naphthol monosulfoacid (e. g., the sodium salt of the acid known as Schaeffer's), a blue coloring matter is formed, which dyes mordanted cotton an indigo shade."

This second recipe, it will be perceived, deals with the sulphonated product, and it is of the product thereby produced that the statement is made that it "dyes mordanted cotton an indigo shade." Whatever implication as to solubility there may be in this last-quoted phrase therefore applies to this sulphonated product, not, as some of defendants' witnesses suggest, to the product of the first recipe. Indeed, the testimony of one of these witnesses as to the alleged "direct statements" of the French patent are so contrary to its text that it is difficult to believe he could have had the document before him when he testified. With the sulphonated product this case is not concerned. Discussion may be confined to the first recipe of this French patent. This recipe gives exact quantities, save in two particulars: It fails to state what percentage of acid is to be taken and what amount of what substance shall be used to produce the alkalinity of the "alkaline solution of 22 kg. beta naphthol." Alkalinity might be produced by caustic soda or by carbonate of soda, but it was known that naphthol would not dissolve in water with carbonate of soda alone; it will dissolve in water with caustic soda. Now, it is a fact established by the testimony in this case that, if the blank in this recipe be filled with a certain quantity of caustic soda alone (or with a certain other quantity of the same to produce solution, the alkalinity being thereafter preserved with carbonate of soda), the result will be water-soluble safranin azo naphthol; but, if the blank be filled with a certain larger quantity of caustic soda, the result will be water-insoluble safranin azo naphthol. Where, then, are we to turn for information as to how this blank should be filled when we are trying to defeat a patent by reference to what has taken place in a foreign country? Not to the individual experiences of foreign dyestuff makers, nor to the unpublished theories of foreign chemists, but to the literature of the art,—to the "description in a printed publication," which the statute calls for. The literature of the art of producing safranin azo naphthol is brief. Defendants' witness, Dr. Schweitzer, says:

"The English Holliday patent is the only one (prior to Julius) giving kind or quantity of alkali to be used in the preparation of safranin azo naphthol. This Holliday patent is the first printed publication on the subject. The subsequent publications do not mention the quantities or qualities any more, because these details were unnecessary for everybody skilled in the art at the date of those publications."

Individual experimenters might, in the light of information derived from their own experience or from the general literature of chemistry, have used, some one quantity, some another, when practicing the first recipe of the French patent; but certainly one skilled in the

art would be expected to determine the "kind and quantity" unspecified therein by reference to the authoritative literature already quoted. If he did so, and used the kind and quantity specified in the Holliday patent, he would inevitably get a water-insoluble product, which is precisely what he would expect to get, because recipe 1 of the Beyer & Kegel French patent is substantially identical with recipe 1 of the Beyer & Kegel application as published in the *Moniteur Scientifique*, and that publication itself declares that the product is water insoluble. The description in the French patent, therefore, when completed by the descriptions in the other printed publications which treat of safranine azo naphthol, does not disclose the invention of Julius.

The Agenda and the Textile Colorist.

The *Agenda du Chemiste* is a French periodical, which in 1890 published an article on azo colors. In September, 1890, the *Textile Colorist*, a periodical issued in Philadelphia, published a translation, or, to speak more accurately, a paraphrase, of this article. During the cross-examination of one of complainant's witnesses the article in the *Agenda* was produced, a translation verified, and both put in evidence; the witness being examined thereon at considerable length. After all the testimony was closed and printed, and the case was on the calendar ready for final hearing, defendants' counsel applied to the circuit court (the writer of this opinion then sitting) for leave to reopen the case to put in the article from the *Textile Colorist*, and to take further testimony thereon. The expressed ground for this application was that by reason of inadvertent mistakes of translation the article in the *Textile Colorist*, although purporting to be a copy, conveyed a different meaning from the meaning of the article in the *Agenda*, already in evidence. Upon an examination of the two articles the court was not satisfied as to the truth of this assertion. Nevertheless, since they were not textually identical, it was deemed best to grant the motion. The case was thereupon reopened, the article put in evidence, and testimony taken, the cause going over to the ensuing term. The result is thus stated in the brief of defendants' counsel: "With the exception of the first paragraph of the *Agenda*, which is omitted in the *Textile Colorist*, the two are identical." It will be sufficient, therefore, to quote from the *Agenda*:

"Colors Formed Directly on the Fiber.

"The greater number of the azo derivatives employed in dyeing are sulpho derivatives, and this introduction of a sulpho group into their molecule has for its purpose to render them soluble in water, and to permit of their use in dyeing. For several years it has been sought to produce these compounds directly on the fiber, by a successive impregnation with the diazo derivative, and then with the phenol or naphthol, which develop the desired shade by their combination. The ingrain colors of Brooke, Simpson & Spiller, which contain as basis the primuline, a derivative of thiotoluidine, are the first examples of this class of products. The pieces of cotton exhibited in the show case of Mr. Horace Koehlin have demonstrated that the reaction giving rise to the azo derivatives can be accomplished on the tissue as smoothly as in the vat of the factory, and that one also obtains perfectly even and regular dyeings. Mr. Horace Koehlin, aided by M. Georges Galland, has found that to insure success it is necessary to invert the usual order of the operations, by first impregnating the cloth with the phenol, and afterwards with the diazo solution. For instance,

one, impregnates the cotton tissue first with B-naphthol, 25 gr.; caustic soda at 88° 25 gr.; water, 1 litre. One pads, one dries in the hot flue, and one passes for thirty seconds through the following diazo baths made by mingling the three solutions mentioned, in the order given. * * *

"Blue:

1st. Safranin of 10 p. c.....	1 litre.
Hydrochloric acid.....	75 gr.
2d. Nitrite of soda.....	20 gr.
Water	$\frac{1}{8}$ litre.
Ice	250 gr.
3d. Acetate of soda.....	250 gr.
Water	2 litres."

The full text of this article thus quoted seems to be a complete answer to the far-fetched inference, sought to be drawn by defendants, that it contains a description of a water-soluble dyestuff formed in substance; that is, as a separate product apart from the fiber. From the beginning to the end of the article it deals with formation on the fiber, first produced by Brooke, Simpson & Spiller, and improved upon by Koechlin. There are two references only to any other process,—one (in the first paragraph), to the sulphonated group; the other, a bare statement of the fact that the reaction which gives rise to azo derivatives can be accomplished in the vat of the factory. Manifestly, this last reference is to a reaction already known, and, since the result of following the process of the Agenda is to produce a water-insoluble product on the fiber, the "reaction accomplished" in the vat "as smoothly" must refer to a reaction giving a like product in substance. Certainly, this Agenda article contains no description of a water-soluble safranin azo naphthol.

Other Prior Publications.

An article in the Textile Colorist for 1887 is referred to in the brief as giving precisely the treatment prescribed in the acid portion of the patent in suit. We find no evidence sustaining this proposition, and the article itself shows that it refers to those bodies which "are by treatment with sulphuric acid transformed into sulpho acids,"—the sulphonated group, with which we are not here concerned.

Two remaining prior publications, viz. Friedlander's Fortschritte and Andressen in Berichte, have not been discussed in appellants' brief, and therefore need not be here considered.

The next branch of the case presents the question of invention. That is sufficiently disposed of in the exhaustive discussion contained in Judge Coxe's opinion. He has stated every argument suggested in defendants' testimony fairly, fully, and more forcibly than do the witnesses themselves. Having thus summarized the argument against invention, he answers it clearly, categorically, and comprehensively. The entire discussion is too long to quote here; to undertake to give excerpts from it would not fairly present the argument. It is sufficient to say that we concur fully in his findings and in his conclusions.

Besides a reiteration of the arguments thus disposed of at circuit, —upon which appellants' counsel has, as he was entitled to, asked the opinion of this court,—he criticises Judge Coxe's reasoning as being founded on a fundamental misapprehension. The brief contains these statements:

"The learned judge [must have] supposed that the color in suit was the first and only coal tar derived substitute for vegetable indigo, to say nothing of the supposition that safranine azo beta naphthol of the prior art was a worthless body. Both suppositions were completely contrary to the fact. * * * It is to these misapprehensions, particularly the misapprehension that the complainant's color stood alone in the art as a substitute for vegetable indigo, and was its first known substitute, that defendants largely attribute his decision in favor of the patent."

The evidence in this case abundantly shows that the *water-insoluble* safranine azo beta naphthol of the prior art (the italicized words are carefully omitted in the brief quoted from) was, as Judge Coxe called it, "a comparatively worthless and neglected body." There is no warrant for the supposition that the judge supposed that the "color in suit was the first and only coal tar derived substitute for vegetable indigo." What he said in the opinion is this:

"To produce a cheap, artificial soluble substitute for indigo, possessing many of its advantages, and in some respects superior to indigo, was surely no mean achievement. Learned chemists in Germany and England, and probably in other countries, had long been experimenting to produce a result the importance of which was universally recognized, but Julius was the first to succeed."

Defendant enumerates many "coal tar derived substitutes for vegetable indigo, all blue cotton dyes," including alizarine blue. None the less the statement in the opinion is accurate. Alizarine blue is dyed with a more expensive mordant. Some of these enumerated dyes are inferior in fastness to air, or to water, or to soap, or in cheapness, or in convenience of dyeing, or in shade, or otherwise. No one of them is indicated which combines as many resemblances to indigo as does the color in suit. The most persuasive evidence to the fact that Indoine Blue is a substitute for indigo so superior to others as to justify all that Judge Coxe has said of it is found in this record itself, where a determined, acrimonious, persistent, and extended assault upon the validity of the patent has been made by 11 expert witnesses marshaled by the defendants and by other infringers. It is not usual to go to such trouble and expense to get a product out of the monopoly of a patent if it be only one of a large class all equally available to the manufacturer. The Bengaline Blue of defendants is identical with the Indoine Blue of complainant, and we find nothing in the record to challenge the accuracy of the following statements which defendants publish of this dyestuff:

"The newest and most perfect substitute for indigo on cotton, [requiring] only about half the quantities of these mordants necessary for other basic aniline colors." "The resistance to strong boiling alkalies or acids far exceeds vat-dyed indigo, and the cost of dyeing is from 33 to 50 per cent. less (according to shade) than indigo vat. The fastness to light, air, rain, etc., is most remarkable."

The identity of defendants' Bengaline Blue with the product of claims 2 and 4 is overwhelmingly established. In selling this product with directions for producing the lake of claim 1, and promoting such sales by distributing sample swatches thus dyed, they also infringe claim 1. The decree of the circuit court is sustained, with costs.

ELECTRIC VEHICLE CO. et al. v. WINTON MOTOR-CARRIAGE CO. et al.

(Circuit Court, S. D. New York. November 9, 1900.)

1. PATENTS—VALIDITY—DETERMINATION ON DEMURRER.

A patent cannot be held invalid on demurrer unless its invalidity so clearly appears on its face that no evidence can change the legal aspect of the case, and entitle the complainant to recover.

2. SAME—GAS-MOTOR ROAD VEHICLES.

The Selden patent, No. 549,160, for a road vehicle propelled by a liquid hydrocarbon gas engine of the compression type, the application for which was made in 1879, is not so clearly lacking in invention, in view of the then state of the art, that it can be held void on its face.

In Equity. Suit for infringement of patent. On demurrer to bill.
Frederic H. Betts and William A. Redding, for complainants.
A. S. Pattison, for defendants.

COXE, District Judge. The bill, in the usual form, is based upon letters patent, No. 549,160, granted November 5, 1895, to George B. Selden for a road vehicle, the motor being a liquid hydrocarbon gas engine of the compression type. The application was filed May 8, 1879. The demurrer, though divided under five separate heads, is based upon the broad proposition that the patent, on its face, is void for lack of patentability. Stated generally the argument for the defendants is as follows: The specification concedes that all of the elements of the combinations of the claims were old; that steam engines were employed to propel road wagons, liquid fuel being used to generate steam; that gas engines were old and their use, as well as that of other motors, had been proposed for tram cars and similar vehicles. This being the admitted state of the art it is argued that it did not require an exercise of the inventive faculty to substitute a gas engine for a steam engine in a well-known self-propelling vehicle. It is insisted, further, that the claims do not cover combinations, but are for aggregations merely.

The law is very plain. A patent must not be held invalid upon demurrer unless its invalidity so clearly appears that no testimony can change the legal aspect of the case. If doubt exists the complainant is entitled to its benefit; if the faults pointed out by the defendant may, by any chance, be cured by proof; if, in short, there be a possibility that the complainant may succeed, the demurrer should be overruled. *American Fibre Chamois Co. v. Buckskin Fibre Co.*, 18 C. C. A. 662, 72 Fed. 508. It should be remembered that the invention, if there be one, was made very early in the history of "horseless carriages." The court will take judicial notice that prior to May, 1879, the art of propelling vehicles by motors, carried by the vehicle itself, was in its infancy. These carriages were unknown to the streets of New York and few were seen on the streets of Paris. They were, without exception, crude and tentative machines. Selden must, therefore, have been among the earliest experimenters in the art. If the thousands of steam and electric "automobiles" which now are constantly perambulating the streets of every large city had been available as models the task of constructing a successful "gasmobile"

would have been less difficult. In other words, the fact that Selden's work was done over 21 years ago should not be lost sight of in estimating the value of his achievement. Upon the present record he must be regarded as the first to construct a road locomotive provided with a liquid hydrocarbon gas engine of the compression type so arranged as to leave the platform of the carriage unobstructed.

The drawings of the English patents referred to show locomotives designed to run upon rails and, therefore, presumably, upon levels or light grades. This was not the problem which was solved by Selden. He has made, or it must, on demurrer, be assumed that he has made, a self-propelling vehicle which is capable of traveling on ordinary country roads, going up and down hill, and making long distances without replenishing its fuel receptacle. Surely, it required invention to construct such a machine. But in order to test the proposition still further let it be assumed that steam carriages and electric carriages similar to those in common use to-day were known prior to 1879 and that gas motors had actually been used to propel, upon common roads, the heavy and clumsy structures shown in the drawings of the English patents.

This statement of the prior art assumes three most pregnant facts not found in the record, but, even so, how stands the case? Is it fair to assert that, in no circumstances, could it involve invention to create the patented machine, because similar machines had been propelled by electricity and steam, and machines, differing radically in structure and purpose, had been propelled by gas? Was there nothing more than the new application of an old device to a well-known class of vehicles? It is thought that the complainants are entitled to a more liberal interpretation of the patent than that contended for by the defendants. The patentee's contribution to the art should not be considered from a narrow point of view; his work should not be examined through an inverted telescope; the horizon of invention should not be contracted to the periphery of a sixpence. The patent describes an ingenious and complicated machine operated by a type of engine never used before in road locomotives, employing with safety a highly volatile and dangerous fluid. The carriage of the patent is easily handled; it economizes space and may be managed by one possessing no expert knowledge. It cannot be maintained, upon the English specifications alone, that the construction of such a machine required no inventive skill. It is possible, if not probable, that a light road carriage equipped after the English plan would prove a lamentable failure. The doctrine invoked by the defendants, that the transfer of an old device to a new use does not involve invention, if applied without qualification or exception, would destroy many of the most valuable patents. See *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. At pages 606, 607, 155 U. S., page 198, 15 Sup. Ct., and pages 278, 279, 39 L. Ed., the court discusses a large number of situations in which the rule is inapplicable and concludes with the following pertinent observation:

"Indeed, it often requires as acute a perception of the relation between cause and effect, and as much of the peculiar inventive genius which is characteristic of great inventors, to grasp the idea that a device used in one art

may be made available in another, as would be necessary to create the device *de novo*."

The court is clearly of the opinion that the immense weight of authority sustains the proposition that this patent cannot be held invalid on demurrer.

The court has refrained from discussing the subsidiary questions mooted on the briefs as they may appear in a totally different light after the proof is presented. The demurrer is overruled, with costs. The defendants may answer in 60 days.

THOMSON-HOUSTON ELECTRIC CO. v. WALKER CO.

(Circuit Court, D. New Jersey. November 8, 1900.)

1. PATENTS—VALIDITY—BRUSH HOLDERS.

Claims 4 and 5 of letters patent No. 462,973, dated November 10, 1891, granted to E. Thomson and W. O. Wakefield, for an "Improvement in Brush-Holders for Dynamo-Electric Machines," are void as lacking patentable novelty, in view of the prior art.

2. SAME—INFRINGEMENT.

Claims 1, 2 and 4 of letters patent No. 394,999, dated December 25, 1888, granted to Edwin W. Rice, Jr., for a "new and useful Brush and Brush-Holder," are valid, and claim 2 has been infringed by the defendant. (Syllabus by the Court.)

In Equity.

J. Edgar Bull and Edmund Wetmore, for complainant.
Henry B. Brownell and C. E. Mitchell, for defendant.

BRADFORD, District Judge. The bill charges infringement of letters patent of the United States Nos. 394,999 and 462,973, both of which are and were at the time of the alleged infringement thereof owned by the complainant. The answer sets up the usual defences, including anticipation, lack of patentable novelty and non-infringement. Patent No. 394,999 was granted December 25, 1888, to Edwin W. Rice, Jr., and patent No. 462,973 was granted November 10, 1891, to Elihu Thomson and William O. Wakefield. These patents relate to improvements in brushes and brush-holders for dynamo-electric machines, and each of them contemplates the use of a brush of block form, spring-actuated and moving in a slot or socket of a brush-holder; the brush of the earlier patent being composed of copper strips or laminæ, and that of the later patent of carbon and metal or of carbon alone. In the mechanism of each of the patents in suit the end of the brush bears upon the commutator in a direction not far removed from a right-angle and is kept in contact with it through the action of a spring or springs. The employment of brushes of block form substantially at right-angles to that portion of the surface of the commutator against which they are properly spring-actuated, not only allows the commutator to rotate in either direction without necessitating a change in the position of the brushes, but is calculated to insure sufficiently good electrical contact between the commutator and the brushes to convey the current without sparking, burning or other injurious results. To secure such an electrical contact is an object of primary importance.

The charge of infringement has been confined to claims 1, 2 and 4 of patent No. 394,999, and claims 4 and 5 of patent No. 462,973. The claims in suit of the earlier patent are as follows:

"1. The combination, with the brush-holder, of a brush-follower mounted independently thereof, a spring for forcing said follower toward the brush, and an intermediate spring between the brush and follower, as and for the purpose described.

2. The combination, with the brush-follower and a spring for forcing the same toward the brushes, of an intermediate spring attached to the follower and bearing on the brush. * * *

4. The combination, with the brush-holder, B, of a pivoted brush-follower, C, a spring, E, attached at one end to the holder and at the other to the follower, and a brush mounted in the holder and movable independently thereof under the influence of the follower."

In the description of patent No. 394,999 the patentee says:

"My present invention relates to brush devices for collecting electric currents from the commutator-cylinder of a dynamo and for delivering such currents to the commutators of motors, and has reference more particularly to improvements whereby the brushes are readily replaceable and whereby it becomes difficult for unskilled persons to place the brushes wrongly on the commutator, at the same time securing cheapness of manufacture and uniformity of overlap on the commutator. The invention is also designed to permit the commutator to be run in either direction without changing the position of the brushes."

The patents alleged to be anticipatory of or to negative patentable novelty in the Rice invention may be divided into two groups: first, those relating to a trailing brush rigidly clamped in a pivoted holder, and, secondly, those relating to a block form of brush, end-bearing, and movable in a box form of holder. Clearly the former group did not anticipate the Rice invention as covered by claims 1, 2 and 4, or any of them, nor so affect the state of the art as to negative its patentable novelty. It is not so clear that the latter group of patents did not so operate. On careful examination I have failed to find that any of the combinations covered by those claims was strictly anticipated by any of the patents referred to by the defendant. A more serious question is whether the prior art, as disclosed by such patents, does not negative invention or patentable novelty. Before the date of Rice's invention brushes of block form, spring-actuated, moving in stationary brush-holders, and so set as to allow the commutator to run in either direction without change in the position of the brushes, were widely known and used. But it appears that Rice was the first to employ a main or primary spring acting upon a pivoted follower so mounted as to move independently of the brush-holder and also an auxiliary or intermediate spring, under the combined influence of which two springs the motion of the brush in its holder or box was controlled, and its end continuously kept in close contact with the surface of the commutator. It is essential to the satisfactory operation of such mechanism that the end of the brush should be in close and continuous contact with the commutator to permit the free passage of the current. The follower of the Rice patent is pressed forward by the action of a coiled spring attached at one end to the follower and at the other end to the brush-holder; the intermediate or auxiliary spring being

adapted and serving so to equalize and regulate the pressure on the brush as to cause it accurately to respond to the rapid and minute vibrations to which it is subjected. The pressure of the follower through the action of the main or primary spring is transmitted to the brush through the agency of the intermediate or auxiliary spring, attached to the follower and bearing on the top of the brush. The introduction of Rice's intermediate or auxiliary spring, not forming part of the brush, was new and performed a useful function. It certainly was an improvement on mechanism in which a brush of block form was actuated in its holder by only a single spring. The grant of the patent carried with it a presumption of patentable novelty in the invention. I am not satisfied that this presumption has been overcome, and must therefore hold the patent valid so far as the three claims in suit are concerned. But the patented invention is not in any sense of a primary or pioneer character. It is not entitled to any liberality of construction which would not be accorded to ordinary patented improvements on prior devices. The combination of claim 1 of the Rice patent contains the following elements, namely, (1) a brush-holder, (2) a brush-follower mounted independently of the brush-holder, (3) a spring for forcing the brush-follower toward the brush, and (4) an intermediate spring between the brush and follower. The elements of the combination of claim 2 are, (1) a brush-follower, (2) a spring for forcing the brush-follower toward the brush, and (3) an intermediate spring attached to the follower and bearing on the brush. The combination of claim 4 has as its elements, (1) a brush-holder, B, (2) a pivoted brush-follower, C, (3) a spring, E, attached at one end to the holder and at the other to the follower, and (4) a brush mounted in the holder and movable independently thereof under the influence of the follower. While the mechanism manufactured by the defendant and disclosed in exhibit "Defendant's U-Shaped Brush-Holder" or "Defendant's Brush-Holder, A," is claimed to infringe the Thomson & Wakefield patent in suit, it lacks the intermediate spring required by claims 1 and 2 of the Rice patent, nor does it have its spring attached to the follower as required by claim 4 of that patent, and admittedly does not infringe any of these claims. The alleged infringing device, so far as the Rice patent in suit is concerned, is disclosed in exhibit "Defendant's Brush-Holder, B." It contains a brush-holder for a brush of block form, and a main spring and an auxiliary or supplemental spring, under the combined action of which the brush is kept in proper contact with the surface of the commutator. The defendant urges, among other things, that the device in question does not infringe for the reason that it has no follower in the sense in which that term is used in claims 1, 2 and 4. This contention cannot be sustained. It is true that in the construction covered by the Rice patent and disclosed in exhibit "Model of Rice Patent in Suit," the follower extends over the box or socket in the brush-holder in which the brush moves, while the follower on the alleged infringing device does not extend so far. But in either case the follower, if acting normally, performs the same function in the same manner. In neither case does the follower itself come into con-

tact with the brush. It is the auxiliary or supplemental spring alone which presses upon the brush and through which the main spring exerts its influence. If in Fig. 1 of the Rice patent the end of the follower, C, were cut off at any point between the socket for the brush and the point of junction of the intermediate spring, c, with the follower, the normal action of the mechanism would be precisely the same as if the follower had not been so shortened. Any difference in its action would necessarily be abnormal and could occur only in case the pressure exerted by the main spring upon the intermediate spring should be sufficient to cause the latter spring to lie flat against the underside of the follower, if not shortened; and in such case the intermediate spring would cease to perform its normal and distinctive function. Nor is the term "follower" a misnomer as applied to the pivoted arm of the alleged infringing device to which the auxiliary or supplemental spring is attached. It moves independently of the brush-holder and follows the end of the brush, transmitting pressure to it from the main spring through the auxiliary spring. There is nothing either in the function of the mechanism or in the language of the claims requiring that the free end of the follower should extend so far as to cover wholly or partially the box or socket containing the brush. The alleged infringing device also contains an auxiliary or supplemental spring attached to the follower and bearing on the brush. It is claimed by the defendant that this spring is not "intermediate" within the meaning of the patent, because it is not so interposed between a follower and the end of the brush that, were it not for the spring, the follower would be in direct contact with the brush. I perceive nothing to justify such a contention. It is, in my opinion, wholly immaterial whether the follower would or would not rest on the end of the brush in the absence of any auxiliary spring. In either case the spring would be intermediate between the brush and the follower, and "an intermediate spring attached to the follower and bearing on the brush." "Defendant's Brush-Holder, B," thus discloses the combination of a brush-follower, a spring for forcing the brush-follower toward the brush, and an intermediate spring attached to the follower and bearing on the brush, and palpably infringes claim 2 of the Rice patent. The combination of claim 1 requires as one of its elements a brush-follower mounted independently of the brush-holder. The brush-follower of the infringing device is not mounted independently of the brush-holder, but, on the contrary, is mounted directly on the holder. The complainant is bound by the language of the claim which is clear and unmistakable. The doctrine of equivalents cannot successfully be invoked to enable the complainant to enlarge the claim plainly limited by Rice to a combination in which the brush-follower is "mounted independently" of the brush-holder. The defendant cannot be held to have infringed claim 1. Nor does it appear that claim 4 has been infringed by the defendant. It is true that the infringing device presents a combination of a brush-holder, a pivoted brush-follower, a spring attached at one end to the holder and at the other to the follower, and a brush mounted in the holder and movable

independently thereof under the influence of the follower. Certainly in the defendant's device the brush is movable independently of the box or socket under the influence of the follower in the same sense as in the mechanism described and claimed in the Rice patent. The follower receives the pressure of the main spring and communicates it through the intermediate spring to the brush, and the brush may with propriety be said to be movable under the influence of the follower. But Rice in claim 4, referring to the drawings and description, specifically claims a combination consisting, among other elements, of "the brush-holder, B," and "a pivoted brush-follower, C." The brush-holder, B, is so adjusted that the brush held by it cannot be removed unless the holder be swung on its pivot away from the commutator or the latter be displaced. The brush-holder in the infringing device is rigidly attached to the yoke and cannot be swung back from the commutator; the brush being removed from the holder after the pivoted follower is forced back. The "pivoted brush-follower, C," is so adjusted that it cannot be forced back sufficiently far to release the brush, and, even if it were capable of being turned further back, the holder is of such construction as not to permit the brush to be removed until the holder itself is swung back or the commutator displaced. In the infringing device, as has substantially been stated, nothing more is necessary to render the brush accessible or removable than the forcing back of the pivoted follower. Rice's patent, not being of a primary or broad nature, the patentee, in so far as he by letter referred in claim 4 to particular elements in the combination shown and described in the drawings and description, confined himself, in the absence of strict equivalency or mere evasion, to the mechanism so particularly pointed out. Such a construction of claim 4 negatives the charge of infringement.

Claims 4 and 5 of the Thomson & Wakefield patent in suit, No. 462,973, are as follows:

"4. The combination of a commutator-brush holder having a socket, a brush movable therein, a brush-pressing arm movable toward and away from such brush, and a spring acting upon said arm to hold it upon either side of a dead-center.

5. The combination of a brush-carrying arm having a box or socket for the brush, a pivoted follower, and a spring acting to hold the follower when swung to either side of a dead-center, as set forth."

In the description the patentees say:

"Our invention aims to secure a holder for the commutator-brushes of a dynamo-electric machine, generator, or motor which permits ready adjustment of the brush-carrying arms bodily toward and away from the commutator, ready access to the brushes, and simplicity of construction in general."

The application for the Thomson & Wakefield patent was filed February 20, 1891, and no date of invention prior to that time is assigned. All the elements entering into the combinations respectively covered by the two claims in suit admittedly were old and well known before the above mentioned date of application; but it is contended by the complainant that the combinations were new and useful and patentable. The combination of claim 4 includes, (1) a

commutator brush-holder and socket, (2) a brush movable therein, (3) a brush-pressing arm, or follower, movable toward or away from such brush, and (4) a spring acting upon the brush-pressing arm to hold it on either side of a dead-centre. The elements of claim 5 are, (1) a brush-carrying arm having a box or socket for a brush, (2) a pivoted follower, and (3) a spring acting to hold the follower when swung to either side of a dead-centre. The invention covered by the Rice patent in suit, not to mention other patented inventions, discloses all the elements, except the last, of claim 4 of the Thomson & Wakefield patent in suit, and all the elements, except the last of claim 5 of the same patent. The Rice invention lacked the spring acting upon the follower to hold it on either side of a dead-centre. This is the last element in claims 4 and 5 respectively of the Thomson & Wakefield patent. But the Rice invention, while not having a spring acting upon the follower on either side of a dead-centre, has a spring acting upon the follower to hold it on such side of a dead-centre as enables it to co-operate with the other elements of the combination when performing its normal function. The narrow question is thus presented whether an adjustment of the follower and the spring attached to it in such manner as to permit the spring to hold the follower on either side of a dead-centre instead of only on one side of a dead-centre, involved invention or patentable novelty. The main spring in the Thomson & Wakefield device performs its primary or principal function when acting upon the follower on one side of a dead-centre in such manner as to cause the follower through the agency of the intermediate spring to hold the brush in contact with the surface of the commutator. The secondary function of the main spring is to hold the follower on the other side of the dead-centre in such position that the brush conveniently may be handled or removed. The latter function is like that of the main spring in connection with the catch shown in the mechanism covered by patent No. 381,394, dated April 17, 1888, issued to O. P. Loomis, in the description of which the patentee says:

"When it is desired to withdraw the brush from the commutator, it is only necessary to draw the clamp, F, back and put the hook, K, into the notch, c, the tension of the spring, b, serving to hold the hook in said notch, so that the clamp and brush will remain retracted until the hook, K, is raised, when the tension of the spring, b, will immediately throw it into operative position against the commutator, H."

But the use of a spring to operate successively on either side of a dead-centre was well known, not only in knives, trunks and various mechanical contrivances, but in dynamo-electrical mechanism, prior to the invention of Thomson & Wakefield. In the description of patent No. 387,010, granted to Albert Schmid, dated July 31, 1888, the patentee says:

"When it is desired to raise either brush from the collector ring or commutator, the box carrying the same is turned backward, as shown in Fig. 8, and the link-connection between the box and the rod, n', permits the parts to assume the position shown in Fig. 8, holding the brush away from the collector ring or commutator. As there are two brushes for each collector ring or commutator, either brush may be thus temporarily removed without interrupting the operation of the machine."

Claims 2 and 6 of the patent last named are as follows:

"2. The combination of a supporting-frame for commutator or collector brushes, an insulated rod carried thereby, two brush-clamps, a sleeve carrying the same supported upon said rod, a tension device for each clamp normally pressing the corresponding brush against its commutator, and a spring pressing the brush toward or from the ring, accordingly as it is moved to one side or the other of the center of support of the brush. * * *

6. The combination, with an electric generator or motor and its revolving commutator or collector, of a movable brush-holder, and an eccentric-spring exerting stress upon the brush-holder in one direction or the opposite accordingly as the spring is moved from one side to the other of the center of support of the brush-holder."

In the description of patent No. 399,404, granted to Daniel Higham, dated March 12, 1889, the patentee says:

"The brushes are caused to bear upon the commutator-surface by means of curved springs, s, hooked at the ends into loops, l, one in each case upon the clamp and the other upon the adjustable holder. This construction of spring permits the brush to be thrown back to the position indicated by dotted lines in Fig. 1, so that when it is turned back to that position it will stay there until it is intentionally returned to bear upon the segments."

While the phrase "dead-centre" is not used, a dead-centre is clearly shown and described. It is true that in the mechanism covered by the three patents last mentioned, the brush was not of block form as in the device of Thomson & Wakefield. But this circumstance is, in my opinion, wholly immaterial. The earlier patents showed mechanism containing a spring bearing on either side of a dead-centre, the primary function of the spring being to hold the brush in contact with the commutator, and its secondary function being to hold the brush at a distance from the commutator where it conveniently could be handled. So far as the point under immediate discussion is concerned, it is unimportant that the spring in the earlier patented devices was attached to the brush-holder and not to the follower. It operated in those devices as in that of Thomson & Wakefield on either side of a dead-centre to keep the brush in contact with the commutator or to allow easy handling of the brush as might be desired. Patent No. 423,309, granted to J. C. Chamberlain, dated March 11, 1890, shows a brush of block form held in contact with a commutator under the influence of a pressure-arm or follower actuated by a main spring acting on one side of a dead-centre. No mechanic skilled in the art, having before him the patented devices of Rice, Loomis, Higham, Schmid and Chamberlain, and devising and constructing the Thomson & Wakefield mechanism, could be considered as an inventor entitled to the benefit of the patent laws. In view of the prior art the device of Thomson & Wakefield was wholly wanting in patentable novelty.

The bill must be dismissed as to patent No. 462,973, and sustained as to claim 2 of patent No. 394,999. Let a decree be prepared in accordance with this opinion.

LA BOURGOGNE.

(District Court, S. D. New York. October 31, 1900.)

1. ADMIRALTY—INTERROGATORIES—PRIVILEGE OF PARTY.

A claim of privilege from answering interrogatories annexed to answers under admiralty rules 31 and 32 in a proceeding by a vessel owner for limitation of liability can only be made on the ground that the answers will expose the petitioner to a criminal prosecution, or to such penalties or forfeitures as may be the subject of a penal or criminal proceeding. That the answers may show that the loss or damage occurred through his "privity or knowledge," and thus deprive him of the right to a limitation of liability under Rev. St. § 4283, does not entitle him to refuse to answer, as the loss of such right is not a forfeiture within the meaning of the rules.

2. SAME.

The owner of a foreign passenger steamship petitioning for limitation of liability for loss of property and life resulting from the sinking of the vessel cannot be required to answer interrogatories annexed to the answers of damage claimants, under admiralty rule 32, over its claim of privilege, where the purpose of such interrogatories is to show that the vessel left an American port without being provided with life boats, disengaging apparatus, and water-tight bulkheads, as required by Rev. St. §§ 4488, 4489, 4500, since such sections impose a penalty for the failure to provide such equipment, and are applicable to private foreign steam vessels which carry passengers.

In Admiralty. On exceptions to interrogatories filed with answers.

Jones & Govin, for petitioner.

Benedict & Benedict, Hunt, Hill & Betts, and A. Gordon Murray, for various damage claimants.

BROWN, District Judge. Numerous persons who have made claims against La Compagnie Generale Transatlantique for loss of property and life in the sinking of the steamship La Bourgogne by collision on a voyage from New York to Havre in July, 1898, have answered the petition of the company filed in this court for the purpose of limiting its liability for such losses, and to their answers have annexed numerous interrogatories addressed to the petitioner, to which exceptions have been filed, on the ground that the petitioner is privileged from answering such interrogatories under rules 31 and 32 of the supreme court in admiralty, as likely to expose the petitioner to a penalty or forfeiture. A few of the interrogatories are clearly not subject to this exception, and the allowance or modification of these is noted upon the papers.

I must, however, sustain the general ground of exception taken to some of the interrogatories, so far only as the subjects referred to would, if proved, bring the petitioner within our statutes imposing penalties and forfeitures. The petitioner is not entitled to a limitation of liability under section 4283, Rev. St. U. S., unless the loss or damage occurred "without the privity or knowledge" of the petitioner. But the mere loss of its right to a limitation of liability under this statute, through proof of "privity" with the cause of the damage, would not be of itself such a "forfeiture" as to exempt the petitioner from answering interrogatories, or from compulsory testi-

mony as a witness. The exemption can only be based upon the liability to such penalties or forfeitures as may be the subjects of a penal or criminal proceeding. See Amendment 5, Const. U. S.; section 860, Rev. St. U. S.

In the two answers filed, which differ somewhat from each other, there are allegations that the loss was occasioned by the negligence of those in charge of *La Bourgogne* and by the negligence of the petitioner; that her speed in fog was immoderate; that she was navigated in a manner forbidden by law, with the knowledge of the petitioner that she would be so navigated; that no proper regulations were given to the commander, or any such direction as would insure the navigation of the steamer in accordance with law; that she was not fully manned or equipped as required by law; and that she was not provided with water-tight bulkheads, or with boats, or with boat-disengaging apparatus, as required by the law of the United States on leaving New York.

It is further charged that the petitioner has not surrendered the "freight pending," that is, the freights and passage money on that voyage, which it is alleged the petitioner collected but retained in possession, untruly stating in the petition that they were wholly lost. It is also charged that the company had received from the French government a subvention or subsidy for carrying the mails and for other services on this voyage, which the company has also retained and not submitted to the jurisdiction of the court. As the surrender of the vessel and of the "freight pending" with all that is legally covered by those terms, is a condition of the petitioner's relief, the above charges in the answers present a material issue, and the interrogatories referring to these latter points are allowed, though without now determining their legal effect when the facts are ascertained.

There are other interrogatories, referring to alleged negligence or misconduct in the management of the vessel, her speed, her course and the competency of her captain. Others still relate to the sufficiency of her equipment, her bulkheads, her small boats, and her boat-disengaging apparatus, which are subject to the regulation of the United States statutes. The latter, I think, fall within the provisions of rules 31 and 32, when considered in connection with these statutes and with the construction placed by the supreme court in the case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, upon the fifth amendment to the constitution providing that "no person shall be compelled in a criminal case to be a witness against himself."

Section 4463 of the Revised Statutes requires that steamers carrying passengers shall have full and sufficient officers and crew; and section 5344 declares that:

"Every captain * * * by whose misconduct, negligence or inattention the life of any person is destroyed, and every owner * * * through whose knowledge, connivance, misconduct or violation of law the life of any person is destroyed, shall be deemed guilty of manslaughter," etc.

But these two sections, cited by the petitioner, are not applicable to foreign vessels, as appears from the explanatory and declaratory act of August 7, 1882 (1 Supp. Rev. St. 383, 384; 22 Stat. 346. See,

also, 2 Supp. Rev. St. 398). By the acts last cited, however, sections 4488, 4489 and 4500 do apply to foreign private steam vessels carrying passengers; and those sections require such steamers to carry lifeboats, disengaging apparatus and water-tight bulkheads as designated in those sections, and for failure to comply therewith penalties or forfeitures are imposed varying from \$500 to \$1,000.

The object of most of the interrogatories to which objection is made, is to prove that the petitioner, or its responsible officers or superintendents, were in privity with the alleged negligence and violations of law, or in the language of section 5344, connived at such violations and negligence, by which the loss and injury arose, in consequence of which the petitioner is disabled from claiming the limitation of liability sought in this proceeding. The purpose of the interrogatories is no doubt material and vital. If established, it will defeat the petition. But the evidence to sustain this defense cannot be forced from the petitioner itself, as against its claim of privilege, so far as relates to the subject-matters that are embraced in the penal statutes above referred to. In the answer of Perry and others numerous interrogatories are addressed directly to these very subjects, and to the petitioner itself; that is, in effect, to its responsible officers, who, if the charges are true, would be liable to prosecution for the penalties and forfeitures thereby incurred. The petitioner itself cannot, therefore, be compelled to answer such interrogatories. Whether true or not, the proof desired must be sought from other witnesses. Section 860 of the Revised Statutes, though it might prevent the evidence extracted from being used in any proceeding to punish the offense or to recover the penalty or forfeiture incurred, would not shield the petitioner from prosecution therefor; and therefore under the decision in *Counselman v. Hitchcock*, supra, it does not avoid the constitutional exemption and the exception here raised. See, also, *In re Feldstein* (D. C.) 103 Fed. 269.

The charges of incompetency of the master, of negligence in management, immoderate speed and improper course, and of the privity of the petitioner therein, not being matters that could subject the petitioner under our law to any penalty or forfeiture, are proper subjects for interrogatories, and as to these matters they are allowed.

The original claims filed by the damage claimants sufficiently comply, as I find, with the rules of the court in such cases, and the exceptions founded on their supposed insufficiency are, therefore, overruled; and as both answers are in behalf of many damage claimants for the loss of property, the question whether damages for loss of life can also be recovered is not material on this motion, and is not therefore considered.

LEBLOND et al. v. McNEAR.

(District Court, N. D. California. September 28, 1900.)

No. 11,317.

1. SHIPPING—CONSTRUCTION OF CHARTER—DELAY FOR REPAIRS.

A vessel was chartered for a voyage from San Francisco to a European port with a cargo of wheat, and was to proceed in ballast from Australia, where she then was, to the port of loading. The charter provided that she should be in good condition, and a certificate of charterers' competent surveyor was to be furnished the charterers, which, if not satisfactory to either party, should be followed by a special survey or arbitration. Following such provisions was one that, "should the vessel fail to pass satisfactory survey, or, in case of submission to arbitration, should the decision be against the vessel, or should the vessel be detained more than ten days for repairs, this charter to be void, at charterers' option." *Held*, that in view of the conditions existing at the time the charter was made, and the long voyage without profit which the vessel was required to make in order to enter upon the charter, the latter clause of such provision must be construed to relate to a delay for repairs occurring after the vessel had been tendered to the charterers, and found to be necessary by the surveyor or arbitrators, and that a delay of more than 10 days for repairs after the vessel reached San Francisco, but before she was tendered to the charterers, did not justify them in rescinding the charter.

2. SAME—RIGHT TO RESCIND CHARTER—DELAY IN DELIVERY OF VESSEL.

A total delay of 21 days after the vessel reached San Francisco, before she was tendered to the charterer, was not so unreasonable as to authorize him to rescind the charter, where she was tendered nearly a month before the expiration of the time allowed by the charter for her arrival.

3. SAME—BREACH OF CHARTER—MEASURE OF DAMAGES.

The measure of damages for a total breach of a charter by the charterer, by refusing to accept the vessel, is the difference between the net earnings which the vessel would have made under the charter and the net earnings which she actually made, or should have made, during the time which would have been required, under ordinary conditions, to make the voyage required by the charter.

4. SAME.

Where, on the refusal of a charterer to accept the vessel, she was at once advertised for charter, and rechartered to the same person, for the same voyage, at a lower rate, which voyage she made, the difference between the freights to be paid under the two charters, plus the demurrage fixed by the original charter for the delay in obtaining the second, does not furnish the measure of damages, but the measure is the difference between the freight which would have been received under the first charter and the amount actually earned under the second, up to the time when the voyage under the first would have been completed, the expenses of the two voyages being presumably the same; and, where the one actually made was under ordinary conditions, it furnishes relevant evidence of the time which would have been required under the first charter.

In Admiralty. Action for breach of charter.

Andros & Frank, for libelants.

H. W. Hutton, for respondent.

DE HAVEN, District Judge. This is an action in personam to recover damages for the alleged breach of a contract, entered into between the libelants and defendant at Liverpool, England, on September 22, 1896, by which the libelants chartered the French bark *Pierre Corneille* to the defendant. The charter party recites that at its

date said vessel was "at or left Newcastle, N. S. W., to proceed in ballast to San Francisco, with about 50 tons coal for ship's account," and also contains the following provisions:

"The said vessel, being tight, staunch, strong, and in every way fitted and provided for said voyage, shall, after discharge of inward cargo or ballast, be made ready, and shall receive on board at San Francisco * * * a full and complete cargo of wheat, * * * and, being so loaded, shall therewith proceed to Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom or on the Continent, between Bordeaux or Hamburg. * * * Loading days not to commence before the 15th October, 1896, except at charterers' option. Should the vessel fail to arrive at San Francisco on or before the 31st December, 1896, charterers to have the option of canceling or maintaining the charter on arrival of vessel. * * * Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water, and ventilation, to be furnished to charterers from charterers' competent surveyor. If the captain or charterers be dissatisfied with the certificate given, the matter in dispute shall at once be submitted to two other regular port marine surveyors, one chosen by the captain, and one by the charterer, who, if they cannot agree, may call upon a third surveyor. A majority decision and certificate shall determine the matter in dispute, and the cost of said special survey shall be borne by the party against whom said decision may be rendered. Should the vessel fail to pass satisfactory survey, or, in case of submission to arbitration, should the decision be against the vessel, or should she be detained more than ten days for repairs, the charter to be void, at charterers' option, such option to be declared at the expiry of said ten days. Upon discharge of inward cargo and/or ballast being so advanced as to make stiffening necessary to complete discharge of inward cargo and/or ballast, charterers to furnish the vessel with sufficient cargo for stiffening at discharge wharf as customary, the captain to give them usual written notice, accompanied by surveyor's certificate, stating that the vessel is ready to take in same and of the quantity required."

The *Pierre Corneille* arrived at San Francisco on the 11th day of November, 1896, in a damaged condition, the result of having been in collision with the British ship *Larnaca*. The damage received by her in this collision was not very great. Her hull was not injured, her bowsprit only having been broken, the gear connected therewith damaged, and her figurehead destroyed. In consequence of these injuries, it became necessary to repair the vessel. Proposals for making these repairs were solicited on November 19, 1896, the contract therefor let on the 24th of the same month, and on the same day the work of repairing was commenced, and finished on the afternoon of November 30, 1896. The vessel was sufficiently discharged of ballast on November 19, 1896, to permit the taking in of stiffening. On December 2, 1896, her master gave notice to the defendant that the vessel would be ready to receive stiffening at 7 o'clock on the morning of the next day. To this notice the defendant, on the same day, December 2d, replied as follows:

"Captain Leloquet—Dear Sir: Referring to charter party dated Liverpool, Sept. 22nd, 1896, your vessel arrived at San Francisco in a damaged condition on November 11th, and you have used 22 days in repairing damages, which is largely in excess of the time allowed you under the charter. I therefore elect to cancel said charter, and herewith give you notice to that effect. I return your stiffening notice.

"Yours, very truly,

G. W. McNear.

"Inclosure: Stiffening notice."

In giving the notice to which the foregoing letter was a reply, the master of the *Pierre Corneille* did not accompany the same with the

certificate of surveyor, as required by the charter party, and so two days thereafter, on December 4, 1896, he gave to the defendant a second notice, and inclosed therewith a surveyor's certificate to the effect that his vessel was in good condition, and lined sufficiently to take in all the stiffening then required. The defendant having refused to load the *Pierre Corneille* under the charter party, the vessel was offered for recharter, and, the defendant making the highest freight offer, she was rechartered to him, on the 18th of December, 1896, for the same voyage. The rate of freight agreed on, however, was 8s. 9d. less per ton of 2,240 pounds than that stipulated for in the previous charter party, of September 22, 1896.

1. I agree with the proctor for defendant that the *Pierre Corneille* was detained for repairs from November 19, 1896, the day when bids for making repairs were first called for, until the date of the actual completion of such repairs, on the 30th of the same month. Certainly all of that time was consumed in letting the contract for and making the repairs needed to put her in proper condition to perform the voyage for which she had been chartered, and the tender of the vessel to the defendant, for the purpose of receiving cargo under the charter, may be said to have been delayed during all of the time between those dates, on account of the necessity for making such repairs. Was the defendant, in view of this delay, justified in rescinding the contract of charter? The answer to this question must depend upon the construction of that clause of the charter party which gave to the defendant the option of rescinding in case the vessel should "be detained more than 10 days for repairs." The meaning of this clause will be better understood if read in connection with its context, as follows:

"Vessel to be properly stowed and dunnaged, and certificate thereof, and of good general condition, draft of water, and ventilation, to be furnished to charterers from charterers' competent surveyor. If the captain or charterers be dissatisfied with the certificate given, the matter in dispute shall at once be submitted to two other regular port marine surveyors, one chosen by the captain and one by the charterers, who, if they cannot agree, may call upon a third surveyor. A majority decision and certificate shall determine the matter in dispute, and the cost of said special survey shall be borne by the party against whom said decision may be rendered. Should the vessel fail to pass satisfactory survey, or, in case of submission to arbitration, should the decision be against the vessel, or should the vessel be detained more than ten days for repairs, this charter to be void, at charterers' option, such option to be declared at the expiry of said ten days."

What did the parties intend by the words, "detained more than ten days for repairs"? What was their understanding as to the time when the period of 10 days allowed by the contract for repairs should commence? The defendant insists that the commencement of this period was the date when the ship, but for her needed repairs, would have been ready to take on that portion of her outward cargo designated as "stiffening." The contention of the libelants, on the other hand, is that it was not the intention of the parties that the 10 days mentioned in this clause of the charter should begin to run until after the vessel had been tendered to the charterers, and her general condition ascertained by the survey or arbitration provided for in the charter party. This latter construction is, in my opinion, the true

one. The terms of the agreement, as stated in the contract of charter, were that the vessel was to be staunch, strong, and in every way fitted for the voyage; to be properly stowed and dunnaged by her owners; and certificate showing all of these facts, and vessel's draught of water and ventilation, were "to be furnished to charterers from charterers' competent surveyor." It is evident that all of these matters were not intended to be embraced in one certificate. The certificate of proper stowage and dunnage, draught of water, and ventilation of the vessel could not be given until after the loading of the cargo had been completed; but it is manifest that a certificate in relation to the general condition of the vessel, and her fitness to perform the intended voyage, was to be furnished to the charterer before he could be required to load her with the cargo called for by the charter. The contract contemplated that the charterer should first have notice that the vessel was ready to receive her cargo. Giving this notice would be, in effect, a tender of the vessel under the charter, and this tender was to be followed by the survey and certificate of charterer's competent surveyor concerning the vessel's condition. If this survey was satisfactory to the parties, then the vessel was to receive her cargo. It was, however, specified that the decision of the surveyor appointed by the charterer was not to be final if either party was dissatisfied therewith, and in that event it was stipulated that there should be a special survey or arbitration for the purpose of settling the matters in dispute, and in this immediate connection we find the provision: "Should the vessel fail to pass satisfactory survey, or, in case of submission to arbitration, should the decision be against the vessel, or should the vessel be detained more than ten days for repairs, this charter to be void, at charterers' option." This clause in relation to detention for repairs refers to such repairs as might, by the special survey or arbitration, be found necessary to put the vessel in the general good condition required by the charter, and not to repairs which might be made before the vessel was tendered to the charterer. The opposite construction, contended for by the defendant, would certainly result in giving him an undue advantage, and cannot be accepted as expressive of the intention of the parties. The vessel was chartered to proceed in ballast from Australia to the port of San Francisco for the purpose of taking on a cargo on which freight could be earned. This was known to be a long and expensive voyage, and that the whole commercial value of the enterprise, so far as the vessel was concerned, would be entirely dependent upon the fulfillment of the terms of the charter party. It is difficult to believe that under such circumstances the libelants would have been willing to accept, as one of the terms of the charter, a provision to the effect that if their vessel, during the course of the voyage between Australia and San Francisco, should receive damage that would require more than 10 days to repair after the discharge of her ballast, the charterer should have the option of canceling the contract, thus rendering fruitless the long and expensive voyage undertaken, unless the vessel should be so fortunate as to secure another cargo. The parties could, of course, make such an agreement if they so desired; but, to justify the court in so inter-

preting their contract, the language employed by them should be so clear and explicit as to admit of no other reasonable construction. My conclusion on this point, as already indicated, is that the libelants had the right, after the arrival of the vessel in the port of San Francisco and before her tender to the defendant, to make such repairs as in their judgment were necessary to put her in the condition called for by the charter, and the fact that the time occupied in making such repairs was more than 10 days did not justify the defendant in rescinding the contract under that clause of the charter relating to detention on account of repairs.

2. It is also claimed by the defendant that, independently of the option given him to rescind the contract if the vessel was detained more than 10 days for repairs, he was justified in refusing to load the vessel because she was not tendered to him within a reasonable time after her arrival in the port of San Francisco; that the whole value of the charter to him depended upon the vessel having quick dispatch from San Francisco; and the delay in offering her to him, from the 11th day of November, 1896, the day of her arrival in the port of San Francisco, until the 2d of December following, rendered the vessel of "no value to him whatever for the purposes for which he had originally chartered her." There is no evidence to sustain this defense, nor could any have been offered, in view of the fact that the ship was tendered to the defendant on the 2d of December, 1896, 29 days before the expiration of the time allowed by the charter for her arrival in San Francisco.

3. The only question that remains for consideration is that which relates to the damages libelants are entitled to recover. The defendant was allowed, by the terms of the contract sued on, 20 working lay days, commencing 24 hours after final discharge of inward ballast, within which to load the vessel; and it was further stipulated that, for each and every day's detention by default of defendant, he would pay to the libelants 4d. sterling, or its equivalent, per register ton of the vessel. It is alleged in the libel, and not denied by defendant in his answer, that after his refusal to load the *Pierre Corneille* under the contract sued on, "and as soon as with reasonable diligence the vessel could be rechartered," the libelants "rechartered her for the same voyage, at the highest rate then obtainable." The defendant repudiated his contract on December 2, 1896, and the vessel was not rechartered until the 18th of the same month. The libelants seek in this action to recover, as damages, the difference between the charter rate for freight under the charter party of September 22, 1896, and that fixed by the charter party made on December 18, 1896, and also for 15 days' detention of the vessel at San Francisco, from December 2, 1896, to December 18, 1896, at the rate stipulated in the contract sued on for each day's detention.

The measure of damages in this class of actions seems to be well settled. In an action against the charterer of a ship for a total breach of his contract, the measure of damages is the net amount that would have been earned by the vessel under the charter sued on, less the net amount earned, or which might with reasonable diligence have been earned, by the vessel during the time required for

the performance of the voyage named in such contract of charter. *Smith v. McGuire*, 3 Hurl. & N. 554; *Utter v. Chapman*, 38 Cal. 659; *Id.*, 43 Cal. 279; *Ashburner v. Balchen*, 7 N. Y. 262; *Dean v. Ritter*, 18 Mo. 182; *Steamship Co. v. Card* (D. C.) 59 Fed. 159; 3 *Suth. Dam.* pp. 179-181.

The case of *Smith v. McGuire*, above cited, is a leading case upon the question now under consideration. That was an action for breach of a contract of charter whereby the plaintiff's vessel had been chartered by the defendant to carry a full cargo of oats from Limerick to London. The contract provided that 12 days should be allowed for loading, and, if the vessel was longer delayed, the charterer was to pay three guineas per day demurrage. The defendant refused to load the vessel, and she was detained at Limerick 39 days after the expiration of her lay days, when she obtained another charter for the same voyage, but at a reduced rate of freight. The plaintiff in his particulars of demand for damages claimed that he was entitled to recover £122. 17s. demurrage at the rate named in the charter for the detention of his ship, and also the difference between the freight earned under the second charter and that which would have been receivable under the first. In his charge Baron Martin informed the jury "that the claim in the particulars was not a proper estimate of the damage; that the legal damage was the loss which had arisen from the breach of the contract; that from the amount of freight which the ship would have earned if the charter party had been performed there ought to be deducted the expenses which would have been incurred in earning it, and also any profit which the ship earned between the expiration of the lay days and the time when the employment of the ship under the charter party would have ended." The jury returned a verdict for the plaintiff allowing him the following items of damage: £122. 17s. demurrage for 39 days; and £68. 8s., the difference between the freight earned under the second charter and that which would have been earned under the first. The court of exchequer, all the judges concurring, held that the charge to the jury was correct, but granted a new trial upon the ground that the damages were not properly assessed by the jury. In his opinion, upon the rule for a new trial in that case, Baron Martin said:

"With respect to the damages, I entertain the same opinion that I expressed at the trial. The proper mode of assessing them would be to take the damage actually proved. The plaintiff was compelled to give particulars of damage, and, as frequently happens in such cases, he gave particulars of the damage which he had actually sustained, but which, when investigated, turned out not to be the legal damage arising from the breach of contract. In my judgment, neither the £68. 8s. 9d. or £122. 17s. are correct items of damage. The real damage is the loss arising from the breach of contract. That is to be ascertained by calculation of the freight to be earned, and deduction of the expenses which the shipowner would be put to in earning it, and what the ship earned (if anything) during the period which would have been occupied in performing the voyage ought also to be deducted."

The case of *Ashburner v. Balchen*, 7 N. Y. 262, was also an action by the owner of a schooner to recover damages for the charterer's refusal to load the vessel. The vessel had been chartered by the

defendant for a voyage from New York to a convenient port in Ireland. Upon the trial a statement of the earnings and expenses of the plaintiff's schooner during the period which the voyage from New York to Ireland would have required was given in evidence, and the court instructed the jury that "the defendant should be charged with the full amount of freight which he agreed to pay under the charter, and * * * credited with the amount of the schooner's earnings during the time that an average passage to Ireland, with the lay days, would have occupied." This charge was held correct by the court of appeals.

In the case at bar, the voyage for which the Pierre Corneille was employed being the same under both charters, it is obvious that the expense of earning the freight stipulated for would be the same under one charter as the other, and, if there had been no delay in obtaining the second charter, the libelants would, under the rule above stated, be entitled to recover as damages the difference between the gross freight which would have been earned under the charter of September 22, 1896, and that earned under the later contract of December 18, 1896. But, by reason of the detention of the vessel from the 2d until the 18th of December, the freight earned under the second charter was presumptively not all earned within the time the voyage would have been performed under the charter sued on. This being so, the defendant, after being charged with the full amount of freight he agreed to pay by the terms of such charter, is only entitled to be credited with so much of the freight received under the subsequent charter as was actually earned by the vessel during the period of time covered by the charter sued on. The difference between these two amounts the libelants are entitled to recover as damages. In order to ascertain the date when the employment of the Pierre Corneille under the first charter would have ended, there must be added to the lay days allowed by that charter, commencing on December 3, 1896, the number of days she was thereafter engaged in discharging inward ballast, and the average time required for a vessel of her speed to make the voyage for which she was chartered, as was done in the case of *Ashburner v. Balchen*, 7 N. Y. 262. The time actually consumed in making the voyage under the second charter, if the voyage was performed under ordinary conditions and circumstances, would be relevant, and perhaps the most satisfactory evidence tending to show the time required for her to make such a voyage at that season of the year. The period of time covered by the first charter ascertained, it ought not to be difficult to show how many days, if any, the vessel was thereafter employed in earning the freight received by her under the second charter, and the proportionate amount thereof with which the defendant should be credited. Libelants are entitled to a decree for the damages sustained by them, with interest and costs, interest to be calculated from the date of the filing of the libel. The case will be referred to United States Commissioner Morse, to ascertain and report the amount of damages.

ABBOTT et al. v. CITY OF DULUTH.

(Circuit Court, D. Minnesota, Fifth Division. November 15, 1900.)

1. TELEPHONES—RIGHT TO USE STREETS—MINNESOTA STATUTES.

Laws Minn. 1860, c. 12, § 1, which grants to any telegraph company incorporated under the laws of the state "full power and right to use the public roads and highways in this state" for the purpose of erecting poles thereon, provided they shall be so located as in no way to interfere with the safety or convenience of ordinary travel, which statute has been continued in force since its enactment, and was subsequently amended to include telephone companies, includes in the terms "public roads and highways" streets, avenues, and alleys in cities and villages, as well as rural highways; and under its provisions, and subject only to its conditions, telephone companies were authorized to erect poles for their lines in the streets of cities without the grant of a franchise therefor from the municipal authorities, whose powers over the streets are only those delegated by the legislature, and subject to such direct control as the legislature may see fit to exercise.

2. SAME—VESTED RIGHTS IN STREETS—WAIVER.

A telephone company of the state, which erected its poles in the streets of a city after the act was amended to include such companies, by accepting the terms of a special act giving it the exclusive right to construct and maintain its lines in such streets for a term of years did not waive or surrender the rights given by the general statute, under which it had a vested right to continue to maintain its poles and wires after the termination of its exclusive franchise, of which right it could not be deprived by subsequent legislation or by the action of the city authorities.

3. MUNICIPAL CORPORATIONS—POWERS OVER STREETS—REQUIRING REMOVAL OF TELEPHONE POLES.

A grant of power to a city by its charter to prevent the incumbering of streets by wagons, carriages, lumber, posts, etc., or any other materials whatsoever, gives only the right of police regulation, and the power to prevent the obstruction of the streets unlawfully, and under such power the city cannot require the removal from the streets of telephone poles and wires erected under lawful authority from the state, where such action is not based upon any finding or claim that the poles or wires interfere with the safety or convenience of ordinary travel, but is taken solely in the interests of a rival company, or to compel the company owning such poles and wires to pay for a franchise to maintain the same.

In Equity. Suit for injunction.

Billson, Congdon & Dickinson, for plaintiffs.

Oscar Mitchell, for defendant.

LOCHREN, District Judge. Final hearing of this suit was had on October 25, 1900, upon the bill, answer, replication, and evidence. It appears that the Duluth Telephone Company is a corporation of the state of Minnesota, organized and doing business as a telephone company, under the provisions of title 1 of chapter 34 of the General Statutes of 1878 of that state, and under articles of incorporation duly adopted, signed, and executed in February, 1881, and then filed in the offices of the secretary of state of said state and of the register of deeds of St. Louis county, in said state, in which articles the general nature of its business was described and defined as follows: "The erection, maintenance and operation of a system of telegraph or telephone lines and a telephone exchange in Duluth, in the state of Minnesota." In January, 1882, and after the enactment by the

legislature of the state of Minnesota of the special act entitled "An act to authorize the erection, maintenance and protection of telephone poles and wires upon and over the streets, avenues and alleys of the city, village and town of Duluth," approved March 7, 1881, and of chapter 73 of the General Laws of Minnesota of the year 1881, approved on the same day, which amended chapter 34 of the said General Statutes of 1878, and in reliance upon the provisions of said two enactments, the said Duluth Telephone Company proceeded to construct its telephone plant, and to transact and carry on the business described and defined in its articles of incorporation and in said special act; and has ever since, in its corporate name, been actively engaged in the construction, operation, repair, and renewal of its telephone system, and in the acquisition of property incident thereto, and in the performance of contracts and transaction of a general telephone business, and is operating in said city of Duluth, and mainly upon its highways, a telephone exchange system embracing many miles of wire supported upon poles planted just inside the curb line of sidewalks in the customary manner, and connected with its many hundreds of telephone instruments; and as a part of the same system has and operates many other miles of wire similarly supported on poles connecting said telephone system in Duluth with the city of Superior, in Wisconsin, and the villages of Proctor Knott, Cloquet, and Carlton, in Minnesota; and the said Duluth Telephone Company has expended on the construction of said telephone plant many thousands of dollars, and the same has become and is a property of great value. The said special act of March 7, 1881, which by its terms granted to the Duluth Telephone Company the exclusive right to erect, use, and maintain upon and over the streets, avenues, and alleys of the city, village, and town of Duluth telephone wire and poles for the period of 10 years, was duly accepted by said company; and the said legislature, by the terms of chapter 254 of the Special Laws of Minnesota of the year 1889, extended its provisions to apply to and cover the territory then included in the corporate limits of the city and town of Duluth and the village of West Duluth as the same was then or might thereafter be established, continuing the rights granted until March 8, 1899. All the allegations of said bill relative to the execution and delivery by said Duluth Telephone Company to the complainants, as trustees, of the mortgage or deed of trust of January 2, 1900, and as to its purport, and to the recording of the same, and as to the bonds secured thereby, the amount of such bonds outstanding, and by whom held and owned, are true as stated in said bill. The defendant city of Duluth, and the village of Duluth as existing in the year 1881, were severally municipalities organized and existing as is stated in defendant's answer, and having the powers of control in respect to highways, streets, sidewalks, alleys, and public grounds set forth in said answer; and the Duluth Telephone Company has not received from either of those municipalities any special authority to place its poles or suspend its wires upon or along any highway, street, alley, or public grounds in said city or village. But, acting upon the assumption that said Duluth Telephone Company had lawful authority and right to so place its poles

and wires, all such poles and wires have been so placed under the direction and supervision of the proper officials of said city and village respectively. The ordinance entitled "An ordinance providing for the sale by the city of Duluth of a franchise for the said city, for the establishment and operation of a telephone exchange system in the said city, from and after March 9th, 1899, and for the receiving of bids and terms for the same," a copy of which is annexed as "Exhibit A" to said answer, was passed by the common council of said city November 29, 1898, and approved by the mayor on the day next following, as is stated in said answer; and all the allegations of said answer relative to the desire of aldermen and officers of the defendant city that said Duluth Telephone Company should, in compliance with the terms of said ordinance, submit a proposition for a franchise enabling it to continue to do business as a telephone company within said city, and the refusal of said company to consider such proposition, and insisting that it had a legal right to occupy the streets, avenues, and alleys of said city without the consent of the city, and the writing by its vice president of the letter, a copy of which, marked "Exhibit B," is attached to said answer, are all true as stated in said answer. Also all the allegations of said answer relative to the bid received by said city from R. H. Evans, and the passage of the ordinance "Exhibit C," and its acceptance by said Evans, and compliance therewith by said Evans and his assign, and the completion by such assign of a telephone plant in all respects as provided in such ordinance, which plant is in full and complete operation within said city of Duluth, are true as stated in said answer. The assign of said Evans now owning said new plant is known as the Zenith City Telephone Company. All the allegations of said bill relative to the threats by the common council, mayor, and other officers of said city, and their intention to cut down and remove from the highways of said city the telephone poles and wires of said Duluth Telephone Company, and obstruct said company in the use and operation of its said system and plant, and interfere and prohibit repairs, renewals, and extensions thereof, and to wholly exclude said company from the use of the highways of said city, and of any easements or rights therein, are true as stated in said bill. The formal resolution passed by said common council, and served upon the Duluth Telephone Company, is admitted by the answer to have been passed by the said common council on February 13, 1900, after the completion of the new telephone plant of the other company, and served upon the Duluth Telephone Company, and is as follows:

"Be it resolved by the common council of the city of Duluth, that the Duluth Telephone Company be, and hereby is, notified and required on or before the 1st day of April, 1900, to remove from the streets, avenues, alleys, and public grounds of the city of Duluth its telephone wires and telephone poles, and to cease using said streets, avenues, and alleys for the purpose of carrying on its telephone business. Be it resolved further, that the city clerk is hereby authorized and directed to cause copy of this resolution to be immediately served upon said telephone company, and to file proof of the same in his office."

The removal of the telephone poles and wires of the Duluth Telephone Company from the streets, avenues, alleys, and public grounds of the city of Duluth, as threatened and intended to be accomplished

by the common council, mayor, and officers of that city, will, if so accomplished, destroy the plant and property of the Duluth Telephone Company in that city, and damage the complainants in the destruction or lessening of the value of the security of their said mortgage or trust deed in a larger amount than is stated in said bill. The poles of said Duluth Telephone Company are not more than 16 inches in diameter, and, as placed along the curb line of the sidewalks in said city, do not, with the wires supported thereon, constitute any real or practical obstruction to the use of the streets and other highways of said city; and the threats and purpose of the said common council and other city officers, and their action in respect to the removal of such poles and wires from such streets and highways, is not because of any pretended obstruction, nor in any bona fide exercise of police powers, but merely for the purpose of favoring the said Zenith City Telephone Company, and of preventing any further competition with it, by destroying the plant and property of the Duluth Telephone Company in that city.

The first question to be considered as arising upon the facts stated is whether the Duluth Telephone Company had the right to construct and has the right to maintain its poles and wires in the streets and alleys of the city of Duluth, in the absence of special authority from the common council, and irrespective of the special acts referred to, which gave it such right exclusively, while they were in force, but which expired on March 8, 1899. The first legislation bearing on the subject is chapter 12 of the General Laws of 1860 (section 1), which provides that:

"Any telegraph company incorporated or organized under the laws of this state, shall have full power and right to use the public roads and highways in this state, on the line of their route, for the purpose of erecting posts or poles on or along the same, to sustain the wires or other fixtures: provided, however, that the same shall be located as in no way to interfere with the safety or convenience of ordinary travel on or over the said roads and highways."

Succeeding sections of the act provide penalties for injuries to any telegraph line, and for divulging the contents of messages improperly. The General Statutes of 1866 (chapter 34, tit. 1, § 28) embodied said first section of the act of 1860, but omitted and repealed the subsequent sections, which were, however, re-enacted in substance by chapter 22 of the General Laws of 1867. The effect of this legislation, which has substantially continued until the present time, is to recognize the public character of the services of telegraph companies as common carriers of messages, amenable to reasonable public regulation, and deserving of such place on the public highways as will not interfere with their primary use for ordinary travel. But it is contended on the part of the defendant that the terms "public roads and highways," used in this statute, apply only to rural public roads and highways, and were not intended to include streets, alleys, or lanes in cities or villages, which are always placed under the control of the municipalities. It is enough to say that the control over streets, alleys, and lanes in cities or villages, which is vested in the municipal government, is but delegated power, and in no way detracts from the power of the legis-

lature to exercise such control itself by direct enactment whenever and so far as it at any time sees fit. If the words "the public roads and highways in this state," in their ordinary and legal signification, include streets, avenues, and alleys in cities, there are no other words in the statute to lessen or limit their meaning. "Public road" and "highway" are usually understood to mean the same thing, and include all ways which of right are common to the whole people, and therefore differ from private roads or byways. A highway is a passage or road through the country, or some parts of it, for the use of the people. It is the generic name for all kinds of public ways. 1 Bouv. Law Dict. 586. The words used must, therefore, be held to include streets, avenues, lanes, and alleys in cities and villages, unless there is something in the subject-matter of the enactment showing that it is inapplicable to these urban highways. That does not appear, but the contrary. Telegraphs connect cities and villages, and have their stations in such places throughout the country and the civilized world. It is quite as necessary to their construction and operation that they have the right to be and continue upon these highways of cities and villages as upon rural highways. I must hold, therefore, that the words of the statute under consideration include all urban as well as rural highways.

This view is strengthened, so far as legislative interpretation may strengthen it, by the amendment enacted by chapter 73 of the General Laws of Minnesota of the year 1881, which inserted after the word "telegraph" the words "or telephone"; thus granting to telephone companies the same power and right to use the public roads and highways in this state which had before that time been granted to telegraph companies. At the date of that amendment the telephone, a then recent discovery or invention, was beginning to be used in cities and villages. In each city or village it was a local enterprise, exclusively urban, with its poles and wires upon nearly all streets, and its instruments in the dwellings and business places. Long-distance telephones connecting one town with another were not in use. The amendment of 1881, referred to, if it only granted rights along rural roads, would never have been asked or enacted; but granting, as it did, such rights upon all highways in the state, it was of great value to telephone companies, besides saving them the annoyance of dealing with municipal bodies for rights and powers, and so obviously for the advantage of the public as to induce the legislature to act directly and at once in respect to all parts of the state. Although this amendment was enacted after the Duluth Telephone Company had executed and filed its articles of incorporation, it was enacted and in full force before that company began the construction of its plant and the placing of its poles and wires upon the highways of Duluth; and it must be considered that its expenditures were made and its plant constructed in reliance upon this general law. The rights and powers granted thereby became contract rights in the company as fully as if the amendment had been enacted and in force when the company was organized and incorporated. These rights and powers, being unlimited in respect to duration, were valuable property rights,

not merged nor excluded by the special acts referred to, which granted in addition the exclusive monopoly of occupying the streets, etc., of Duluth, and later of West Duluth, with telephone poles and wires for a limited time. This monopoly, which was the only real grant made by the special acts, ceased with the lapse of the prescribed time; but the unlimited right to occupy the highways of the city remains and continues. The acceptance by the company of the special exclusive rights granted by the special acts for a fixed time, and presumably of value, cannot be construed as a refusal, disclaimer, or surrender of the rights and powers granted to and vested in the company by the general law. There was no inconsistency. The company could receive and enjoy all the rights and powers given by the general law and the special acts. No election or disclaimer was required or expected. Both the general law and the special acts were beneficial, and will, therefore, be presumed to have been equally acted on and relied upon.

Chapter 74 of the Laws of 1893 has no bearing. It can only be given a prospective construction, and be held applicable to enterprises undertaken after its passage. The plant of the Duluth Telephone Company had been constructed, and its rights had become vested rights, and beyond the power of the legislature to destroy or diminish, before the passage of that statute; so that it is needless to resolve the doubt whether it applies to telephone wires supported upon poles and along streets and alleys in cities and villages, or only to all railways, and to such other constructions as are placed beneath the surface of the ground.

It is very obvious from the allegations in the defendant's answer that its threats and purpose to remove the poles and wires from the streets and other highways of the city of Duluth are not made in any bona fide exercise of the police powers which the common council may lawfully exercise, nor because such poles and wires are in the judgment of the common council such an obstruction of the streets and highways as to constitute a nuisance in fact. The answer alleges a desire on the part of the aldermen and officers of the city that the Duluth Telephone Company should continue its business if it would submit a proposition for a franchise under the ordinance Exhibit A. The answer also alleges that the assign of Evans has, under the authority of the common council, constructed and completed a new telephone plant, which the evidence shows is constructed with poles and wires upon and along the streets and highways of said city precisely like that of the Duluth Telephone Company, except for a short distance on Superior street. The resolution of the common council of February 13, 1900, discloses the real purpose of the common council in its notification to the Duluth Telephone Company "to cease using the said streets, avenues, and alleys for the purpose of carrying on its telephone business." The evidence shows—what is matter of common knowledge—that the obstruction to travel caused by the placing of telephone poles along the curbstones of streets as in this case is fanciful and unsubstantial, as is any inconvenience from the wires supported on such poles. The power granted by the charter of the city of Duluth to the com-

mon council "to prevent the incumbering of streets, sidewalks, alleys, public grounds and wharves with carriages, carts, wagons, sleighs, boxes, lumber, firewood, posts, awnings or any other materials or substances whatsoever" cannot be construed to be an absolute grant of power, as the language might seem to import. Any person has the lawful right to drive his carriage, cart, wagon, or sleigh, loaded with boxes, firewood, lumber, posts, awnings, or any other materials or substances whatsoever, over and upon all streets, alleys, etc., of Duluth in the usual manner; and although driving of carriages, etc., is an actual incumbrance upon the streets, yet, as it is lawful, it cannot be prevented by the common council under this grant of power, which in fact gives only the right of police regulation, and the power to prevent unlawful obstructions on streets and other highways. As the Duluth Telephone Company has the lawful right to have its poles and wires upon and along these highways of the city, the common council has no more authority to remove them therefrom than it has to prevent the lawful use of the highways by ordinary vehicles. I do not mean to assert that the buildings, business, travel, and use upon some street, or section of a street, may not be such that due regard for all interests involved may warrant the common council in requiring that all electric wires in such street or section be placed in underground conduits, and that the poles, when no longer used, be removed. But no such question arises here. If I am correct in what is above expressed, it follows that the Duluth Telephone Company has the lawful right to continue to have its telephone poles and wires upon and along the highways of the city of Duluth, and to extend the same to accommodate the increasing needs of that growing city, and that the complainants, for the protection of their security, are entitled to the relief prayed for in their bill of complaint, with costs. Decree may be entered accordingly, and the terms thereof, unless agreed to by counsel, may be settled upon two days' notice.

BUEL v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 779.

1. APPEAL—APPEALABLE ORDERS—REFUSING LEAVE TO INTERVENE.

An appeal does not lie from an order refusing leave to intervene and become a party.

2. SAME—WHO MAY TAKE.

An appeal cannot be taken from a decree by one who has not been a party to the cause either originally or admitted upon intervention.

3. SAME—CONSTRUCTION OF ORDER.

Findings stated in an order refusing leave to file an intervening petition, purporting to determine questions of fact raised by such petition, must be construed as having been made only for the purpose of the motion, and not as a final adjudication upon such facts, which would bind the petitioner, or give him ground for an appeal therefrom.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Frank Rumsey and C. Walter Artz, for appellant.
Herbert B. Turner and Edward Colston, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. Upon the hearing of this appeal the court expressed a doubt whether it had jurisdiction to entertain it, but we permitted the argument on the merits to proceed under a reservation of that question. Upon more mature consideration we are satisfied that our doubt was well founded. The order from which the appeal is taken was one made by the circuit court, denying an application made by the appellant, on behalf of himself and others, as holders and owners of the first, second, and third preferred income bonds of the Baltimore & Ohio Southwestern Railroad Company, for leave to file an intervening petition praying to be admitted as a party, with leave to file an answer, in the case of the Farmers' Loan & Trust Company against the Baltimore & Ohio Southwestern Railway Company and others,—a consolidated cause then pending in that court. An outline of the principal case is all that is required for the purpose of ascertaining the object of the proposed intervention, and the effect of the order denying it. The Baltimore & Ohio Southwestern Railroad Company, then owning a line of road extending from Belpre, Ohio, to Cincinnati, and certain branch lines, on the 26th day of December, 1889, executed to the Farmers' Loan & Trust Company its first mortgage on all its lines of railroad to secure an issue of its gold bonds to the amount of \$11,000,000, part of which were issued and sold, and a part reserved to retire a like amount of the bonds of a railroad company formerly owning the property. Then, on the 28th, 30th, and 31st days of the same month, it executed and delivered to the same trust company three several mortgages to secure three several issues of preferred income bonds, so called, denominated the first, second, and third issues of such bonds. The amount secured by the first of these three mortgages was \$5,500,000, that secured by the second was \$6,400,000, and that secured by the third was \$7,700,000. All these bonds were issued and sold. The petitioner claims to be the owner of 14 of the first preferred income bonds, 33 of the second, and 74 of the third, amounting in all to \$121,000, besides interest. On the 1st day of November, 1893, a consolidation was effected of the above-named Baltimore & Ohio Southwestern Railroad Company with the Ohio & Mississippi Railway Company, then owning a line of railroad extending from Cincinnati to East St. Louis, Ill., under the name of the Baltimore & Ohio Southwestern Railway Company. The consolidated company is one of the defendants in the principal suit. By the scheme of the consolidation a great majority of each of the first, second, and third preferred income bonds were surrendered, and in lieu thereof the owners were to receive preferred and common stock of the new company. The same privilege was accorded to all such holders of the income bonds who should surrender their bonds. A minority, including those held by the petitioner, were not surrendered. The consolidated company

on the day of its consolidation executed its first mortgage on its properties to the Farmers' Loan & Trust Company and W. H. H. Miller to secure an issue of \$37,500,000 of bonds, of which about \$12,000,000 are outstanding. The bill to foreclose this mortgage was filed January 9, 1899, for the nonpayment of interest due January 1, 1899, and is the foundation of one of the consolidated causes. It states that the lien of that mortgage was subordinate to the above-mentioned several mortgages of the Baltimore & Ohio Southwestern Railroad Company, so far as the property formerly owned by that company is concerned. It further appears that the consolidated company on the 2d of November, 1896, executed to a trustee its first income mortgage upon its properties to secure one issue of bonds, called "Series A," for \$8,750,000, and another, called "Series B," for \$10,000,000, all of which are outstanding. On the 31st day of December, 1898, the Mercantile Trust Company of New York, being a judgment creditor of the consolidated company, filed its bill, alleging the insolvency of the company, and praying the appointment of a receiver, the liquidation of its affairs, and the satisfaction of the judgment. Receivers were appointed. On January 9, 1899, upon the filing of the bill to foreclose the above-mentioned first mortgage of the consolidated company, these two causes were consolidated and the receivership extended to both. On the 3d of May, 1899, a bill was filed by the Farmers' Loan & Trust Company to foreclose the above-mentioned first mortgage of the Baltimore & Ohio Southwestern Railroad Company, and on the 27th of the same month this cause was consolidated with the other two already consolidated. Proper parties were made defendants in these several causes, unless it be that the minority bondholders, such as the petitioner, should have been joined. Those made defendants generally appeared and answered, but none of them contested the suits. Upon the last-mentioned consolidation being made, and on the same day, a final decree was entered for foreclosure of the mortgages and sale of the property, and adjusting the rights of the creditor, the Mercantile Trust Company. On the 3d of June, one week after the decree was entered, this petition was filed, praying for leave to intervene, in which it is stated, among other matters of complaint, that the Farmers' Loan & Trust Company had some time previously resigned its position of trustee under the several income mortgages of the Baltimore & Ohio Southwestern Railroad Company, and in its stead the Standard Trust Company of New York, Louis L. Stanton, and Frederick P. Voorheis had been appointed; that these last-named parties, as trustees of the income mortgages, had been made defendants in the bill to foreclose the first mortgage of said last-named company, and had consented to a decree the effect of which is "to cut out entirely the lien of the mortgages under which they claim to be the trustees." These are the mortgages which secure the petitioners' bonds. The petition alleges that the earnings of the Baltimore & Ohio Southwestern Railroad Company have been ample, if properly preserved and applied, to keep down the interest on its gold bonds secured by its first mortgage, and that the default in making payment thereof was unnecessary and was fraud-

ulently suffered in order to give ground for the foreclosure of the mortgage, and eliminating the income bonds, which had not been surrendered. It is further alleged that the resignation of the original trustee in the income mortgages, and the substitution of others in its place, to appear and bind by a consent decree the cestuis que trustent in a suit to be brought by the first trustee (now freed from that trust) as trustee in the underlying mortgage, was collusive and fraudulent as against the petitioner; that the scheme of the consolidation of the Baltimore & Ohio Southwestern Railroad Company and the Ohio & Mississippi Railway Company in providing for the holders of the bonds of the former who surrendered their bonds, and in not providing for or at any time making any payment of interest on the bonds not surrendered, was with the intent to defeat the rights of the petitioner; and that the course of the proceedings in the suits has been taken with a view to extinguish the bonds held by the petitioner, without satisfying them. It is alleged that the income mortgages are superior to all other claims upon the property that was of the Baltimore & Ohio Southwestern Railroad Company, other than the first mortgage given by that company, and that the property subject to those mortgages is of such value as to make the bonds of the petitioner valuable, after satisfying the superior lien. These constitute the substantial matters on which the petitioner relies in seeking to obtain an opportunity to defend the suits. Upon the hearing in the circuit court an offer was made in behalf of the defendants to extend to the petitioner and the other minority bondholders who had not come into the reorganization scheme the privilege given to those who surrendered their bonds. This offer was not accepted. The judge presiding in the circuit court directed the entry of the following order:

"This day this cause came on further to be heard upon the application of Franklin S. Buel for leave to file the intervening petition and answer attached to said application, and on the evidence adduced by the parties, including the offer made in open court at the hearing by the reorganization managers, and filed herein, and was argued by counsel, and the court, being fully advised in the premises, finds that all and singular the allegations of fraud and collusion made in said proposed intervening petition and answer are untrue; that said Baltimore & Ohio Southwestern Railway Company at the time of filing of the several bills of complaint herein was, and now is, insolvent; that the several defaults in the payment of interest as set forth in said bills of complaint were and are bona fide; and that said plan of reorganization is fair and just to all interests, including those of the said Buel, in case he should choose to avail himself thereof. Therefore it is ordered and adjudged that the said application be, and hereby is, denied. But it is ordered that the said Franklin S. Buel may, in case he refuse to accept said offer of said reorganization managers, file in this court within ten days, if he be so advised, an intervening petition, for the purpose only of setting up any claim he may have to participate in the distribution of the proceeds of the sale herebefore ordered."

This is the order from which the appeal is taken, and the question is whether it is appealable. It seems to be quite well settled that the granting leave to intervene in a case to which the petitioner is not a party is a matter addressed to the discretion of the court, to be exercised upon consideration of all the circumstances of the case. Among other things, the court will regard the sea-

sonableness of the application, and the extent to which those already parties to the suit may be injuriously affected by admitting the new party to assert his claims and have them litigated at that stage of the case. The question for the court will be whether the petitioner has slept upon his rights and unreasonably delayed his application. Another will be whether it will be more convenient that he litigate his rights upon an independent bill. And the court must necessarily, before granting leave, determine whether there is any reasonable ground for believing that the petitioner has any substantial interest to be protected,—not, indeed, conclusively whether such interest exists, but, *pro hac vice*, whether there is sufficient indication of it to justify the intervention. As settling the doctrine that the action of the circuit court in granting or refusing such an application is not subject to review upon appeal, reference is made to the following cases: In *Ex parte Cutting*, 94 U. S. 14, 24 L. Ed. 49, an application was made by Cutting and his associates, some of the stockholders of the Pacific Railroad Company, for a writ of mandamus to compel the allowance of an appeal by them from an order denying them the privilege of intervening, and from the final decree of foreclosure in a suit brought by the bondholders against the railroad company to foreclose a mortgage given by the company to secure their bonds. The petition of the stockholders for intervention alleged that the bonds which were secured by the mortgage were void, and were issued in fraud of the stockholders of the company, of which the petitioners were part. It was held that an appeal would not lie from the order refusing them leave to intervene and become parties, and it was said that such an application "is always addressed to the sound judicial discretion of the court." This rule was recognized by Judge Lurton in *Toler v. Railroad Co.* (C. C.) 67 Fed. 168, though the application was granted, in the circumstances of that case. In that case it was pointed out that the parties interested, but who were not made parties, would not be concluded by a decree impeachable for fraud and collusion by and between the actual parties to the suit. It is upon this ground, mainly, that the matter is left to the sound discretion of the court. In *Lewis v. Railroad Co.*, 10 C. C. A. 446, 62 Fed. 218, one Lewis, as trustee in a mortgage to secure the bonds of a railroad company, brought a foreclosure suit; and Street, claiming some interest in the subject of the suit, prayed leave to intervene for his own protection. This was refused, and he applied to the circuit court of appeals for a mandamus requiring the allowance of an appeal. That court refused the writ, saying: "No right of the petitioner has been finally adjudicated by any of the orders of the court. Besides, this refusal of the circuit court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right,"—referring to the case of *Ex parte Cutting*, 94 U. S. 14, 22, 24 L. Ed. 49. In *Hamlin v. Trust Co.*, 47 U. S. App. 422, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826, which was a railway mortgage foreclosure suit, as well as one by general creditors, consolidated, Hamlin and his associates, being the owners of preferred stock in the railway com-

pany, which they alleged would be jeopardized without their presence as parties, filed a petition for leave to intervene and file an answer and cross bill. The court granted the petition and leave to file the proposed answer and cross bill, but it was added to the order that it was subject to the right of the complainants to move to strike them from the files. This reservation was due to the fact that the complainants had not fully examined the answer and cross bill, and requested time to do so. Subsequently, on motion made, under the leave reserved, the court reserved its decision until the final decree, wherein it was ordered that the petitioners be denied the right to intervene. The case came here on their appeal, and it was held that, while the question of admitting the intervention was entirely within the discretion of the court, yet, having been once admitted, it was erroneous to deny them the privilege of making any defense. The controlling fact in that decision was that the petitioners had been admitted as parties, and would be bound by the decree. The question whether the pleading which they had filed was proper was one relating to the subsequent procedure, and the kind of defense they would be permitted to make. In the same case, reported under the title of Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 155, 95 Fed. 497, which came here on a subsequent appeal, one Rose, who was also a preferred stockholder, had, without leave of the court, filed what purported to be a cross bill and answer. He was not recognized as a party, and the suit went on to decree. Conceiving himself aggrieved, he appealed. It was held by this court that, conceding, for the purpose of the decision, his filing an answer and cross bill might be treated as an application for leave to intervene, and the action of the court as a denial of it, still, as the court had never granted him leave, and had not recognized him as an actor in the suit, he had no standing on which to claim an appeal from the refusal to admit him; and, of course, it followed from that that, not being a party, he could not appeal from the decree. His appeal was accordingly dismissed. In the present case, as in that, the appeal extends to the final decree in the case. But, from the decision that he never became a party, it necessarily follows that his appeal is wholly nugatory.

For the appellant it is urged that the order in question finds and declares certain facts touching the merits of the main controversy, and that this cannot rightfully be done except upon a final hearing after proofs are taken. It is true, the language of the order indicates that the court passed upon the main facts which the petitioner seeks to litigate. But this finding is only for the purposes of the motion. The final determination of such facts was not then submitted to the court. The construction and effect of the language employed are affected by the occasion and purpose, and, when read with reference to them, it is known that there was no intention of passing final judgment upon the facts, and that no such effect can be lawfully attributed to the order. And, so construed, there is no ground for the contention made by counsel for the petitioner, in their supplemental brief, that the court in making this order treated

him as a party to the suit. It follows that the appeal cannot be entertained, for want of jurisdiction. It is accordingly dismissed, with costs.

THOMPSON v. CHICAGO, M. & ST. P. RY. CO. et al.

(Circuit Court, D. Nebraska. November 23, 1900.)

No. 253.

1. WRONGFUL DEATH—ACTION FOR DAMAGES—NEBRASKA STATUTES.

The action for wrongful death, authorized by the Nebraska statute (Comp. St. 1897, c. 21), under the construction of such statute by the supreme court of the state, is one which can be maintained only for the pecuniary loss sustained by the next of kin of the deceased, for whose benefit the recovery is permitted, and general damages are recoverable only where such next of kin are persons who were dependent upon the deceased for their maintenance, or to whom he was under legal obligation to furnish such maintenance. In other cases there can be no recovery unless special damages to the next of kin are alleged and proved.

2. PARENT AND CHILD—RIGHT OF FATHER TO EARNINGS OF MINOR CHILD—EFFECT OF DESERTION.

A father who has deserted his family, and for years has not communicated with them or furnished them any support, has no legal claim upon the earnings of his minor children; the desertion operating as an emancipation of the children.

3. WRONGFUL DEATH—ACTION FOR DAMAGES—NEBRASKA STATUTE.

Plaintiff's intestate, a boy 14 years old, was killed through the negligence of defendant; the injury being one for which he might have maintained an action had he lived. A statute of the state (Comp. St. Neb. 1897, c. 21) provided that in such case the defendant should be liable to an action for damages for the benefit of the next of kin, notwithstanding the death. The father of the deceased had deserted his family some 10 years before, and thereafter held no communication with them, and furnished them no support, but he was still living, and under the statutes of the state was the next of kin and sole heir at law of the deceased. The boy had lived with his mother, who was dependent upon his earnings and her own for support. *Held*, that there could be no recovery for the death under such statute, since the father, by his desertion, had forfeited his right to his son's earnings, and had therefore sustained no pecuniary damages by his death, and the mother, while entitled to his earnings, was not the next of kin, within the meaning of the statute, which gave no right of action for the recovery of her damages.

Action at Law. On motion for new trial.

J. L. Kaley, for plaintiff.

John C. Cowin and T. J. Mahoney, for defendant.

MUNGER, District Judge. This is an action brought by plaintiff, as administratrix of the estate of one Edward J. Thompson, deceased. The petition alleges that the plaintiff and one William J. Thompson were married in November, 1881, and that the deceased was the fruit of said marriage; that said Edward J. Thompson was, at the time of his decease, 14 years of age; that William J. Thompson, the husband of the plaintiff, more than 10 years prior to the bringing of the action, wrongfully deserted herself and family, had been absent from them since that time, and had furnished no sustenance or support for them, or either of them; that the deceased was a strong, healthy, capable,

and obedient child; that for several years next preceding his death he rendered to plaintiff much and valuable service and assistance, and earned wages; that she was wholly dependent upon him for support, except such support as she received from her own efforts; that deceased had constantly improved in capacity and usefulness in rendering assistance to her, and would have continued to do so had he lived, and that he devoted all his earnings, and at all times gave his best efforts, in rendering all the aid and assistance to plaintiff in his power, up to the time of his death, and would have continued to do so, not only until he reached his majority, but thereafter as well, had he lived. Plaintiff in her petition further alleges that said Edward J. Thompson was, on the 20th day of January, 1898, killed by certain acts on the part of the agents and employes of the defendants, which said acts constituted negligence upon the part of the defendants of such a nature and character that, had the said Edward J. Thompson lived, he would have been legally entitled to recover damages from said defendants for the injuries which he sustained by reason of said negligent acts specifically alleged to have been committed by the defendants; that on the 26th day of April, 1898, plaintiff was by the county court of Douglas county, Neb., duly appointed administratrix of the estate of Edward J. Thompson, deceased. The petition further alleges that plaintiff is the mother and next of kin of said deceased, and that she has sustained damages by reason of the death of said deceased in the sum of \$5,000, for which she prays judgment. The answer of the several defendants denies the acts of negligence charged against them, denies that plaintiff is the next of kin of deceased, and further denies that plaintiff or the next of kin has sustained any damage by reason of the death of said Edward J. Thompson.

The cause came on for trial upon the issues joined. Testimony was introduced on the part of the plaintiff, which, in substance, established the fact that the death of deceased was caused by the negligent acts of the defendants, as stated in the petition. The evidence further established the fact that William J. Thompson, father of deceased, was at the time still living; that for more than 10 years prior thereto he deserted plaintiff and his child, the deceased, had wholly failed to contribute to the support of either his wife or child, and during said time had not visited or communicated with them. At the close of plaintiff's evidence the court directed the jury to return a verdict for the defendants, on the ground that the action was one brought under the provisions of chapter 21, Comp. St. Neb. 1897, under which statute the action could only be maintained for the pecuniary loss which the next of kin to deceased had sustained by reason of his death; that under the statutes of Nebraska the father was the next of kin and only heir of deceased; that, under the allegations contained in the petition and the evidence in support thereof, it conclusively appeared that the father, the next of kin, had not sustained any pecuniary loss for which a recovery could be had, under the provisions of the statute. Plaintiff has filed a motion for a new trial, and challenges the correctness of the rule of law thus announced to the jury in directing a verdict.

In support of the motion for a new trial, it is strenuously argued that, to maintain an action under this statute, it is only necessary to allege and show that the death was caused by acts upon the part of the defendants of such a character as would have entitled the deceased to recover had he lived, and that upon his death he left next of kin. It is further argued that the father, being next of kin, was entitled to the services and earnings of deceased, and hence entitled to recover such sum as the jury should deem a fair and just compensation therefor. If plaintiff's contention as to the law in this respect is correct, and numerous authorities are cited in support thereof, then a new trial should be granted. If, however, the rule as announced by the court is the correct rule in this jurisdiction, then the motion for a new trial should be denied.

The present action, being one unknown at common law (*Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Sullivan v. Railroad Co.* [C. C.] 2 Fed. 447), but based upon the state statute, the decisions of the supreme court of this state construing the statute are binding upon this court. This being an action at law, the rules of pleading and practice, as announced by the supreme court of the state, also govern this court. The statute of the state which is the basis for the present action has been construed in numerous cases by the supreme court. *City of Friend v. Burleigh*, 53 Neb. 674, 74 N. W. 50; *Orgall v. Railroad Co.*, 46 Neb. 4, 64 N. W. 450; *Railroad Co. v. Van Buskirk*, 58 Neb. 252, 78 N. W. 514; *Railway Co. v. Young*, 58 Neb. 678, 79 N. W. 556. An analysis of these cases establishes the doctrine that the facts stated in the petition must show that the next of kin were persons who were dependent upon deceased for their maintenance and support, or that deceased was under a legal obligation to furnish such next of kin support and maintenance, and that the facts must support such allegations to entitle the party to recover, under a general claim of damages. If special damages have been sustained by the next of kin, such special damages must be alleged in the petition. They cannot be shown or recovered under a general claim of damages. The supreme court of the state, in announcing this rule, expressly adopt the rule announced by the supreme court of Michigan in the case of *Hurst v. Railway Co.*, 84 Mich. 539, 48 N. W. 44, wherein it was held that the father was not entitled to recover for the loss of services on account of the death of his minor child, in the absence of allegations of fact in the petition showing that such minor child would have rendered services which would have been of value to the father; that the claim for loss of services was in the nature of special damages which must be specially alleged and proven. While the rule, as announced by the supreme court of this state in following the Michigan case, is not in harmony with the doctrine announced in many other states, as shown by the authorities cited upon the part of the plaintiff, yet the court in *Railway Co. v. Young* say:

"Whether upon this question we are in line with the current of authority in other jurisdictions is not important. The rule we have adopted is not contrary to sound principle. It is reasonable and just, and, after mature deliberation, we have concluded to adhere to it."

Such being the rule as announced by the supreme court of this state, and which is binding upon this court, it follows that, under the pleadings and proof in this case, no recovery can be had based upon the loss of services to the father, the next of kin, for the reason that such loss is not pleaded; but, as the petition in this respect might be cured by amendment, the court is not disposed to rest the decision upon that ground.

Under the law in this state, there can be no question that the father was the next of kin to deceased, and that the recovery in this case, under the statute in question, can only be had for the damages which it may be reasonably inferred the father has sustained by reason of the death of his minor son. If the petition should be amended, the facts, nevertheless, would remain that the father, more than 10 years prior to the deceased's death, abandoned his wife and deceased, and gave them no support and protection. Under such state of facts, is the father entitled to the services of the son whom he thus abandoned? In Rodg. Dom. Rel. § 467, it is said:

"If the father deserts and abandons his family, exercises no control over them, interferes with them in no way, manifests no interest in their welfare, does not communicate with nor look after them, the relation of master and servant is dissolved, and the principal of servitude no longer sustains the right of the father to the wages of his infant son. It is as if the father were dead, and the custody of the child and the right to appropriate his earnings thereby devolve upon the mother. If the father refuses to be a parent in act as well as in name, the law will not recognize his right to control the earnings of his infant child, whom he thus casts aside to neglect."

The rule is well settled that, if the father emancipates his minor child, he is no longer entitled to the earnings of such child, and emancipation may be inferred by acts.

In 17 Am. & Eng. Enc. Law, p. 397, it is said:

"If the parent forces the child to leave the house or deserts or abandons him, the child is released from all filial duties which the law will enforce, and may seek his own welfare in his own way. Thus, an emancipation may be accomplished by wrong and violence."

And, as stated by Schouler, Dom. Rel. § 267: "This is termed the presumption of necessity."

In the note to Wilson v. McMillan, 35 Am. Rep. 117, it is said:

"Emancipation is always presumed in cases of necessity. Thus, if the parent absconds, expels his child, or leaves him to shift for himself, and refuses or neglects to provide, emancipation is presumed. * * * It would certainly be a great defect in the laws of any civilized people if they furnished no mode by which the innocence and helplessness of infancy, and the purity and ingenuousness of youth, could be protected from the brutality of an unnatural parent. As a father may forfeit his right to the custody and control of his child's person by abusing his power, so, by neglecting to fulfill the obligations of a father, he may forfeit his right to the fruits of his child's labor. If he provides no home for his protection, if he neither feeds nor clothes him, nor ministers to his wants in sickness or health, it would be a most harsh and unnatural law which authorized the father to appropriate to himself all his child's earnings. * * * But where the father has discharged himself of the obligation to support the child, or has obliged the child to support himself, there is no principle but that of slavery which will continue his right to receive the earnings of the child's labor."

Suppose, in this case, the motion for a new trial should be sustained, and plaintiff permitted to amend the petition to correspond with the facts, by showing that at the time of the death of deceased his father was living, still plaintiff could not recover, as, upon a new trial, the fact must remain the same, that the father abandoned the child years before, in a manner and under circumstances which must be held to be an act of emancipation on the part of the father, and for reason thereof the father is not entitled to, and could not, recover for the services of deceased. Then, under such facts, plaintiff would not even be entitled to judgment for nominal damages.

While it is true that, the emancipation on the part of the father being presumed because of his desertion of his child, the right to the earnings of the child would belong to its mother, yet a recovery could not be had in this case, for the reason that the mother was not the next of kin, the father having survived the child. It is doubtless true that in a case like this the mother ought to receive the damages which would, but for the desertion and emancipation upon the part of the father, entitle him to recover, yet the court cannot extend the provisions of the statute which limits the recovery to the pecuniary loss sustained by the next of kin only. The father being the only next of kin, and having sustained no loss, the motion for a new trial is overruled.

PETERS v. MALIN et al.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. December 1, 1900.)

JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTIONS—ACTION INVOLVING RIGHTS OF TRIBAL INDIAN.

An action to recover damages for the illegal arrest and imprisonment of the plaintiff under the laws of the state, where the claimed illegality is based upon allegations that plaintiff is a tribal Indian, and not subject to state jurisdiction, and that defendants, in instituting the prosecution against him, acted in their official capacity as Indian agent and Indian school superintendent, respectively, of the United States, involves the construction of the laws and treaties of the United States, and is of federal cognizance.¹

At Law. On demurrer to petition presenting question of jurisdiction.

Charles A. Clark & Son, J. W. Lamb, and Wm. G. Clark, for plaintiff.

H. G. McMillan, J. R. Caldwell, and Struble & Stiger, for defendants.

SHIRAS, District Judge. In the petition and amendment thereto filed in this case it is averred that the plaintiff, James Peters, is a member of the Sac and Fox Tribe of Indians living on the tribal reservation in Tama county, Iowa, and that the defendant William G. Malin is the agent appointed by the United States and placed in

¹ Federal question as ground for federal jurisdiction, see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

charge of the Indians on the reservation, and that G. W. Nellis is the superintendent of the boarding and training school at Toledo, Iowa, appointed by the United States to superintend the school, which is conducted by the United States for the benefit of the named Indian tribes. It is further charged in the petition that the defendant Malin, while acting as agent for said Indians, wrongfully swore to and filed before a justice of the peace for Tama county an information falsely accusing the plaintiff herein of the crime of enticing away a tribal Indian child under the age of 15 years from the Sac and Fox reservation, the said child being at the time enrolled as a pupil in the boarding school at Toledo, contrary to the laws of the state of Iowa; and caused the plaintiff to be arrested and imprisoned under said charge awaiting the action of the grand jury of Tama county thereon. It is further averred that the defendants confederated together, and by their wrongful joint action caused an indictment to be found by the state grand jury, based upon the charge aforesaid, and caused the plaintiff herein to be arrested and imprisoned, and finally to be put to trial in the district court of Tama county upon said indictment; the defendant thereto, being the plaintiff herein, being found not guilty by the trial jury. It is further charged in the petition that the defendants, while acting as servants of the United States, well knew that the letters of guardianship procured from the state court of Tama county by the defendant Malin were wholly void, and that the state court had no jurisdiction over the plaintiff, he being a tribal Indian; and for the wrongs done him the plaintiff prays judgment in the sum of \$8,000. By a demurrer filed to the petition the defendants present the question of the jurisdiction of this court, it being claimed in support of the demurrer that it does not appear on the face of the petition that the case is one arising under the constitution or laws of the United States.

It is made plain on the face of the petition that the plaintiff claims that he is a tribal Indian, and that as such the general laws of the state of Iowa are not applicable to him. The decision of this question clearly calls for a consideration and construction of the laws and treaties of the United States as the same may affect the status of the Indians belonging to the reservation in Tama county. It being admitted by the demurrer that the plaintiff is a tribal Indian residing on a reservation under charge of an Indian agent, it follows that he must be held to be a ward of the general government, and entitled to its protection; and the question of the applicability of the laws of the state to his personal rights is one that arises under the laws and treaties of the United States. If it were true that the plaintiff's claim was that he had not violated the provisions of the state law in the sense that he had not done any act forbidden by the state law, then it might well be, as is contended by counsel for the defendants, that the cause of action declared on called for a construction of the law of the state, rather than of a law of the United States; but that is not the issue tendered in the petition. On the contrary, the averment in the petition is that the arrest and imprisonment of the plaintiff under a proceeding based upon the state statute was an infringement of his rights as a tribal Indian, and it is clear that the

plaintiff bases his alleged right of action upon the rights secured to him as a tribal Indian by the laws of the United States. Furthermore, it is averred in the petition that the defendants are the Indian agent and school superintendent appointed by the United States, and that, acting in their official capacity, they caused the arrest and imprisonment of the plaintiff; thus presenting the question of the extent of the power conferred upon defendants as officers of the general government, and of their right to subject the plaintiff, as a tribal Indian, to the provisions of the laws of the state,—questions which depend for their solution upon the construction to be given to the laws of the United States. In fact, the case declared on in the petition presents the double question of the rights of a tribal Indian and of the power and authority conferred on Indian agents and school superintendents by the laws of the United States, and, viewed in either aspect, the case is clearly one of federal cognizance. The demurrer is therefore overruled, with leave to defendants to answer the petition within 60 days.

UNITED STATES TRUST CO. v. VILLAGE OF MINERAL RIDGE.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 828.

MUNICIPAL BONDS—STATUTORY REQUIREMENTS AS TO RECITALS—NOTICE TO PURCHASERS.

Rev. St. Ohio, § 2703, relating to municipal bonds, requires that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued and under what ordinance." The only reference to any ordinance contained in bonds issued by a village, purporting to be refunding bonds, was a statement that they were issued to take up former bonds of a certain date, "as provided in the ordinance of said village." It was admitted that no valid or sufficient ordinance authorizing the issuance of such bonds was passed, and that the bonds refunded were void. *Held*, that under such statute every purchaser was charged with notice of their invalidity.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Benjamin Parmely, for plaintiff in error.

Chas. M. Wilkins and S. H. Tolles, for defendant in error.

Before LURTON and SEVERENS, Circuit Judges, and RICKS, District Judge.

SEVERENS, Circuit Judge. This was an action brought by the plaintiff in error against the village of Mineral Ridge to recover upon certain bonds, purporting to be refunding bonds issued and sold by the village for the purpose of providing means to pay off prior bonds issued by the village. The prior bonds thus refunded were voted in aid of the construction of the Niles & Mineral Ridge Electric Railroad, a private enterprise, which the village had no lawful power to aid. It is conceded that those bonds were void, but it is contended that these refunding bonds, being upon their face, as it is claimed, in conformity with the law of the state which gives to its

municipalities the power to issue refunding bonds to take up former obligations, and containing the usual recitals of the existence of the required conditions precedent to their issue, are valid in the hands of bona fide holders. The statute of Ohio (section 2703 of the Revised Statutes) requires that all bonds issued under the provisions of the chapter authorizing them "shall express upon their face the purpose for which they were issued, and under what ordinance." This is an imperative requirement, of which all purchasers must take notice; for they are presumed to have knowledge of the statute creating the power to obligate the municipality. The purpose of this provision requiring a specification of the ordinance under which the bonds are issued is to draw the attention of those who take them to the particular record authorizing their issue, so that they may examine it and discover any excess or abuse of power by the municipal council which the record would disclose. The purchaser of bonds issued under a statute containing such provisions is chargeable with notice of what the ordinance contains. *Barnett v. City of Denison*, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. Ed. 652. The only reference upon the face of these bonds to any ordinance is the statement that they were issued to take up former bonds (giving the date of their issue) "as provided in the ordinance of said village." If it were not for the express provision of the statute that the bonds should refer to the particular ordinance, it might be held that, taken in connection with other recitals in the bond, it might be presumed by the purchaser that the ordinance was free from any illegality. *Hackett v. Ottawa*, 99 U. S. 86, 25 L. Ed. 363; *Risley v. Village of Howell*, 22 U. S. App. 635, 12 C. C. A. 218, 64 Fed. 453. But in this case it was admitted upon the trial by counsel for the plaintiff that no valid or sufficient ordinance for the issuing of the refunding bonds was passed, so that, if the purchaser had consulted the record of ordinances, he would have known that the refunding bonds were invalid. In this respect (and it is of vital consequence) this case differs from that of *Village of Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 56, recently decided by this court. In that case the bonds referred to the ordinance under which they were issued, by giving its date; and the ordinance itself, when seen, did not disclose any unlawful purpose, but a legitimate one.

For these reasons, there was no error in holding, as the circuit court did, that the bonds in suit were invalid. The judgment is therefore affirmed.

LOCHBAUM v. OREGON RY. & NAV. CO.

(Circuit Court of Appeals, Ninth Circuit. November 5, 1900.)

No. 469.

MASTER AND SERVANT—FELLOW SERVANTS—RAILROAD SECTIONMEN AND FOREMAN.

A section foreman on a railroad, who is under a division road master having authority to direct the work and inspect the same, and who is required to report to a general road master, who in turn reports to the general superintendent, is a fellow servant with the men working under

him, whether or not he has authority to hire and discharge them; and the company is not liable for an injury to one of the men resulting from his negligence.¹

In Error to the Circuit Court of the United States for the Southern Division of the District of Washington.

The plaintiff in error was a workman in the employment of the defendant in error, a corporation, which was operating a line of railway in the state of Oregon. The railroad ran through a certain cut bounded upon either side by steep and nearly perpendicular embankments. The plaintiff in error was brought into the cut with some 20 or 30 other men, under the direction of Peter Grant, a foreman, who had the ordinary authority of a section foreman, and was put to work digging out the ditches along the sides of the track and beneath the overhanging banks. While so employed, a rock became dislodged from the side of the cut above him, and fell, striking him on the head, causing a permanent injury, for which he sought damages in the present action. It appeared from the evidence that in the spring, when the ground began to thaw, the ditches of the railroad as it passed through the Blue Mountains became filled with earth and rocks which were dislodged and fell from the sides of the banks. The plaintiff and the gang of men with whom he was working had been for some time engaged in cleaning out ditches and taking rock and dirt therefrom, so that water could run out. It was usual, before beginning work in a cut, to have the banks above scraped so as to dislodge the loose material. On the morning on which the accident occurred such precaution had been taken in the first cut in which the gang had worked. Just before noon they moved to a second cut, and were directed by the foreman to go to work cleaning out the ditches, but no one was first sent up the banks to scrape down the loose rock. The plaintiff himself had been engaged in scraping the banks in the first cut, and he admitted in his testimony that he knew that no such precaution had been taken in the second cut. His explanation of this omission to scrape the banks of the second cut is that the dinner hour was approaching, and they were in a hurry. It appeared further in the evidence that rocks frequently fell from such embankments while the men were at work cleaning out the ditches, and there was testimony that one of the workmen had upon the day prior to the accident quit work on account of the risk of being injured by the falling rocks. Upon the close of the testimony the court, upon the motion of the defendant in error, directed the jury to return a verdict for the defendant, upon the ground that the company was not responsible for the negligence of the foreman of the gang of workmen, and that the plaintiff assumed the risks connected with his employment, and was guilty of contributory negligence.

P. J. Cavanaugh, for plaintiff in error.

W. W. Cotton, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The motion to dismiss the writ of error upon the ground that it was not sued out within six months after the entry of the judgment is denied upon the authority of *Insurance Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088.

It is contended that the foreman, Peter Grant, stood in the attitude of vice principal to the plaintiff in error, and that he was negligent in not first ordering the men to scrape the banks before be-

¹ Fellow servants. see notes to *Northern Pac. R. Co. v. Smith*, 8 C. O. A. 668, *Canadian Pac. Ry. Co. v. Johnston*, 9 C. C. A. 596, and *Flippin v. Kimball*, 81 C. C. A. 286.

ginning work in the ditches, and in not stationing a man to warn the gang against falling rocks. It appeared from the testimony that Peter Grant was section foreman, and had authority to hire and discharge men for the work in which the plaintiff in error was engaged, and that he reported to one F. Brown, who was one of six division road masters on the line of the railroad; that Brown, as such division road master, had authority to determine what work was to be done on his division, and from time to time inspected it and examined it; and that he in turn was required to report to the general road master in charge of the entire road, and the general road master reported to the general superintendent. Upon this statement of the facts we think there can be no question that under the ruling in *Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, Peter Grant was a fellow servant of the plaintiff in error. In that case the court held, in a case where the business of a mining corporation was in the control of a general manager, and was divided into three departments, of which the mining department was one, and each department had a superintendent under the general manager, and in the mining department were several gangs of workmen, that the foreman of one of these gangs, whether he had or had not authority to engage and discharge the men under him, was a fellow servant with the men, and the corporation was not liable to one of the men for injuries caused by the foreman's negligence in managing a machine or in giving orders to the men. It is impossible to distinguish that case from the case at bar, and it becomes unnecessary to discuss the decisions of the state courts which are cited by the plaintiff in error. The judgment of the circuit court is affirmed.

SIGUA IRON CO. v. GREENE.

(Circuit Court of Appeals, Second Circuit. October 24, 1900.)

No. 101.

1. TRIAL—STATEMENTS BY COUNSEL TO JURY.

It is not error to permit counsel for a defendant to state to the jury that he was unable to put in evidence the books of the plaintiff corporation because the court had excluded them, merely for the purpose of preventing the jury from drawing an inference unfavorable to the defendant because of their absence, where no attempt is made to state the contents of the books, or to comment on their exclusion.

2. CORPORATIONS—STOCKHOLDERS—EVIDENCE OF RELATION.

The fact that a person's name appears on the books of a corporation as a stockholder is not sufficient evidence upon which to charge him as such, but, the relation of corporation and stockholder being contractual, the assent of both parties, either express or implied, must be shown.

Thomas, District Judge, dissenting on the facts.

In Error to the Circuit Court of the United States for the Southern District of New York.

William B. Hornblower, Joseph S. Clark, Howard A. Taylor, and Henry P. Driggs, for plaintiff in error.

Kellogg, Rose & Smith, L. Lafin Kellogg, and Alfred C. Pette, for defendant in error.

Before PECKHAM, Circuit Justice, and TOWNSEND and THOMAS, District Judges.

TOWNSEND, District Judge. This action has been tried three times. On the first trial the jury rendered a verdict for the plaintiff, and the judgment thereon was reversed on appeal. 88 Fed. 203. On the second trial the court directed a verdict for the defendant, and the judgment thereon was reversed on appeal. 88 Fed. 207. This is an appeal from a judgment on the third trial, dismissing the complaint, and for costs, rendered on a verdict for defendant. It was assumed at the hearing that this court would follow the former decisions as to the questions disposed of on the former appeals, and would consider only the new contentions made on the third trial.

Plaintiff assigns 12 errors. Most of them have been passed upon on the former appeals, the reports of which contain a substantially complete statement of the facts. The transfer of stock into the name of the defendant was made on July 9, 1890. It has been held on former appeals that Exhibit CC did not, of itself, authorize the transfer of the stock; that the defendant did not necessarily, by the transfer, become a stockholder; that the appearance of the defendant's name upon the books of the company as a stockholder was not sufficient, without evidence of his authority or ratification; that being a member of the board of directors did not make him conclusively chargeable with notice of what appeared in the company's books; that the parol evidence, as between him and the company, was admissible to show that the agreement in Exhibit CC was in fact conditional.

The fourth point in plaintiff's brief is as follows: "The charge of the trial court as to the legal results flowing from the use of the words 'Sigua Syndicate' in both the agreements was error." This is not included among the errors assigned. We think there was no error of law, and that, taking the whole charge together, the jury were not misled.

The eighth and ninth assignments of error are not referred to in plaintiff's brief. We think the evidence was properly admitted.

The testimony referred to in the tenth assignment of error—that defendant never had any notice from the company, or any officer, asking for payment on account of the four hundred shares—was admissible on the question of interest, and as bearing on the question whether the company understood that defendant was the real owner of the stock.

The eleventh ground of error refers to the exclusion of evidence that Smith notified the twelve persons who were desirous to sell their stock that he had ceased his efforts to sell, and that about 36 per cent. had been disposed of. Plaintiff claims that it was material to show that there was not an oversubscription. This could have been shown, and in fact was shown, by direct evidence. That Smith notified them to that effect does not tend to prove the fact. The notice by the treasurer of the company to these stockholders was not evidence against the defendant.

The twelfth ground of error is that the court permitted defendant's counsel to state to the jury that he was unable to put in evidence the books of the company, because the court had excluded them. It is not said that he attempted to state the contents of the books, or commented upon their exclusion. It was permissible to remind the jury that no inference could be drawn adverse to the defendant by reason of their absence.

The eighth assignment of error, and the only one of any importance not disposed of in the former opinions, is that the court refused to charge the jury that the letter of July 8, 1890, was sufficient authority for the transfer of the stock. This letter was as follows:

"George F. Baker, Treasurer, Philadelphia—Dear Sir: Inclosed please find my check for \$3,000 in payment of assessment on 600 shares of stock. The other 400 shares subscribed by me has been taken by friends whom I may not see before going away, but as soon as I return will see them, and send you the names.

"Very respectfully,

B. D. Greene."

Taken in connection with defendant's prior correspondence with Smith, saying that he had placed the shares, but desired to delay sending the names, and the other evidence as to the conditional character of the subscription, this letter was fairly open to the interpretation of a request to plaintiff not to take any further action in regard to the subscription on behalf of defendant's friends until defendant could see them, and should send their names to him; and was not an authority for the transfer of the stock to defendant. If defendant's testimony is believed, said letter should clearly have such construction.

The substantial question is whether, on this trial, the court correctly stated the law as to defendant's status. In view of the former opinions and of the decision of this court in *Carey v. Williams*, 79 Fed. 906, and the decision of the New York court of appeals in *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, 31 N. E. 344, it is difficult to see how the court could have taken any other course. In the opinion on the last appeal of this case, the court said:

"A person cannot be constituted a shareholder in a corporation by a transfer of shares without his consent. The same proposition was enunciated by this court in *Carey v. Williams*, 25 C. C. A. 227, 79 Fed. 906, in these terms: 'The relation of corporation and stockholder is a contractual one, and can only be created with the consent, express or implied, of both parties.' * * * The important fact is that assent by the newcomer is an essential prerequisite. We do not understand that there is any contention here that a man may be made a stockholder by the mere unauthorized entry of his name upon the books without his knowledge or consent; or that he may, without such knowledge or consent, be made a stockholder, even by act of the legislature. It is contended, however, that when a person's name appears on the books as a stockholder, no matter how it got there, such entry is *prima facie* proof that he is a stockholder, and the burden is on him to disprove it. This proposition was discussed and decided contrary to the contention of the plaintiff in error by this court in *Carey v. Williams*, 25 C. C. A. 227, 79 Fed. 906."

On this trial, the court, in its charge to the jury, followed the foregoing statement of the law in *Carey v. Williams*. That case also

disposes of plaintiff's contention that a verdict should have been directed on the entries in the plaintiff's stock books. Judge Wallace, speaking for the court, says:

"It is not enough that he appears to be a stockholder upon the books, and when this occurs without his sanction he incurs no liability as such."

Altogether, we think the case was properly tried, and that the evidence justified the verdict.

THOMAS, District Judge (dissenting). The question is whether the defendant is liable for the sum unpaid on certain stock standing in his name on the books of the company. His defense is that he was not the owner of the stock, and that it was transferred without authority to his name. An initial fact is that the stock was transferred on the books of the company to the defendant. If the transfer was made of right, it continued of right. It was made of right if the defendant owned the stock and was bound to accept a proffered delivery of it. There is a written instrument showing his agreement to purchase it. If this agreement was complete in itself, the stock was the property of the defendant, and was transferred lawfully to him. But he was permitted to show that the agreement to purchase was qualified by an oral agreement that he should take the stock only upon his finding an opportunity to place it. Even so, the condition was fulfilled, for he notified by letter both the vendor and the company that he had placed the stock. Such notice, for present purposes, discharged the condition and perfected the purchase. Thereafter the stock was the property of the defendant. It was the privilege and duty of the vendor to deliver it, and thenceforth it was for the benefit or at the peril of the defendant, and it was the duty of the defendant to meet calls and assessments made upon it. The right to deliver thus accrued to the seller, and the defendant's obligation to accept enabled the vendor to transfer the stock to the purchaser on the books of the company. He might exercise this power to detach himself from responsibility attending the future of the stock and to attach any possible liability to the true owner. Thus the defendant's ownership was conjoined to his just and authorized enrollment as a stockholder, and there at once arose his obligation to respond in actions like the present, and no subsequent event has diminished that liability. When a contract of sale is consummated, the vendor, in the absence of modifying stipulations, may deliver the subject of the sale, and impose the burden of future consequences upon the vendor. That is the present case. These views should lead to the reversal of the judgment.

FIDELITY & CASUALTY CO. OF NEW YORK v. ST. MATTHEWS SAV. BANK.

(Circuit Court of Appeals, Fourth Circuit. November 14, 1900.)

No. 332.

REFERENCE—CONSENT ORDER—REVIEW OF REFEREE'S FINDINGS.

Where a case involving the examination of long and complicated accounts, and the taking of the testimony of many witnesses, is by consent of the parties referred to a special master to hear and determine all issues of law and fact involved, his findings and conclusions have every presumption in their favor, and are not to be set aside unless there clearly appears to have been error or mistake, or for fraud or misconduct on his part.

In Error to the Circuit Court of the United States for the District of South Carolina.

T. Moultrie Mordecai, for plaintiff in error.

S. Dibble and Charles G. Dantzler, for defendant in error.

Before PAUL, BRAWLEY, and WADDILL, District Judges.

PAUL, District Judge. This case is here on a writ of error from the circuit court for the district of South Carolina. It was brought in the circuit court of common pleas for the county of Charleston, S. C., by the defendant in error, and on the petition of the plaintiff in error, a nonresident, it was removed into the circuit court for the district of South Carolina. The object of the suit was to recover of the plaintiff in error, the Fidelity & Casualty Company of New York, the sum of \$10,000, and interest thereon. The action is based on the bond of the plaintiff in error, guarantying the honesty and integrity of J. W. Zimmerman as cashier of the said St. Matthews Savings Bank. The bond was executed July 8, 1889, and was renewed annually from that date; the last renewal being on the 8th day of July, 1894, extending the bond from that date to July 8, 1895. It was under this extension that the defalcation of the said Zimmerman occurred. After the removal of the case, the defendant below filed its answer to the complaint. The answer denies the material allegations of the complaint, and sets up affirmative defenses to the effect that the renewals of the bond were made upon false representations of the president of the bank, and that the officers of the bank were guilty of such negligence in the management and supervision of the bank and of its cashier, Zimmerman, as to relieve the defendant from any liability for the default of said cashier. A succinct statement of these defenses, as made by the master, is as follows:

"That the several renewals of said guaranty bond were made upon the warranty and representation of the plaintiff, through its president, that the accounts of said cashier had been examined and found correct, that he had performed his duties in an acceptable manner, and that the officers of the plaintiff bank knew of no reason why the guaranty should not be continued, and that, but for the said warranty and representations, said renewals would not have been made, and that the warranty and representations so made were false, and that by reason thereof the defendant was released from any liability to the plaintiff, if any ever existed; it being provided by the bond that

'any willful misstatement or suppression of fact by the employer, in any statement or declaration to the company concerning the employed, or in any claim made under this bond, or a renewal thereof, renders this bond void from the beginning.' And, further, that the plaintiff and its officers and agents were guilty of negligence and the want of due care and business caution in the management and supervision of its said bank and of the said cashier, and that if the plaintiff had caused a proper examination to be made quarterly, or at any other time, the defalcations and discrepancies of the cashier would have been easily and readily revealed, and that, if any defalcation or dishonesty occurred on the part of the said cashier during any period for which the defendant is claimed to be liable, the same occurred through the negligence and mismanagement of the plaintiff and its officers, and the defendant is not liable therefor."

The case involving the examination of long and intricate accounts, the court entered a consent order, under the practice of South Carolina, referring the same to a special master to hear and decide all issues of law and fact involved. The master took the testimony of many witnesses, and in his report, which shows a thorough and an intelligent investigation of the facts, and presents a clear statement of the law bearing upon the defenses presented by the defendant, he recommended that judgment be entered for the plaintiff for \$7,047.85, with interest at the rate of 7 per cent. per annum from the 12th of September, 1895; this being the amount due on account of defalcation under the renewal bond of July 8, 1894. The principal sum so reported as due on account of the fraud and dishonesty of the cashier is made up of his defalcations in connection with the current deposits in the bank and deposits in the savings bank department, his own personal account, the collection account, limited to other than those of its corresponding banks, and the daily balance account. The master further found that there had been no willful misstatement or suppression of fact made by the bank, concerning the said Zimmerman, to obtain the renewal of the guaranty bond of July 8, 1894. He held that there was not such negligence and want of due care on the part of the bank and its officers in the management and supervision of the bank and its cashier as to occasion the loss complained of by the plaintiff. Exceptions were filed to the master's report by both the plaintiff and the defendant. The plaintiff excepted on the ground that the master had disallowed the items and amounts claimed as defalcations of the cashier, Zimmerman, on account of collections made by him from corresponding banks. The defendant's exceptions were, in substance, that the master erred in finding, as a conclusion of fact, that the date of the discovery of the defalcation of Zimmerman was March 29, 1895, instead of April 1, 1895; that the master erred in holding that the discovery mentioned in the bond did not relate to the full and complete discovery of the entire defalcation, but to the first discovery of any single act of defalcation; that the master erred in finding that the bank, in compliance with a proviso of the bond, had immediately given notice to the defendant on the discovery of the fraud and dishonesty of the cashier; that he erred in holding, as a conclusion of law, that neither of the affirmative defenses set up in the answer could prevail; that he erred in holding that the proof was not sufficient to show that the plaintiff bank, in any statement made by it concerning Zimmerman,

the cashier, had made any misstatement of fact or suppressed any known fact; that the proof was not sufficient to show negligence and want of due care on the part of the plaintiff and its officers in the supervision of its bank and cashier as would relieve the defendant from liability on its guaranty bond; that the master erred in holding that he was not prepared to extend to a surety in a cause like this the same leniency which the law extends to a surety on a personal bond, because the latter assumes the risk through feelings of friendship and kindness, and the former as a matter of business, for a pecuniary consideration, and for the purpose of profit; that he erred in holding that no condition of the bond required the plaintiff to examine the books of account, including cash securities and vouchers, at any time; that he should have held that the representations contained in the certificate of the president of the bank were by the terms of renewal made a condition of the bond on which the action was brought; that he erred in holding that the defendant, under the condition of the bond, must reimburse the plaintiff bank for the fraudulent acts and defaults of its cashier by reason of which the bank has suffered pecuniary loss; that he erred in finding, under the head of "Current Deposits," the liability of the defendant to be \$4,531.48, under the head of "Individual Accounts" \$888.11, under the head of "Savings Deposits" \$1,095.28, and under the head of "Collections" \$532; and that he should have found, if there was any liability on the defendant, it did not exceed \$1,945.75. The exceptions were all overruled by the circuit court, the report was confirmed, and judgment entered for the amount reported as due the plaintiff. A motion for a new trial was made and overruled. Exceptions were taken to the finding of the court below in its failure to sustain the exceptions filed by the defendant to the master's report.

We do not deem it necessary to discuss any of the questions raised by the assignment of errors, as they do not, in our view of the case, present any matters of law for the decision of this court. The learned judge of the circuit court, in his opinion filed in the record on the motion for a new trial, accurately states the law applicable to an account of this character. He says:

"It would seem, in a case of this kind, involving as it does a long and intricate account, and the testimony of many witnesses, that the findings of fact by the special master should have an effect analogous to that of a special verdict found by the jury. If this be so, the court could not disturb them, except for gross error on the part of the referee, or for fraud or misconduct on his part."

In *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363, the supreme court thus states the rule:

"In cases of this kind referred to a master to state an account, depending as they do upon an examination of books, upon the oral testimony of witnesses, and perhaps, as in this case, upon the opinions of an expert, its conclusions have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

This rule had previously been laid down in *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, and approved in *Callag-*

han v. Myers, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547, and in Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. In the last case the order of reference was as follows:

"By consent and request of all the parties herein, it is ordered by the court that Hon. Richard D. Harrison be, and he is hereby, appointed a special master herein to take and decide all the issues between the parties and make his report to this court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become part of his report, which report shall be subject to like exceptions as other reports of masters."

To the report of the master, exceptions were filed, and, being sustained by the circuit court, the cause was appealed to the supreme court. Justice Field, delivering the opinion of the court, says:

"It [the court] cannot of its own motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers. But when the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration,—a proceeding which is governed by special rules,—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct,—subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise."

The order of reference entered by Judge Simonton in this case is a consent order, and is so treated by him in his opinion. It is as follows:

"It appearing to the satisfaction of the court, upon an examination of the pleadings herein, that the trial of this cause will require the examination of a long account, after hearing counsel for plaintiff and defendant, and on motion of Messrs. Mordecai & Gadsden, defendant's attorneys, it is ordered that this cause be, and the same is hereby, referred to James Izlar, Esq., as special master, to hear and decide all issues of law and fact involved herein, with leave to report any special matter; and then the said special master shall have the power and authority to demand of the parties that such books, papers, and documents be produced before him as may be necessary to elucidate the same."

The report made in pursuance of this order of reference just quoted is covered by the doctrine stated in Kimberly v. Arms, *supra*. The order referring the case to a special master directed him to hear and decide all matters of law and fact involved in the case. His findings are clearly within the scope of the order. The court below gave them the weight to which they are entitled under the principles well settled by the decisions to which we have referred. The circuit court was correct in holding that the findings of the master could not be disturbed except for gross error or fraud or misconduct on his part. No evidence of such error or misconduct appearing in the record, the judgment of the circuit court is affirmed.

UNITED STATES ex rel. ADLER v. HAMMOND, Judge.¹
(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 869.

BANKRUPTCY—APPEALABLE ORDERS—REFUSAL TO CONFIRM COMPOSITION.

Under Bankr. Act 1898, § 25, subd. 2, allowing appeals from a court of bankruptcy to the circuit court of appeals "from a judgment granting or denying a discharge," an appeal lies from an order of a district court refusing confirmation of a composition tendered by a bankrupt, and accepted by the required number of creditors. The right of appeal given by such section is reciprocal, and, as the confirmation of a composition discharges the bankrupt (section 14), opposing creditors clearly have the right to appeal from such an order, and the bankrupt has an equal right to appeal from an order refusing the confirmation. Such an appeal, moreover, is within the spirit of the provisions for review, since the order in either case is a final termination of the composition proceedings which are provided for by the act as one of the methods for the settlement of the bankrupt's debts, and the effecting of his discharge from further liability thereon.

On Petition for Writ of Mandamus to Compel Allowance of Appeal.

The petitioner, Adler, was adjudged a bankrupt upon his voluntary petition by the district court for the Western district of Tennessee on the 12th day of October, 1899. With his petition he filed a schedule of his property, and a list of his creditors, as required by the bankruptcy act of 1898. He was thereafter examined by the referee at a meeting of his creditors, and on December 8, 1899, he offered terms of composition to his general creditors, of whom 26 in number had proven claims in the sum of \$8,336. These creditors held a meeting, and 24 of them, representing claims to the amount of \$6,062.75, accepted in writing the terms of composition offered. One of the general creditors, whose claim amounted to about one-fourth of the unsecured indebtedness, objected to the acceptance of the composition. The secured creditors, of whom there were three, filed their agreement to rely solely upon their securities. The appraisers found that the assets, after paying the debts secured thereby and deducting exemptions, amounted to \$782.50. The bankrupt deposited the amount necessary to pay the composition agreed upon, and the costs, expenses, and fees in a bank designated as a depository, and thereupon filed an application for the confirmation of the composition. The matter was heard before a referee, who reported that the composition should be confirmed upon conclusions found by him, and on a subsequent order reported the facts upon the specifications of the objecting creditors relating to alleged fraudulent acts of the bankrupt, and his further finding that the specifications were not sustained. The objecting creditor excepted to the referee's report. Upon the hearing of these exceptions the court directed an order setting aside the report, refusing the confirmation of the composition, and requiring the bankrupt to pay the costs of the application. Thereupon the bankrupt prayed an appeal to this court. This was refused. The ground of the refusal, as stated by the judge in a memorandum indorsed upon the petition for appeal, was as follows: "No appeal is allowable, in my judgment. The refusal of an order confirming a proposed composition is not the refusal to grant a discharge meant by section 25, that comes when the bankrupt shall file his petition for discharge, if it be then refused. The effect of a consent by a creditor to the composition, either that he joins in accepting it, or that which is enforced upon him if the composition be confirmed, may be to release the unpaid balance of the debt, but it is not, in fact or law, the discharge referred to in section 25." The petitioner having applied to this court for a writ of mandamus requiring the judge of the district court to allow his prayer for an appeal, an order to show cause was issued and served. The answer of the respondent is, substantially,

¹ Appeal and review in bankruptcy proceedings, see note to *In re Eggert*, 43 C. C. A. 9.

that the appeal was refused for the reason set forth in the memorandum copied above, namely, that the determination appealed from was not, in his opinion, the proper subject for an appeal, to which opinion he adheres, and thereupon he submits the matter to the judgment of the court, proffering ready observance when that shall be made known to him.

B. M. Jackson, for petitioner.

Thomas M. Scruggs, for respondent.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the matter as above, delivered the opinion of the court.

The single question presented for our determination is whether an appeal lies to this court from the order of the district court refusing confirmation of the composition tendered by the bankrupt and accepted by the requisite number of creditors, under the provision relating to appeals contained in subsection 2 of section 25 of the bankrupt act. The provision is "that appeals, as in equity cases, may be taken in bankruptcy to the circuit court of appeals of the United States * * * in the following cases, to wit: * * * (2) from a judgment granting or denying a discharge." The learned judge of the district was of opinion that it does not. His reasons are amplified in an elaborate opinion reported in 103 Fed. 444. Upon attentive consideration of the subject and of the reasons assigned by him, we are unable to agree to that conclusion. The general purpose of the act, so far as it relates to creditors, is that the assets of the debtor liable to be subjected to the payment of their dues shall be speedily collected and distributed to them in accordance with the equitable rules thereby prescribed. As concerns the bankrupt, the leading purpose is that, having surrendered to his creditors all his property subject to their demands, he shall be released from all further liability for his debts, and be given a clear field for future effort. The law prescribes that, after he has been adjudged a bankrupt, has been examined, and has filed a schedule of his property, and a list of his creditors, two methods of procedure are open, each of which is designed to accomplish the ends intended by the act. One of these is by the tendering of a certain sum to his creditors by the debtor in lieu of the amount which might ultimately be gathered from the assets, and their acceptance thereof. Obviously, this amount is contemplated as a sum which will be the equivalent of the assets which would be obtained by the other and more tedious course, for the creditors have the right to reject it. If they accept it, their object is satisfied, and it only remains to execute the purpose towards the bankrupt. This is done by the confirmation of the composition by the court, which is required to see that the non-assenting creditors are not wronged thereby; and the law declares that the confirmation shall have the effect to release or discharge the bankrupt. As was said by Mr. Justice Miller in *Wilmot v. Mudge*, 103 U. S. 217, 219, 26 L. Ed. 536, 538: "The composition proceeding is * * * one of the modes which the bankrupt law authorizes of releasing the debtor and securing to his creditors an equal share of his means." In *Liebke v. Thomas*, 116 U. S. 608, 6 Sup. Ct. 497, 29 L. Ed. 745, it was said to have been decided in *Wilmot v. Mudge*

"that, though no written discharge be granted, a lawful composition and its performance by the party has the same effect." See, also, *Smith v. Morganstern* (C. C.) 2 Fed. 674, per Judge McKennan; In re *Bjornstad* (D. C.) 5 Fed. 791, per Judge Bunn. If this course is not pursued, or proves abortive, the proceeding advances by the other method. The assets in specie are turned over to the trustee, who collects and converts them into money, and that is distributed to the creditors, who then get that which they would have reached by the former course, more or less, as it may turn out. Then, because the record does not show any formal declaration of the right of the bankrupt to be released, it is provided that he may obtain an order declaring that right. It is to be noted that the court is charged with the same duty whether it is sitting to determine whether a composition should be confirmed or where it is considering the propriety of a formal discharge, namely, to ascertain whether the conditions which the law prescribes have been complied with. This general survey may conduce somewhat to a clearer apprehension of the significance and essential character of the provisions with which we have to deal. The act provides an appeal from a judgment which grants or denies a discharge. The meaning of the word "discharge" is defined by section 1 to be "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act." By section 14 it is declared that the confirmation of the composition shall discharge—i. e. release—the bankrupt from his debts, except those from which by the other method he is not discharged. The one "discharge" is the equivalent of the other for the purposes of the act, and both are covered by the same section of the act (14), which relates solely to that subject. Moreover, it is to be observed that in both methods the procedure is under the control of the judge. In the case of a composition, the nonassenting creditors are given the opportunity to contest the confirmation which is to operate as a discharge. It is against that consequence that the contest is directed. It is made because the nonassenting creditors are not satisfied that their claims shall be discharged by the payment of the amount tendered. Questions as important, perhaps, as any that may occur in bankruptcy proceedings may arise upon the hearing. If the composition is confirmed, the contesting creditors are cut off from any further consideration of the facts unless they can appeal. And so of the bankrupt. Whichever way the decision goes, it is the end of that endeavor of the debtor and the creditors to close the matter. To be sure, there is a power of revocation given to the court upon the petition of a party interested and proof of "fraud practiced in the procuring of such composition." Section 13. There is a like power given where a discharge in terms has been granted when "it shall be made to appear that it was obtained by the fraud of the bankrupt." Section 15. This still further illustrates the parallelism of the courses. It seems improbable that congress should have intended to deny an appeal while granting it upon a similar inquiry preliminary to a discharge in the ordinary course. Suppose the composition is confirmed, and the bankrupt is thereby discharged. Has the creditor no right of appeal? And it can scarcely be doubted that, if

the creditor has the right if confirmation is granted, the debtor would have the same right if it is refused. When the language of a statute is admissible of different constructions, it should be so construed as to make its provisions harmonious and consistent with each other, and most completely to secure the rights of all persons affected thereby. Black, *Interp. Law*, pp. 60, 61.

It is suggested by the learned judge of the district court in his published opinion, and again by counsel in his brief filed in opposition to the writ, that the bankrupt is not finally concluded by the judge's refusal of confirmation, but may still go on by the usual routine, and in the end be discharged, if he is entitled to be. But the law has given the right to this procedure, and the parties are entitled to this relief if they have complied with the conditions prescribed. It would be a clear denial of a substantial right if the court in a case where those conditions are shown to exist should stop the parties there, and turn them around to proceed in that which the court might think the more regular route. The opinion of the district judge exhibits disfavor towards those provisions of the act relating to composition, and the reasoning by which his conclusion is reached seems much influenced by a sense of obligation to so construe the statute as to subordinate those provisions to what is regarded as the preferable procedure. We do not think, however, that the discharge of the debtor by effecting composition with his creditors is so far contrary to the justice due to creditors as to require the court to resort to acute criticism to avoid the apparently proper construction of the act. A provision of this kind was first brought into bankruptcy proceedings in this country by amendment in 1874 of the act of 1867, and to some extent it became subject to the rule of limitation upon an amendment which changes the pre-existing law. Whatever influence that rule may have had upon the construction and operation of the then existing law, it can have no application to the present act. Each part of it should be construed and given effect in such a way as to promote and accomplish the general purpose of the act. The new course is the most expeditious, and in it the interests of all parties are safeguarded by the same court, guided by similar rules, and seeking to accomplish the same results, to the creditors as well as to the debtor, as are reached by the more prolonged, though more familiar, route. It seems to us that the giving the effect of a discharge to the order confirming a composition makes it the equivalent of an order in terms discharging the bankrupt, and that the right of appeal is given where either party considers himself aggrieved by the granting or refusing it, as the case may be, as well where the right accrues by reason of a composition as where the assets of the debtor are taken in hand by the trustee for distribution.

The fact that an application for the allowance of the appeal might be made to another judge is not a sufficient objection to the allowance of the writ. We think, therefore, the relator is entitled to the writ as prayed; but, as we have no reason to doubt that its actual issuance is quite unnecessary, it will be withheld until the further order of the court.

In re HILBORN.

(District Court, S. D. New York. November 17, 1900.)

1. BANKRUPTCY—OFFER OF COMPOSITION—NOTICE.

Under Bankr. Act 1898, the calling of a special meeting of creditors to receive an offer of composition is not required, and a submission of such offer to the creditors at their first meeting after an examination of the bankrupt is competent and sufficient; such submission being within the terms of the notice prescribed, which states that the purpose of the meeting embraces the transaction of "such other business as may properly come before said meeting."

2. SAME—DUTIES OF REFEREE.

In view of the provision of Bankr. Act 1898, § 38a. subd. 4, which excepts from the referee's authority questions arising out of applications for compositions, the proper practice is for a referee, when requested, in accordance with a rule of court, to appoint a day for bringing the composition before the court, and to issue the required notices to creditors, suggesting in his report any legal questions arising upon the composition papers.

In Bankruptcy.

Lewenson, Kohler & Schattman, for bankrupt.

BROWN, District Judge. The question presented on this motion is whether the bankrupt's initial offer of "terms of composition to his creditors" pursuant to section 12, can only be made at a special meeting of creditors called for that purpose, or whether it may properly be made at the first regularly called meeting of creditors after the examination of the bankrupt has been completed. The facts are as follows:

The bankrupt was adjudicated on his own petition on October 1, 1900. His scheduled debts amount to about \$54,000. The first meeting of creditors was held before the referee in charge on October 30th on the usual notice to all creditors. Claims to the amount of \$30,000 were proved; the examination of the bankrupt was had and completed; and thereupon he submitted to the meeting an offer of compromise in writing, verified before the referee, and offering a composition of 65 per cent., namely, 25 per cent in cash, and the rest in indorsed notes. A resolution was put by the referee, as appears from the stenographer's notes, in the following words:

"A motion is duly made and seconded that it is the sense of the meeting that said composition is acceptable to the creditors here represented; that it is the best interests of the creditors to accept the offer. The motion was carried unanimously."

During the 10 days following, the bankrupt, according to the affidavits submitted, deposited the requisite cash and the notes, and procured acceptances of creditors to the amount of \$40,000, being a great majority of the creditors in number and amount; and thereupon on the 9th day of November he filed with the referee a petition, addressed to the district judge, stating the above facts and praying for a confirmation of the composition. The referee was thereupon requested to fix a day, in accordance with rule 11 of this court, on which the application for a confirmation of the composition might be heard before the judge, and to issue notices for the hearing to creditors, pur-

suant to section 58 (2) and section 39 (4). The referee deferred action, doubting the sufficiency of the previous offer to creditors, in consequence of the language of Judge Coxe in the Case of Rider (D. C.) 3 Am. Bankr. Rep. 178, 96 Fed. 808, 810, in which, referring to section 12, he says that "the offer should be made to all his creditors whether they have proved their debts or not." The question has accordingly been submitted to this court.

The facts in the Case of Rider were quite different from the present. In the report of that case it is stated that at the meeting of creditors, after the examination of the bankrupt and "partly during the session of the meeting, but not as a part of the proceedings thereof, the bankrupt presented the proposed written composition herein to 11 of the 15 creditors in attendance. * * * It does not appear that the paper was presented to the remaining 4 creditors who had proved their debts. It was not presented to the general creditors at all." The acceptance of the offer also in that case was only by a majority in number and amount of the creditors who had proved their claims, and much less than a majority of the creditors.

In the present case the offer of compromise was made to the meeting as such. It was a part of the proceedings of the meeting; and it was resolved that the acceptance of the composition was for the interest of the creditors. The point here raised was not presented for decision in the Case of Rider, nor did Judge Coxe decide that an offer presented at the first meeting of creditors could not be deemed an offer made to all the creditors; since it is expressly found in that case that the offer was not made to the meeting, nor to all the creditors present.

Under the amendment of 1874 to the bankruptcy act of 1867 (18 Stat. 183, c. 390, § 17) a meeting of creditors was required to be called to consider any offer of compromise proposed by the bankrupt. The mode of proceeding under that section was altogether different from that contemplated by section 12 of the present act. Under the former act, the proceeding for a compromise might be initiated not only before any examination of the bankrupt or schedules filed, but even before adjudication; so that creditors when the offer was thus made, might have no knowledge of the actual condition of the bankrupt's affairs. As it was essential that provision should be made for an examination of the bankrupt, if desired, under such circumstances it was necessary that a meeting should be called at which the debtor might be examined, or a full statement of his affairs secured in order that the creditors might have sufficient information to act intelligently upon the offer, since such information could not otherwise be obtained. It is evident that the mode of proceeding under the present act was made intentionally different, since section 12 expressly prohibits any offer of compromise until "after an examination of the bankrupt in open court, or at a meeting of his creditors." When such a meeting is held and the bankrupt's examination is concluded, the object of the special meeting of creditors required by the former act is presumptively secured; and, accordingly, no special meeting merely to receive an offer of compromise is anywhere required by the present act, but only notice of a hear-

ing before the judge on the question of confirmation. Section 58a (2). After the acceptance of the composition by a majority of creditors in number and amount, the provision for notice to all creditors of the application to confirm it, gives full opportunity to all for examination, objection, consultation and hearing thereon. I see no sufficient reason, therefore, for adding to the act a requirement which it nowhere contains, to call a new meeting merely to receive the offer, when this would serve only to delay the proceeding and add to the expense. The notice issued for the first meeting states that it is called in order that creditors "may attend, prove their claims, appoint a trustee, examine the bankrupt and transact such other business as may properly come before said meeting." After the examination of the bankrupt at such a meeting, the consideration of an offer of a compromise is by section 12 immediately in order, if the bankrupt desires to make such an offer to his creditors, and it is embraced in "such other business as may properly come before said meeting," within the terms of the previous notice, in the absence of a requirement of any special call or special notice on that subject. Section 58a states in eight separate subdivisions the objects for which special meetings of creditors are required to be called, and this is not among them. In view of section 17 of the act of 1874, and of the obvious deliberate change in the mode of procedure as to compositions adopted by the present act, the omission of the requirement of a special meeting to receive an offer of compromise must be deemed intentional, and no longer required. Section 56a further provides that "creditors shall pass upon matters submitted to them at their meeting by a majority vote in number and amount," thus recognizing that matters other than a choice of a trustee may be submitted for their consideration. The offer being thus properly submitted to a meeting of creditors, regularly called, is in law a submission to all the creditors under sections 12 and 56, if an initial submission of the offer to all is necessary; and it was competent and proper for the creditors, therefore, after the examination of the bankrupt, to pass, if they desired, such a resolution as was passed at this meeting as a part of its proceedings, expressing their opinion that the composition offered was desirable and in the interest of creditors.

Mr. Collier in annotating the Case of Rider, 3 Am. Bankr. Rep. 178, 179, 96 Fed. 808, intimates that a private circulation of an offer among the creditors so far as to obtain a majority in number and amount, might be a sufficient offer to creditors. It is not necessary to consider that question here. Form 60 (32 C. C. A. lxxxii., 89 Fed. lviii.), drawn from the practice under the act of 1867, with a notice for a meeting of creditors, no doubt furnishes an easy, convenient and desirable method of presenting an offer of compromise to all the creditors, when they are numerous or widely scattered, and the offer has not been previously presented at any regular meeting; but there is nothing either in the present act or in the general orders of the supreme court analogous to general order 36 (18 Sup. Ct. ix.) under the act of 1874, that makes this course obligatory; and forms 61 and 62 (32 C. C. A. lxxxiii., 89 Fed. lix.), though reciting the pre-

liminary conditions for the application and confirmation of the composition, make no reference to any special meeting to consider the original offer.

I am of the opinion, therefore, that a submission of the bankrupt's offer of composition to the creditors at their first meeting after an examination of the bankrupt, is competent and sufficient under the present act. I may add that under the provision of section 38a (4) excepting from the referee's authority "questions arising out of the applications of bankrupts for compositions or discharges," I think that whenever composition papers stating a general conformity to the rules are presented to the referee for the purpose of bringing the composition before the judge for confirmation, and legal questions arise thereon, the better practice would be for the referee to appoint the day and issue the required notices to creditors, if requested to do so, in accordance with rule 11 of this court, suggesting, however, in his report to the judge his doubts, if any, as to the regularity or propriety of the mode of procedure adopted.

In re MOORE.

(District Court, D. West Virginia. November 19, 1900.)

BANKRUPTCY—WITHHOLDING PROPERTY FROM TRUSTEE—SUMMARY PROCEEDINGS.

On the appointment and qualification of a trustee in bankruptcy he is vested with the title to the bankrupt's property, which carries with it constructive possession. The property is thus brought into the custody of the court, and the trustee cannot be compelled to resort to a suit to recover its possession, where his right is not contested, but any one withholding such possession while making no claim to the property is guilty of a contempt of court, and may be summarily proceeded against for its recovery.

In Bankruptcy.

JACKSON, District Judge. The certificate of the referee, and the report of the trustee of the above bankrupt, which have been certified to the district judge, show that the bankrupt, just prior to the filing of the petition herein, turned over to his wife certain moneys and properties amounting to \$300 in value, which properties she now refuses to turn over to the trustee, although admitting the receipt. The wife of said bankrupt has made no claim of ownership of said property, but simply claims, according to the record now before me, that she is advised by her counsel not to deliver possession thereof to said trustee unless ordered by the court. While title to property or moneys claimed by the trustee to belong to the bankrupt are not ordinarily to be tried by the district court, and the claims of ownership of adverse claimants summarily be passed upon and determined by this court, yet, the ownership not being contested, the trustee should not be driven to his action to obtain possession of property of the bankrupt simply because such property is in the possession or custody of another not claiming ownership thereof. Were this the case, the trustee might be compelled to institute suit for every sepa-

rate item of the bankrupt's estate not in the personal, physical possession of the bankrupt at the date of the adjudication; and the malice, caprice, or whim of the bankrupt, or the various parties who chanced to have physical control of portions of the bankrupt's estate at that date, could, on any pretext, or without pretext, nullify the entire purpose of the act. Fortunately, the bankruptcy act is not subject to such an absurdity. As soon as the trustee is appointed and qualified, he is vested with the title to the bankrupt's property. The vesting of the title gives him constructive possession of the property the instant the title passes. Such property is thereby brought into the bankruptcy court, and placed in its custody, and under its protection, as fully as if in the visible presence of the court. Being in the custody of the bankruptcy court, to interfere with it or withhold it is contempt of such court, and may be punishable as such. Section 21e provides that a certified copy of the order approving the bond of the trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and is sufficient to authorize and require all custodians of such property, wherever situated, to deliver it to such trustee. Section 70, subd. 5, provides that the trustee shall be vested by operation of law with the title of the bankrupt to all "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him." Upon the facts of this case an order should be entered requiring Mrs. Moore to forthwith turn over to the trustee all property of the bankrupt of every description, in her possession, and a failure to comply therewith would, upon proper proceedings had thereon, constitute a contempt of this court.

In re SCHELD.

(Circuit Court of Appeals, Ninth Circuit. November 5, 1900.)

No. 647.

BANKRUPTCY—EXEMPTIONS—LIFE INSURANCE POLICIES.

The provision of Bankr. Act 1898, § 70, subd. 5, which makes an insurance policy having a cash surrender value payable to a bankrupt or his estate assets in the hands of his trustee unless he shall pay or secure such surrender value, is a specific limitation on section 6, which secures to the bankrupt, in general terms, the benefit of the exemption laws of the state, and title to such a policy vests in the trustee, notwithstanding it is exempt from execution under the state laws.

In Bankruptcy.

A. M. Johnson and Riordan & Lande, for petitioner.
Isaac Joseph, for respondent.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. In this matter the sole question presented for decision is whether insurance policies having a cash surrender value, and exempt from execution under the laws of the state, pass

to the trustee of the bankrupt as assets unless the insured secures to the trustee such cash surrender value. Section 6 of the present bankrupt act declares:

"That this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

This, as will be seen, is a general provision, and, if it stood alone, would clearly exempt the policy in question; for, under the law of California, such a policy is exempt. But in a later section of the bankrupt act (section 70) it is declared that the trustee of the estate shall become vested by operation of law with the title of the bankrupt, "except in so far as it is to property which is exempt, to all * * * property which, prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have an insurance policy which has a cash surrender value payable to himself, his estate or personal representative, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets." In respect to these provisions we agree with the views of Judge Shiras as expressed in *Re Lange* (D. C.) 91 Fed. 361, that section 6 "is the declaration of the general purpose of congress to secure to bankrupts the exemption provided for by the laws of the state in which they reside, but that this general purpose is limited by the subsequent clause of section 70, which declares the rule to be applied with respect to a named and particular kind of property, to wit, policies of insurance having a surrender value payable to the bankrupt or his estate. The fact that this special clause is preceded by the word 'provided' does not in any sense limit the force thereof. Thus, in *Railroad Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. Ed. 377, it is said: 'It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail; thus having no greater signification than would be attached to the word "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.' Giving to the words used in section 70 their usual and fair import, they clearly declare that policies of insurance of the character of that in issue in this case pass to the trustee as part of the assets of the bankrupt; and, as these words deal with a specific matter, they must be construed to be a limitation upon the general declaration with respect to exemptions found in section 6." It will be seen that the clause of section 70 above quoted does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but

is limited to policies the proceeds of which are payable to the bankrupt himself, his estate, or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankrupt act. If there is anything unjust or unwise in this,—which, however, we are unable to see,—the remedy is with congress alone. The judgment is affirmed.

In re CORBETT.

(District Court, E. D. Wisconsin. November 17, 1900.)

BANKRUPTCY—TRANSFER OF PROPERTY TO ATTORNEY—UNEXECUTED AGREEMENT.

An agreement by an insolvent debtor, made after the filing of a petition in involuntary bankruptcy against him and in contemplation of the filing of a voluntary petition, that his attorney should take certain goods in payment for his services, where there was no actual delivery or change of possession until after the adjudication upon the voluntary petition, did not constitute a transfer of the property, within the meaning of Bankr. Act, § 60d, and the goods, having been removed after such adjudication and while they were in custodia legis, must be restored to the trustee.

In Bankruptcy. On review of findings and order made by the referee, on application for an order to require the attorney for the bankrupt to turn over certain goods taken from the stock under claim of security or payment for services.

Carter & Pedrick, for creditors.

John S. Rountree, for bankrupt.

SEAMAN, District Judge. The material facts, as found by the referee and supported by the testimony, are these: After the filing of a petition by creditors for involuntary bankruptcy the attorney for the bankrupt stated that he would take for his services the goods upon certain shelves in the store, the bankrupt either assenting or not refusing, and advised the filing of a voluntary petition in bankruptcy. Such petition was thereupon filed by the bankrupt,—with schedules wherein the goods so selected by the attorney were invoiced as of the value of \$100, and held for attorney's fees,—and adjudication was entered thereupon. The goods were not removed until after adjudication, but before the appointment of a trustee. The briefs submitted upon one side and the other discuss a question which is not involved in the present controversy,—whether the voluntary petition was rightly filed, and displaced the creditors' petition through the adjudication. Nor is it material to determine the effect of section 60d upon a payment or transfer perfected thereunder. These facts are undisputed: (1) That the alleged transaction occurred after the filing of the petition against the debtor; and

(2) that there was no actual delivery or change of possession to make a lien or transfer effective before the res was brought within the jurisdiction of the court. Consequently no transfer was made within the meaning of the provision referred to, and, the property having been removed when in custodia legis, possession must be restored. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. If lien were asserted, it could be enforced only through an application to the court; but it is not apparent how it could exist under the facts stated, or be essential to an allowance of reasonable fee, under section 64b. The order of the referee denying the application of the trustee for restoration of the property in question is disapproved, with direction to grant an order as prayed.

RICHARDSON v. WOODWARD et al.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1900.)

No. 349.

1. BANKRUPTCY—EXEMPTIONS—CONSTRUCTION OF STATUTES.

Courts of bankruptcy, in determining the claims of bankrupts to exemptions under state laws, will follow the construction placed upon such laws by the highest court of the state, so far as they have received a construction, and beyond that will apply to them the general, established rules of construction.

2. SAME—HOMESTEAD EXEMPTIONS—MARRIED WOMEN.

Under Const. Va. art. 11, which secures to "every householder or head of a family" a homestead exemption not exceeding in value \$2,000, and provides that it shall be "liberally construed to the end that all the intents thereof may be fully and perfectly carried out," a married woman who holds the title to the property, although living with her husband, is entitled to claim the exemption, as against her own creditors, where she has been trading as a feme sole. She is the head of a family, either alone or jointly with her husband, for homestead purposes.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Virginia, in Bankruptcy.

Mrs. Marian H. Richardson, a married woman, conducted a mercantile business at Plumpoint under the style of J. L. Richardson, Agent. J. L. Richardson, the agent, was her husband. The family consisted of the husband, the wife, and a daughter 13 years old, all of whom resided in a house owned by the wife. Mrs. Richardson was the postmistress at Plumpoint, and the post office was kept in the store, and managed by the husband, who conducted the business. Previous to entering into this business J. L. Richardson was a clerk for R. E. Richardson, and Mrs. Richardson boarded her husband and the other clerks of R. E. Richardson. Just when J. L. Richardson ceased to clerk for R. E. Richardson, and opened business in his wife's name, does not appear; but about the 10th of May, 1898, Mrs. Marian H. Richardson made an assignment for the benefit of her creditors, and closed the business. She and her husband were both out of business from this time until about September, 1898, when J. L. Richardson again commenced business in the same house as agent for T. J. Richardson, his brother. During all the time he was conducting the business for his wife, while he was out of business, and also while conducting business for T. J. Richardson, J. L. Richardson carried passengers back and forth from Plumpoint to the station, and money made from this and other sources was used to aid his wife in supporting his family. The goods conveyed in the assignment did not pay off the creditors of J. L. Richardson, Agent; and on the 5th day of January, 1899, Mrs. Marian H. Richardson filed

her petition praying to be adjudged a bankrupt, and on the next day the order of adjudication was entered. Afterwards J. L. Richardson filed a petition in bankruptcy, and claimed all his property under what is known in Virginia as the "Poor Debtors' Law" (section 3650 et seq., Code Va.), which exempts certain chattels to "a householder or head of a family." Marian H. Richardson filed an amended petition, and claimed her real property under what is known as the "Homestead Exemption Law," which exempts to a householder or head of a family \$2,000, free from levy, garnishment, or distress. The title to the real estate is in the wife, Marian H. Richardson; and the husband testified that the wife managed the business of the family, and had always been regarded as the head of the family since their marriage, and he was an assistant or helpmate in getting along; that she was postmistress, took boarders, sewed, and was a dressmaker. The petitioner, on examination, testified that she was a householder and head of a family, and she supported the family by the income from the store conducted by her husband as her agent, and other sources.

R. T. Lacy and John A. Lamb, for petitioner.
Isaac Diggs, for respondents.

Before GOFF and SIMONTON, Circuit Judges, and PURNELL, District Judge.

PURNELL, District Judge (after stating the facts as above). The only question presented and argued is whether, being a married woman living with her husband, petitioner is entitled to the homestead exemption as "a householder or head of a family" as provided by the constitution and laws of Virginia. No question of procedure is involved,—as to whether the bankrupt had properly set up a claim for the exemption. Section 6 of the bankruptcy act, approved July 1, 1898, provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

The intention was to adopt the state laws governing exemptions. Hence the courts of bankruptcy will look to, and be governed by, the constitutions, statutes, and decisions of the several states and territories, in deciding who is entitled to exemptions, and the amount and species of property to be exempt. A bankrupt is entitled to the same exemptions as if proceeded against as a debtor under the state law, and none other. "Shall not affect" means shall not enlarge or diminish. In determining these exemptions the bankrupt courts will follow the construction given the state laws by the highest courts of the state the statute of which is involved. The decisions to this effect are numerous and uniform. But where there is no construction of a state law by the state courts, or there is a conflict of construction, and a proper case is presented, involving a construction of state constitutions or statutes, the court of bankruptcy will, as other courts of the United States do, give it a construction to carry out the purport and intent of the act of congress; and section 2, subd. 11, provides that the courts of bankruptcy shall determine all the claims of bankrupts to their exemptions. Otherwise, they will follow the interpretation of the

state courts. *Marly v. Railroad Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925; *Provident Sav. Inst. v. Massachusetts*, 6 Wall. 630, 18 L. Ed. 907; *Randall v. Bingham*, 7 Wall. 541, 19 L. Ed. 285. It appears, was admitted in the argument, and is stated by the district judge, that the courts of Virginia have not considered or decided the question involved in the case at bar. These courts have construed the constitution and statutes referred to, but not as bearing upon or involved in this question of homestead exemptions. Had they done so, this court would follow their interpretation. In the absence of such decisions, this court must determine the claim of the bankrupt to exemptions, not upon any supposition of how the state courts would probably decide, but according to established rules of construction. The husband does not claim the homestead exemption. The poor debtor's exemption of specific articles of personal property, which he has claimed, is provided for in a different statute, and can in no way affect a decision of the question under consideration. That is a personal property exemption, personal to the debtor. It is founded on a different policy.

The general rule is that exemption laws should be liberally construed. The constitution of Virginia (article 11, § 7) emphasizes the rule, and makes it more specific, by providing, "The provisions of this article shall be construed liberally to the end that all the intents thereof may be fully and perfectly carried out." What was the legislative intent in the adoption of article 11 of the constitution of Virginia, and the acts of assembly in pursuance thereof? "All the intents" to be fully and perfectly carried out? Homestead laws are enacted as a matter of public policy, in the interest of humanity,—that, though a citizen may be overtaken by reverses of fortune, he and those of his household shall not be homeless, without shelter, raiment, and food. The debtors' prison and attendant evils meet with little favor in modern legislation. The policy of the law is that families shall not be deprived of shelter and reasonable comforts. The state is concerned that the citizen shall not be divested of the means of support and reduced to pauperism. *Thomp. Homest. & Ex.* p. 1; *Wap. Homest.* pp. 3, 4, and cases cited. The exemption is intended for the family. The decisions in Virginia do not controvert or differ from all the other authorities on this point; for Judge Staples, in delivering the opinion of the court in *Shipe v. Repass*, 28 Grat. 716, says:

"No one can look into the provisions of our constitution and the adjudicated cases of other states, and fail to see that the primary object is to provide for the family."

This policy is well stated in *Wap. Homest.* p. 4:

"The conservation of family homes is the purpose of homestead legislation. The policy of the state is to foster family homes, as the factors of society, and thus promote the general good. To save them from disintegration and secure their permanency, the legislator seeks to protect their homes from forced sales, so far as it can be done without injustice to others. * * * Families are the units of society, indispensable factors of civilization, the basis of the commonwealth. Upon their permanency in any community depends the success of schools, churches, public libraries, and good institutions of every kind. The sentiment of patriotism and independence, the spirit of free citizenship,

the feeling of interest in public affairs, are cultivated and fostered more readily when the citizen lives permanently in his own castle, with a sense of its protection and durability."

The reverse effect would be produced by a sale of the homestead and destruction of home ties. Founded, therefore, on sound public policy, the homestead is intended for the family. It is not a "poor law."

Article 11 of the constitution of Virginia secures, in addition to the articles now exempt, etc. (those claimed by the husband), to "every householder or head of a family" an exemption not exceeding in value \$2,000, to be selected by him. The personal pronoun "him" has no bearing, as it may be construed "her"; for section 5, subd. 13, Code Va., provides that "a word importing the masculine gender only, may extend to and be applied to females as well as males." Petitioner is a householder, for the title is in her; and the words "or head of a family" seem to be qualifying words, for it is conceded that an unmarried man could not, under this provision, claim the exemption, nor could one not a householder do so. The provision might, therefore, be read "every householder who is the head of a family," which, in the light of the decisions, seems to be a proper paraphrase of the language. The husband could not claim the exemption. The title is in the wife, and he is not the householder. If, then, the wife cannot claim it, the primary object of the constitution, as stated by Judge Staples,—to secure a homestead for the family,—is defeated, and the provision of section 7, art. 11, of the constitution is inoperative. The article is not "liberally construed to the end that all the intents thereof may be fully and perfectly carried out."

The husband is generally and for many purposes the head of the family. He owes it as a moral duty to support his wife and children. A failure to do so is in many jurisdictions made a crime. He may say where they shall reside, but the home provided must be suitable, or the wife would be justified in leaving him,—if the place is not suitable. *Hutchins v. Hutchins*, 93 Va. 71, 24 S. E. 903. This was a divorce case, and in no way involved the question of homestead. The records of the courts show that husbands do not always discharge this and many other duties incumbent upon them. When he fails in these moral and legal obligations; when an intelligent, active, industrious, frugal woman finds she has married a man who, instead of coming up to the standard of husband, is a mere dependent, who acknowledges that he is only a helpmate to his wife, obeys her instructions, pours his little earnings into her lap, acknowledges her to be and to have always been the head of the family, and leaves to her its support,—it would be contradictory of fact and an absurd construction of law to say he, and not she, is the head of the family, and deny to her the benefits intended for the family out of her separate estate, property she has accumulated, because the title is in her and she lives with her husband. This would seem to defeat instead of construing the law "to the end that all the intents thereof may be fully and perfectly carried out." While there are no decisions on the question under con-

sideration, an authority on state law, whose opinion is entitled to great respect, not only within but beyond the limits of the state, in discussing this question, says:

"A married woman with separate property and a family may, it seems, claim the privilege of homestead; but she and her husband can have but one exemption between them." 4 Minor, Inst. pt. 1, p. 1007.

And for this *Thomp. Homest. & Ex.* § 64, pp. 220-226, and cases cited, are quoted as authority. To the same effect is *Wap. Homest.* p. 63. This last authority says:

"The law recognizes husband and wife as the united head of their family for homestead purposes. It allows either to own the property upon which the homestead privilege of both is based. It allows either to claim the benefit when the other does not."

Under the Code of Virginia many of the disabilities of a married woman have been removed by statute, and she is entitled "to hold, control and use her separate estate as if she were sole, and by her own act encumber, convey, devise, bequeath or otherwise dispose of it in the same manner and with like effect as if she were unmarried." Code, c. 103. "She may engage in trade and carry on business for her separate use and benefit the same as though she were unmarried. She may make contracts as if sole, in respect to such trades, business, labor, services and her said estate or upon the faith and credit thereof. * * *" Section 2288. And she may sue and be sued as though she were unmarried. Section 2289. In short, she has been liberated from many of the restrictions and disabilities of the common law, and placed upon a higher plane in the eye of the law. In many of the states having laws similar to the Virginia constitution, where the question has been decided, where the married women owned the fee and were the debtors, they have been allowed to claim the homestead exemptions; and in those states the rights of married women were not as liberal as under the statutes above cited. *Partee v. Stewart*, 50 Miss. 720; *Brigham v. Bush*, 33 Barb. 596; *McPhee v. O'Rourke*, 10 Colo. 301, 15 Pac. 420; *Crane v. Waggoner*, 33 Ind. 83; *Wilson v. Cochran*, 31 Tex. 680; *Orr v. Shraft*, 22 Mich. 260; *Thomp. Homest. & Ex.* pp. 220-224; *Wap. Homest.* pp. 64-66. The wife may represent the united head of the family in applying for homestead, upon the husband's request, or upon his neglect to apply in behalf of the family. *Wap. Homest.* p. 64, citing *Bowen v. Bowen*, 55 Ga. 182; *Cheney v. Rodgers*, 54 Ga. 168; *Smith v. Ezell*, 51 Ga. 570; *Page v. Page*, 50 Ga. 597; *Larence v. Evans*, 50 Ga. 216; *Connally v. Hardwick*, 61 Ga. 501; *Fareley v. Hopkins*, 79 Cal. 203, 21 Pac. 737. If the wife owns the fee, she is the proper person to have it made the family reservation or exempt home. She has thus the dedication of her own separate property. *Wap. Homest.* p. 64.

The case of *Partee v. Stewart*, cited, resembles the case at bar. The words used in the Mississippi statute are, "The head of every family, being a white person and a house-keeper." On page 721 of that case, Judge Simrall, in delivering the opinion of the court, used the following language:

"She was the exclusive owner. The marital rights of the husband did not extend to the income, rents, and profits. She could lease without the concurrence of her husband, and could put the lessee in possession of the premises, including the buildings. Having this large control over the property, she was certainly within the reason of the statute, and we think within its words. The debtor must both own and reside upon the land,—must be a householder and have a family. Under that policy which secures to the wife all the property owned by her at the time of the marriage, and all subsequent acquisitions, there must be a multitude of instances where all the means for the support of the family are exclusively hers; and the argument is just as strong to protect her homestead from seizure and sale as where the property belongs to the husband, and he is the debtor."

Brigham v. Bush, cited, is parallel to the case at bar. The New York statute provides that certain property "when owned by a person being a householder shall be exempt." The court held that Mrs. Brigham, although married, was entitled to hold a part of her separate estate as exempt under the New York statute.

McPhee v. O'Rourke is in point. The Colorado statute provides that "every householder in the state of Colorado, being the head of the family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars," etc. The court held that a married woman owning separate estate was entitled to the benefit of the act.

Crane v. Waggoner, referred to above, is similar to the case at bar. Section 1 of the homestead laws of Indiana provides "that an amount of property not exceeding in value three hundred dollars owned by any resident householder, shall not be liable to sale or execution or any other final process from a court," etc. A judgment was obtained against the wife, and levied upon the property which formed a part of her separate estate. The wife was residing with her husband, and claimed the property levied upon as exempt to her as a homestead. The court held that the wife was entitled to hold the property levied upon as exempt, and that, her property being less than \$300 in value, the wife and husband had the right to claim a joint homestead. Judge Ray, in delivering the opinion of the court, used the following language:

"The language of the law must therefore be construed with regard to the declared objects and purpose to be accomplished, and effect given, so far as reasonably can be, to the constitutional declaration. The plain intent is to preserve a home or support for the family, and not for its head, as distinguished from its members. Where, therefore, the husband and wife are living together, and the property of the husband does not reach the limit fixed by law, and the wife is the owner of the property levied upon, and yet claimed as exempt, and is herself the real debtor in the judgment and execution, we must regard her claim to exemption as valid, to the extent necessary to make, with her husband's property, the amount protected by the statutes."

While denominating the husband as the head of the family, this joint head of the family, for the purpose of homestead exemptions, is recognized in South Carolina, in the constitution, statutes, and the decisions. Const. S. C. Amend. 2, § 32; Rev. St. S. C. 2132; In re *McCutchen* (D. C.) 4 Am. Bankr. R. 81, 100 Fed. 779.

Under the rule of construction in the constitution, for the reasons given, under the circumstances of the case, the conclusion is that there is error. The wife, living with her husband, having a separate

estate, and being the debtor, may be the head of the family, or there may be a joint head of the family, for homestead purposes. Certainly there are decisions which might tend to a different conclusion, but the weight of authority is to the effect that where the wife is the owner of the property, where she trades as a feme sole, and is the debtor, and the husband cannot and does not claim the homestead exemption, the wife, though living with her husband, may be alone, or jointly with him, the head of the family, and as such claim the homestead exemption. Under the circumstances of the case at bar, the petitioner, a married woman living with her husband, is entitled to the homestead exemption, and there was error in refusing to allow such claim. The decree of the district court is reversed, and the cause remanded, that the claim for homestead exemption by the bankrupt be allowed. Reversed.

In re J. D. SPRECKELS & BROS. CO.

(Circuit Court, N. D. California. November 5, 1900.)

No. 12,302.

1. CUSTOMS DUTIES—REBATES—MATERIALS FOR SHIP FOR FOREIGN TRADE.

The provision of section 8 of the revenue act (26 Stat. 613) requiring the duty on materials imported in bond for use in the construction or equipment of vessels to be paid in case the vessel shall be employed in the coastwise trade of the United States for more than two months in any one year, must be given a reasonable construction in harmony with the general spirit and purpose of the exemption contained in the section, permitting the use of such materials free of duty when the vessel is to be employed in the foreign trade; and it cannot be held to require the payment of the duty before the vessel is permitted to engage in the coastwise trade after the material exempted has become worn out, or has ceased to be useful or serviceable for the purpose for which it was used.

2. SAME—CANCELLATION OF CHARGE AGAINST VESSEL—WORN-OUT MATERIALS.

The treasury department, under its construction of said section, and of Rev. St. § 2513, of which it is virtually a re-enactment, having customarily allowed the cancellation of the duty charged against a vessel whenever it was made to appear that the article against which it was charged had become unserviceable, a shipowner, under such rulings, should be allowed a cancellation of the duty on metal sheathing used on the wooden hull of his vessel, on his application therefor in contemplation of a coastwise voyage, where such sheathing has been in constant use for more than 4 years, where it is shown that the life of such metal sheathing and its effectiveness does not continue longer than from 2½ to 3 years, notwithstanding he has allowed it to remain on the vessel, and accepted the consequent lower rating.

On Petition for Review of Decision of the Board of General Appraisers.

Andros & Frank, for petitioner.

Frank L. Coombs, U. S. Atty., and Marshall B. Woodworth, Asst. U. S. Atty.

MORROW, Circuit Judge. This is a petition by the J. D. Spreckels & Bros. Company, a corporation, for a review of the decision of the board of United States general appraisers, and to have returned

to said corporation the amount of certain duties paid by it under protest upon yellow metal sheathing, under the revenue act of October 1, 1890 (26 Stat. 613). The rate of duty prescribed by section 8 thereof for this class of merchandise is 35 per cent. ad valorem. The portion of the section applicable to the controversy now before the court reads as follows:

"That all lumber, timber, hemp, Manila, wire rope, and iron and steel rods, bars, spikes, nails, plates, tees, angles, beams and bolts, and copper and composition metal which may be necessary for the construction and equipment of vessels built in the United States * * * for the purpose of being employed in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, after the passage of this act, may be imported in bond, under such regulations as the secretary of the treasury may prescribe, and upon proof that such materials have been used for such purpose, no duty shall be paid thereon. But vessels receiving the benefit of this section shall not be allowed to engage in the coastwise trade of the United States more than two months in any one year, except upon the payment to the United States of the duties on which a rebate is herein allowed."

On April 21, 1891, the petitioner herein withdrew the merchandise in question from bond, using it at the port of San Francisco to sheathe the hull of the American bark Alden Besse, owned by the petitioner. Eleven days later the rebate of duty on said merchandise, amounting to \$528.04, was duly indorsed on the register of said vessel, in accordance with the provisions of the above section. Thereafter the vessel was continually engaged in the foreign trade until July 18, 1895. On that day, the bark then being in the port of San Francisco, the petitioner, following the custom in similar cases, requested the collector of customs at that port to cancel the entry of said charge for duty upon the register of said vessel upon the ground that the said sheathing was so worn that it was practically useless. It appears that the condition and the position of the vessel at that time were such that an examination of the sheathing could not be made, and the vessel departed for Alaskan waters without any action having been taken by the collector upon the application for the cancellation of the duty charge. The vessel returned to San Francisco on September 24, 1895, the duration of her voyage being six days in excess of the period prescribed by the statute. The collector of customs at the port of San Francisco upon the next day demanded the payment of the duty of 35 per cent. ad valorem upon said sheathing, amounting to \$528.04. This amount the petitioner paid, but filed a written protest against the action of the collector upon the ground that it was an unwarranted exaction, claiming that the sheathing was of no practical use, and no protection to said vessel. On October 2, 1895, an examination of the sheathing was made by an examiner of merchandise, who reported that all but 5 per cent. of the sheathing was in fair condition, and would last for several years. The petitioner again protested, and requested a re-examination of the metal by some one competent to make a just report, and on February 12, 1896, the collector of customs caused such re-examination to be made by the same examiner as before, who reported that six feet of metal sheathing, extending the entire length of the starboard side of the vessel, was exposed to view, and that

this sheathing, with the exception of one plate, he found in apparent good condition. To this report the petitioner filed a further protest, and the matter was thereupon referred to the board of United States general appraisers. This board overruled the protest of the petitioner, the grounds of the decision being stated as follows:

"In this case the suit of metal is found in use upon the vessel. * * * We hold that, so long as the suit of metal is upon the vessel, the liability to the payment of the duty becomes fixed upon the vessel having voluntarily engaged in coasting more than two months in any one year."

The case is now brought into this court for review, and to determine whether or not the charge of duty should have been canceled by the collector of customs, as requested by the petitioner.

The exemption from customs duties made by the section of the statute under consideration is evidently one carrying out the general policy of the government in the interest of foreign commerce and deep-sea navigation. Similar provisions have appeared in former revenue acts with reference to the class of merchandise in said section described. The language used in this section is clear and distinct in the exemption it provides in favor of the free importation of material used in the construction and equipment of vessels in the United States for foreign account and foreign trade, including trade between the Atlantic and Pacific ports, but the scope of the limitation placed upon vessels using such materials and engaging in the coastwise trade is not so clear. That they cannot engage in the coastwise trade more than two months in the year is certain, but the extent of the use of the material contemplated by the exemption has not been made so clear. It could hardly have been intended by congress to permanently exclude from the coastwise trade for ten months in the year a vessel built in the United States because it had used in its construction or equipment, free of duty, some foreign materials, the use or life of which was of short duration. The statute specifically provides that "upon proof that such materials have been used for such purpose [construction and equipment], no duties shall be paid thereon." In what way is this exemption qualified by the provision "that vessels receiving the benefit of this section shall not be allowed to engage in the coastwise trade of the United States more than two months in any one year except upon payment of the duties"? Suppose an imported Manilla or wire rope has been completely used up on board of a vessel, must the duties be paid upon such an article, notwithstanding its destruction, to secure the privilege of engaging in the coastwise trade for more than two months in the year? The requirement of the payment of duty on imported material used in the construction and equipment of a vessel appears to be a reasonable regulation, if the material continues to exist in a useful condition. But if it is worn out, and its life has gone as a useful or serviceable article, the payment of the duties does not appear to be a reasonable requirement within the spirit and purpose of the regulation. There is no question but that the coastwise voyage of the Alden Besse exceeded in time the limitation prescribed by congress. And it may be conceded at the outset that, if any considerable portion of the life of the sheathing remained

at the time this coastwise voyage was made, the article could not, in a revenue sense, be said to have been "used," and there would, therefore, be no exemption, and the duty would properly be collected. But was the board of general appraisers right in holding that, "so long as the suit of metal is upon the vessel, the liability to the payment of the duty becomes fixed upon the vessel having voluntarily engaged in coasting more than two months in any one year"? Is there any warrant for the assumption that congress intended to impose a duty upon material after it had been used and become practically worthless, simply as a penalty for its retention upon the vessel? The statute is silent upon this point, and the inference to be drawn from this silence is purely a matter of construction, to be determined by the general spirit and intent of the statute. As it is not to be presumed that an injustice was within the legislative intent, wherever a statute is capable of two constructions, one of which would work manifest injustice and the other would work no injustice, it is the duty of the courts to adopt the latter. *Lau Ow Bew v. U. S.*, 144 U. S. 47, 59, 12 Sup. Ct. 517, 36 L. Ed. 340, and cases cited. In accordance with these principles, the court will consider that the section in controversy applies only to material that is useful for the purpose for which it is intended to be used. The question for determination here thus becomes essentially one of fact whether or not the sheathing on the *Alden Besse* was of practical value at the time the duty was collected upon it.

Section 8 of the revenue act of October 1, 1890, is virtually a re-enactment of section 2513 of the Revised Statutes; and while in the former statute, as in the present, no point of time is prescribed after which the charge of duty shall be canceled, the treasury department appears to have recognized the worthlessness of metal sheathing after a certain period of use, and to have allowed a cancellation of the charge of duty at such time. In the case of *The Levi G. Burgess*, *Treas.* Dec. 8422, though the metal sheathing had not been in use upon the vessel for two years, the secretary of the treasury allowed the duties collected on rebate to be refunded, because the metal was considered worthless for the purposes for which it was originally withdrawn. And in December, 1879, in a letter from the assistant secretary of the treasury to the collector of customs at Philadelphia with regard to an application for cancellation of duties on sheathing, in contemplation of a coastwise voyage, it was stated that "the department understands that it is a recognized fact that sheathing metal in constant use lasts but two or three years." *Treas.* Dec. 4363. No decisions upon this point of more recent date have been noted, but the custom of cancellation of duty when the value of the metal is practically destroyed is the same at the present time, and it was in accordance with this custom that the petitioner applied to the collector of customs before the bark entered upon the coastwise voyage. The contemporaneous construction of a statute by the executive officer of the government charged with its execution is entitled to great respect. *Marriott v. Brune*, 9 How. 635, 13 L. Ed. 282; *U. S. v. Graham*, 110 U. S. 219, 3 Sup. Ct. 582, 28 L. Ed. 126; *U. S. v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 846, 31 L. Ed.

389; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363. The evidence before the court shows the weight of opinion to be that metal sheathing is used upon the hulls of wooden vessels to protect them from the teredo, and to prevent them from fouling; that, while a certain quality remains in the metal, which is denominated its "life," the surface of the metal remains smooth, and the various forms of marine crustacea will not attach themselves to it; that the action of the sea water causes a chemical change in the quality of the metal, destroying its life in time, rendering it brittle, and easily broken, and as liable to fouling or the attachment of these crustacea as is the wood when unprotected by metal. It also appears that the teredo and other worms will force their way through holes in the metal of the minutest size, and work great injury to the wood beneath. An insurance surveyor for Lloyd's Register and for the Wheat Tariff Association, a combination of insurance companies, testifies that a ship, to retain her first class in this port, must be re-metaled within 30 months, otherwise insurance companies will not take risks on a dry or perishable cargo carried by such vessel. It further appears that the maritime insurance companies at San Francisco, when allowing claims for repairs to metal sheathing on ships insured by them, deduct $2\frac{1}{2}$ per cent. per month of the cost of the metal for every month it has been in use up to the extent of 40 months, after which time no allowance is made. In the policies of Boston companies this limit is made at three years. This is a general clause in policies covering wooden ships sheathed with metal. Various shipowners testify that the real value of the metal sheathing is usually gone in from 30 months to 3 years; that, where a first-class rating is of no object to the owner, the metal is sometimes allowed to remain on the vessel for a longer time, until it is convenient to meet the expense of stripping, caulking, and remetaling, though the sheathing is recognized to be of no practical value during this extended time. One or two instances were noted by the United States attorneys where ships had been in service for many years without remetaling, but the testimony developed the fact that a great amount of patching had been done with new plates, at various times, so that but little, if any, of the original sheathing remained. The collector of customs based his action in the collection of duty in the present case upon the report of an examiner of merchandise, who examined the metal sheathing in question. This report was not made under oath, and the examiner admitted upon the hearing before the referee that he knew nothing whatever about copper sheathing. He testified that upon his first examination of the bark *Alden Besse* he noticed that some of the metal was stripped off, and that there were barnacles on the woodwork; that there were also barnacles and marine growth on the metal sheathing. He reported that he was not familiar with the merchandise examined, and requested the assistance of another examiner. A day or two later he made a second examination of the vessel in company with another examiner. The vessel's bottom had been cleaned, and they were putting metal patches on it. He and his associate counted the plates, and found that about 5 per cent. of the original plates were gone, and new ones being put

on in their places. He did not take into consideration the thickness of the metal remaining, or its condition other than as it appeared from this cursory examination. He was not informed as to the elements of value to be noted in his appraisal, and appears to have considered a report upon the proportion of old metal remaining and its apparent unbroken condition a fulfillment of all requirements. His associate testified that he did not understand the order of the collector to include a report upon the value of the metal, or an estimate of the wear and tear upon it, and therefore confined his examination to the quantity of new metal required to replace that which was gone, and to the condition of the old metal remaining with regard to its being intact. To this extent he concurred in the report of his associate examiner. It is urged by counsel for the government that the fact that the vessel continued in service for nearly a year after this date without remetaling is conclusive evidence that the metal sheathing in question was of practical value at the time of the appraisal. In the light of the evidence of experienced shipowners, however, this fact should be regarded as evincing the option of the petitioner to temporarily accept the consequences of lower rating, a different class of cargo, and slower sailing, rather than as proof of the value of the metal. The preponderance of evidence justifies the conclusion that the metal sheathing in question had lost its practical value for the purpose for which it was intended at the date the duty was collected upon it. The decision of the board of United States general appraisers is therefore reversed, and a judgment will be entered in accordance with this opinion.

UNITED STATES v. HOLMES.

(Circuit Court, N. D. Ohio, E. D. November 3, 1900.)

No. 6,122.

1. HOMICIDE—NEGLIGENT MANAGEMENT OF VESSEL—CONSTRUCTION OF FEDERAL STATUTE.

Rev. St. § 5344, first enacted in 1838, and revised in 1871, which subjects to prosecution for manslaughter "any captain, engineer or pilot or other person employed on any steamboat or vessel, by whose misconduct, negligence or inattention to his or their respective duties on such vessel the life of any person shall be destroyed," is not restricted in its application to vessels propelled in whole or in part by steam, as was the original statute, but the word "vessel" must be construed, in accordance with its definition given in Rev. St. § 3, as including "every description of water craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water."

2. SAME—ELEMENTS OF OFFENSE—INTENT.

Under such statute the offense is complete when the misconduct, negligence, or inattention in the navigation of a vessel by one of the persons named results in the loss of human life, and an indictment thereunder need not charge a criminal intent.

On Demurrer to Indictment.

John J. Sullivan, Dist. Atty., and Robert Tucker, Asst. Dist. Atty.,
for the United States.

Canfield & Shay, for defendant.

DAY, Circuit Judge (orally). The demurrer to the indictment in this case raises two questions: First, whether the vessel described in the indictment is one coming within the terms of the statute; second, whether the charge is sufficient, so far as it undertakes to describe the offense as having been committed with criminal intent. The indictment, it is apparent, intends to describe a sailing vessel. No claim is made that the vessel mentioned is a steam vessel, or one using steam in whole or in part. Is such vessel within the terms of section 5344, under which this indictment is drawn? We have had a very interesting presentation and discussion, on brief and orally, of the origin and history of this section of the criminal law of the United States. There is no doubt that, when originally enacted as a statute of the United States, the purpose of the lawmakers was to prevent the constant recurrence of the serious accidents then prevailing in the navigation of the waters of the United States by vessels using steam. The citations from the messages of the president and the discussions in congress, no less than the terms of the act itself, show it to have been that situation and condition of fact which led to the original enactment of the law. It first came into the statutes of the United States by the act of July 7, 1838, which is an act entitled:

"An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam."

Section 12 of that act reads as follows:

"That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years."

There is no ambiguity about that statute, either in its title or in the act itself, and a vessel which was not propelled in whole or in part by steam did not come within its terms. Thus the law stood until 1871, when, we judge by the act passed, and its numerous sections and provisions, congress undertook to codify and consolidate the many previous acts upon this subject of navigation on the waters of the United States, and passed an act "to provide for the better security of life on board of vessels propelled in whole or in part by steam, and for other purposes." Act Feb. 28, 1871. Section 57 of that act provided that:

"Any captain, engineer, or pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his or their respective duties on such vessel, the life of any person shall be destroyed, or [if] in consequence of fraud, connivance, misconduct, or violation of law by any owner or inspector, or other public officer, the life of any person shall be destroyed, he or they shall be deemed guilty of manslaughter," and shall be punished, etc.

The phrase "propelled in whole or in part by steam" was omitted in the enactment of this section, and, we cannot doubt, intentionally, and certainly cannot assume that congress did not understand the

difference which this change made, when compared with the former enactment. The primary rule in the construction of statutes is that, if possible, their meaning is to be gathered from the language used, and it is never to be assumed that congress or any other legislative body did not understand exactly what they were doing when they made so important a change in the law. And we cannot escape the conclusion that, in making this change in the statute, the congress intended to extend the terms of the statute to include not only steam boats or vessels, or vessels propelled in whole or in part by steam, but any steam boat or vessel on the navigable waters of the United States. If reasons are necessary to be ascribed for this change, undoubtedly they may be found in the purpose of congress to protect human life, not only upon vessels propelled in whole or in part by steam, but upon sailing vessels as well, where misconduct, negligence, or inattention may result in the loss of life.

Now, that change having been made, we come to the revision of the statutes made in 1874, being the present Revised Statutes of the United States. That revision undertook to consolidate and codify the general laws of the United States in force on the 1st day of December, 1873, and was passed as one statute. And in the conclusion of the statutes, we find the provision (section 5595) that:

"The foregoing seventy-three titles embrace the statutes of the United States general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three, as revised and consolidated by commissioners appointed under an act of congress, and the same shall be designated and cited, as The Revised Statutes of the United States."

The next section repeals all prior general laws on the same subjects embraced in the revision, and provides that any portion of such laws embraced in any section of this revision are repealed, and the section applicable thereto shall be in force, in lieu thereof. This revision, constituting but one legislative act, must be read together; and we find certain provisions at the beginning of the act, entitled: "Title 1. General Provisions,"—applicable to all of the sections of the Revised Statutes of the United States, and, among others, section 3, not limited to the revenue acts, or acts in reference to the treasury of the United States, but applicable to the entire revision. Here is a general provision that the word "vessel" includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water. If there is any doubt, in reading section 5344, as to the meaning of the word "vessel," as used in that section, we shall be compelled to give it the definition prescribed by the terms of the law itself. Read into this section under consideration, a "vessel," as designated in section 3, would include sailing yachts. It is not necessary to amplify so plain a definition, as it must be admitted that a sailing yacht is clearly within the definition of vessels as described in the statute; and, indeed, in the general definition of the term, and without this statutory aid, we think there can be no question that the word "vessel" would include sailing vessels as well as steam vessels and steam boats. We find, then, the act of 1871, without substantial change, carried into the revision, and

the change then effected still preserved. Taking that view of this statute, we think that, so far as that proposition is concerned, the demurrer will have to be overruled.

Now, as to the other objection,—that there is no charge in the indictment of any criminal intent on the part of the defendant in the doing of the acts with which he is charged, which, it is alleged, amounted to the misconduct and negligence denounced in the statute, and which, it is averred, resulted in the loss of certain human lives. The statute, in that respect, has been subject to construction in quite a number of courts of the United States, so far back as the case of *U. S. v. Warner*, 4 McLean, 463, Fed. Cas. No. 16,643, with which counsel are familiar, and another case reported from the West Virginia district, and in other cases. There is a uniform holding that in order to constitute the offense it is not necessary to charge and prove that the acts were done with criminal intent,—maliciously done,—or with the purpose to take the life of any person, but it is sufficient, within the terms of this statute, if the government charge and prove the misconduct, negligence, or inattention which results in the loss of human life. As Judge Leavitt well said in his charge to the jury in the early case in 4 McLean, 463, Fed. Cas. No. 16,643, congress has fixed the penalty, from a mere nominal sentence up to the period of 10 years of imprisonment, entirely within the discretion of the court; and it is obviously one of those statutes which find analogy in the revenue laws of the United States. Where the act is done which the statute denounces and punishes, and with the result which the statute requires, the crime is complete, and it is not necessary to aver that the misconduct, negligence, or inattention was the result of malevolent or criminal motives. In short, the offense is complete when the misconduct, negligence, or inattention in the navigation of the vessel by one of the persons named in the statute results in the loss of human life. We think that proposition to be so thoroughly established by former adjudications, both in the early decisions in this circuit and others, that it needs no lengthy discussion. We therefore hold, from an examination of the statute and the authorities cited, and in consideration of the arguments of counsel, that the demurrer upon that ground is not well taken.

No other objection has been called to our attention, and we have discovered none in examining this indictment. We are therefore constrained, holding these views, to overrule the demurrer to the indictment.

BOWERS et al. v. ATLANTIC, G. & P. CO. et al.

(Circuit Court, S. D. New York. November 22, 1900.)

1. PATENTS—SUITS FOR INFRINGEMENT—DISTRICT OF SUIT.

The purpose of Act March 3, 1897 (29 Stat. 695), which provides that in suits for infringement of patents the circuit courts shall have jurisdiction "in the district of which the defendant is an inhabitant or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business," was not to

enlarge, but to restrict, the jurisdiction in such cases, and since its passage a suit for infringement can be brought only in one of the districts enumerated therein.

2. SAME—LIABILITY FOR INFRINGEMENT—OFFICER OF CORPORATION.

A suit for infringement cannot be maintained against an individual who is not alleged to have infringed, except in his official capacity as an officer of a corporation charged to have committed the infringement, and which is not shown to be insolvent.

In Equity. Suit for infringement of patents. On pleas filed by each of the defendants separately, denying the jurisdiction of the court.

John H. Miller and Howard R. Bayne, for complainants.

Edwin H. Brown, for defendants.

COXE, District Judge. The complainants, who are citizens, respectively, of California and Illinois, file their bill in the usual form charging the defendants with infringement of complainants' patents for improvements in dredging machines. The pleas were set down for argument by the complainants, the facts admitted being as follows: First. The Atlantic, Gulf and Pacific Company is a West Virginia corporation and an inhabitant of that state. Second. The said corporation has a regular and established place of business in this district. Third. The said corporation has never infringed in this district, the infringement complained of having occurred at Savannah in the state of Georgia. Fourth. The defendant Catt is the president of the said corporation and for eight years has resided in the Eastern district of New York. The defendant Wood is the corporation's secretary and treasurer and resides in this district. Fifth. The action was commenced July 10, 1900. As to the corporation, then, the question is whether or not the suit can be maintained upon the sole ground that the defendant has a place of business in the city of New York or is found there. In other words, can a West Virginia corporation be sued in the Southern district of New York for an infringement committed in Georgia?

The act of March 3, 1897 (29 Stat. 695), is as follows:

"Chap. 395. An act defining the jurisdiction of the United States circuit courts in cases brought for the infringement of letters patent.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought. Approved, March 3, 1897."

This is the latest legislative deliverance upon the subject, and there can be no question that under its provisions, considered alone, the only districts where the court has jurisdiction are, first, the district of which the defendant is an inhabitant, and, second, the

district where the defendant infringes and has a regular place of business. If, then, there were no other provision of law, it is manifest that this action could not be maintained in this district, and could only be maintained either in the district of West Virginia or in the Southern district of Georgia, provided the defendant has a regular place of business there. The law says, if a corporation be sued outside the district of which it is an inhabitant, that it must be in a district where there is infringement and a regular place of business. Infringement alone will not give jurisdiction, a regular place of business alone will not give jurisdiction, both must concur. This is the law of 1897. But it is argued that the law must be interpreted in the light of existing and pre-existing statutes, and as so construed it does not restrict but enlarges the jurisdiction of the court,—providing an additional place where the defendant may be sued, namely, the district where he infringes and has an established place of business. If this be the proper construction of the act an infringement suit may be brought first, in the district of which the defendant is an inhabitant; second, in the district where he is found; and, third, in the district where infringement occurs and where the defendant has an established place of business. A defendant residing in Maine and having a place of business and infringing at Boston could, under this construction, be sued in Maine, in Massachusetts, or, if he happened to be in Texas, or Oregon, he could be sued there. On the other hand, if the defendants' construction be correct, such a defendant could be sued only in Maine, where he lives, or in Massachusetts, where he transacts business and infringes. Prior to March 3, 1887, the courts of the United States had almost unlimited jurisdiction, and could hold a defendant in any district where he chanced to be and was served with process. The abuses which this condition of affairs permitted were many and serious, and it was largely to correct them that the act of 1887-88 was passed. That act has always been regarded as a restrictive measure. That it limited the jurisdiction of the federal courts in several important particulars is beyond dispute. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Machine Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833; *Manufacturing Co. v. Watson* (C. C.) 74 Fed. 418. The purpose of the act being to narrow the federal jurisdiction, it may well be inferred that congress intended to limit it as to all classes of actions, infringement suits included, for in no branch were complaints of injustice and oppression more numerous. In this congress failed. In the *Hohorst Case*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, the supreme court decided, in December, 1893, "that the provision of the existing statute, which prohibits suit to be brought against any person 'in any other district than that whereof he is an inhabitant,' is inapplicable to an alien or a foreign corporation sued here, and especially to a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant." The circuit courts quite generally accepted this decision as holding, by implication, that the

provision quoted from the act of 1887 was applicable to all defendants except aliens and corporations of foreign countries. The courts still declined, in numerous instances, to assume jurisdiction in infringement suits where the defendant was a citizen of the United States and was sued in a district of which he was not an inhabitant. *Union Switch & Signal Co. v. Hall Signal Co.* (C. C.) 65 Fed. 625; *Donnelly v. Cordage Co.* (C. C.) 66 Fed. 613. Although it was decided in *Smith v. Manufacturing Co.* (C. C.) 67 Fed. 801, that the Hohorst Case was applicable to all infringement suits, the contrary doctrine was followed thereafter in this district in at least two unreported cases. *Button Works v. Wade* (C. C.) 72 Fed. 298.

This was the situation when, in December, 1895, the case of *In re Keasbey & Mattison Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, was decided. Although that case arose under the act of March 3, 1881, and related to the infringement of a trade-mark, the court took occasion to comment upon and restate its decision in the Hohorst Case in language so plain that the circuit courts were no longer in doubt as to the scope of the decision. The court says (page 230, 160 U. S., page 275, 16 Sup. Ct., and page 405, 40 L. Ed.):

"It was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit courts of the United States by section 629, cl. 9, and section 711, cl. 5, of the Revised Statutes, re-enacting earlier acts of congress; and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several states."

The circuit courts accepted this statement as a definitive settlement of the vexed question, and thereafter it was held that the act of 1887 did not affect infringement suits and that the jurisdiction was as broad as it had been before the passage of that act. *Van Patten v. Railroad Co.* (C. C.) 74 Fed. 981, 989; *Earl v. Southern Pac. Co.* (C. C.) 75 Fed. 609, affirmed in 27 C. C. A. 185, 82 Fed. 690; *Button Works v. Wade*, supra; *Westinghouse Air-Brake Co. v. Great Northern R. Co.* (C. C.) 84 Fed. 9. Accordingly any district where the defendant happened to be served, no matter how distant from his home or the place of infringement, was a proper one in which to begin the action.

This was the situation when the act of March, 1897, was passed,—15 months after the decision in *Re Keasbey & Mattison Co.* The court is unable to discover anything in the circumstances leading up to the passage of this act to aid the contention of the complainants that it broadened the jurisdiction of the circuit courts in patent causes. The reasons for this conclusion, briefly stated, are as follows: First. The jurisdiction did not need to be broadened; it was as broad as it had ever been since the creation of the government. It was limited only by the national sovereignty. There was not a foot of ground within the limits of the United States where an infringer was safe from process. Second. There was no demand for a more extended jurisdiction; on the contrary, the demand was that the jurisdiction should be limited so that all suits should stand upon an equal footing. Many thoughtful minds conceived it to be

an injustice that, whereas, defendants in other actions were given immunity from suit, when absent from their domiciles, defendants in patent suits could be attacked in districts where defense was difficult if not impossible. Third. The last previous expression of legislative intent was in favor of a restricted jurisdiction. So long as the courts decided that this jurisdiction applied to patent causes congress remained silent. If the lawmakers were dissatisfied with the construction of the act of 1887 by the circuit courts that it was applicable to patent suits it would seem that then was the time for a new act broadening the jurisdiction. In other words, while the courts were restricting the jurisdiction congress remained silent and acted only after the supreme court had finally decided that the act of 1887 had no application to patent suits. This inaction and action on the part of congress seem absolutely inconsistent with a legislative intent to give a wider jurisdiction in patent cases, but perfectly consistent with a purpose to narrow it. Fourth. The inference is justifiable that the act of 1897 was the reply of congress to the decision of the Keasbey Case. Not until then was the question finally disposed of. It was disposed of contrary to the legislative view so far as it may be inferred from the act of 1887. If congress were in accord with the Keasbey decision no legislation was necessary; if otherwise the act of 1897 was the logical outcome. It seems well-nigh incredible that, after the decision of the supreme court, congress should have deemed an act necessary to broaden still further the jurisdiction in patent cases. Such an act could have no *raison d'être*. An act limiting the jurisdiction was to be expected, and any doubtful phraseology must be solved in the light of what, in the circumstances, appears to have been the obvious purpose of congress.

Turning, now, to the act itself it will be seen that there is nothing therein to support the complainants' contention. It is an act limited to patent causes and "defining" the jurisdiction therein, its aim being to set at rest disputes which might thereafter arise regarding that jurisdiction. It provides that in suits brought after March 3, 1897, the circuit courts shall have jurisdiction in the district "of which the defendant is an inhabitant." Thus the act of 1887 is made applicable to patent causes. Had congress intended to make the act of 1875 also applicable it would have added the words "or in which he shall be found." The omission of these words is wholly incompatible with the theory that the jurisdiction is broader after the passage of the act than it was before. After placing patent suits on a par with other suits the act proceeds to make an exception in their favor by permitting the owner of a patent to sue in a district where the defendant is systematically committing acts of infringement. There is no hardship to the infringer if called upon to answer where he is actually established in business. On the other hand, it is but justice to the owner of the patent that he is permitted to seek redress in the district where the wrong is done. The act of 1897 is in the nature of a compromise between the act of 1875 and the act of 1887; the former was too broad; the latter is too narrow. By adding to the district of in-

habitation the district of infringement congress has made an exception in the case of patent suits which gives them every advantage over other suits to which the owners of patents are fairly entitled. If the intention of congress were, as complainants contend, to add one more district to the domain of jurisdiction, the act would hardly have been passed in its present form. The language is most inapt to express such a purpose. An act intended to give a broader jurisdiction would not have presented the strange anomaly, after reciting a provision of existing law limiting jurisdiction to the district of inhabitance, of omitting another provision of existing law upon which the widest jurisdiction had been based. In short, had the legislative purpose been, as the complainants assert, there would, in all probability, have been a brief enactment to the effect that, in infringement suits the circuit courts, in addition to the jurisdiction allowed by law, shall have jurisdiction in the district where the defendant infringes and has a regular place of business. The court is clearly of the opinion that under the act of 1897 patent suits can be brought only in the district of which the defendant is an inhabitant, or in the district where he infringes and has a regular and established place of business. Such a construction places all suits upon substantially a common plane and makes a consistent and harmonious body of law. Comparatively few decisions construing this act have been reported, but all that the court has been able to find are, it is thought, in harmony with this view. In *Westinghouse Air-Brake Co. v. Great Northern R. Co.*, 31 C. C. A. 525, 88 Fed. 258, the court, in speaking of the act of 1897, says:

"The object was to determine with precision the boundaries of jurisdiction and to create a future method of service in patent causes against nonresident defendants, which had not theretofore been stated in a federal statute."

The court has not attempted to discuss the various objections interposed to the form of the pleas for the reason that it is understood that it was agreed at the argument that the question of jurisdiction should be determined at this time upon the undisputed facts. The court is fully in accord with this view, and even were there doubt in the mind of the court it would still seem that the parties should not be subjected to the hardship and expense of taking the proofs with this question undetermined. So far as the pleas have been examined they are believed to be free from the complainants' criticisms, but were this otherwise it would subserve no useful purpose to sustain objections to the pleas which relate to matters of form. The question of jurisdiction must be met, and it is for the interest of all that it be decided in limine.

The plea of the defendant Wood presents a different question. He is an inhabitant of this district, but has never infringed the complainants' patents as an individual, and has done nothing in the matter except in his official capacity as secretary and treasurer of the corporation defendant. There is no pretense that the corporation is financially irresponsible or that a decree against it will not give adequate relief. It is hardly probable that complainants will care to retain the suit here against the defendant Wood alone,

but in any event the weight of authority is to the effect that the action cannot, in these circumstances, be maintained against him. *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556, 27 L. Ed. 322; *Rowbotham v. Iron Co.* (C. C.) 71 Fed. 758; *Linotype Co. v. Ridder* (C. C.) 65 Fed. 853; *Howard v. Plow Works* (C. C.) 35 Fed. 743. The pleas are sustained.

STIMPSON COMPUTING SCALE CO. v. W. F. STIMPSON CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 873.

1. PATENTS—CONSTRUCTION OF LICENSE—RIGHTS OF LICENSEE AFTER TERMINATION.

A license to manufacture a computing scale under a patent contained a provision that the licensees should "have the right to determine this contract, and their obligation thereunder, by giving six months' notice in writing to said first party of their intention to discontinue the manufacture and sale of such scales under this contract." *Held*, that the effect of such notice was merely to terminate the contract relations between the parties, and that the provision did not impose upon the licensees any duty, after such termination, to cease the manufacture of the scale they had theretofore made and sold under the license, but left them with the same right a stranger would have to dispute the title or right of the former licensor.

2. SAME.

The right of the licensees to terminate the contract and surrender the license, if it existed, was purely one derived from the terms of the contract itself, and the legality of their action in exercising such right cannot be affected by the motives with which they acted, and especially such motives could not affect their rights after the license had been surrendered and the surrender accepted.

3. SAME—CONTINUED USE OF PATENTEE'S NAME—INJUNCTION.

Where a manufacturer of an article under a license from a patentee avails itself of a provision of the contract to terminate the same and surrender the license, but continues to manufacture and sell the same article, it no longer has the right, as against the patentee or a subsequent licensee, to use the name of the patentee, in connection with its goods subsequently manufactured, in such way as to lead the public to understand that they are still made under his patent, and such use may be enjoined.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is an appeal from an order granting a preliminary injunction upon the cross bill of the appellees. A brief account of the matters on which the controversy between the parties arose is as follows:

Walter F. Stimpson, one of the appellees, on the 31st of May, 1895, having filed an application in the patent office for a patent covering an invention which he claimed to have made of improvements in computing scales, which was subsequently granted, entered into a contract involving the use of the expected patent with the Stimpson Computing Scale Company, a corporation organized under the laws of the state of Michigan, for the purpose of manufacturing and selling such scales, and located at Tecumseh, Mich. The license was for the term of the patent, and provided for the payment of a royalty upon the scales which should be manufactured and sold. There was a condition in the contract, however, for an abandonment thereof and a surrender of the license, the clause containing it being as follows: "Further, that the party of the second part shall have the right to determine this contract and their obligations thereunder in the event that it or its agents are estopped by process of law from the manufacture and sale of said improvements at the conclusion

of a properly contested suit, or by giving six months' notice in writing to said first party of their intention to discontinue the manufacture and sale of such scales under this contract." After having been engaged in business for a time, the Michigan corporators, with others, organized a corporation with the same name, under the laws of Indiana, and changed the place of business to Elkhart, in the latter state, and, with the concurrence of Stimpson, assigned to the new company all the rights and privileges which the first-named company had acquired under the contract and license above mentioned, the assignee assuming all the obligations thereof. This was some time in the year 1896. The new company continued and enlarged the business. After having for a while manufactured their scales under the patent in a form of construction intended by it, as was supposed, which form, for convenience, may be called "A," another form was adopted, which may be called "B." This appears to have been done with the assent of Stimpson, and both parties, for a considerable time, at least, assumed and proceeded upon the assumption that form B was one within the scope of the patent. Both forms were called and branded "Stimpson's Computing Scale," or, in some cases, "Stimpson Grocer's Computing Scale," and were sold by those names. Rival manufacturers of computing scales constructed under other patents, which covered inventions regarded as endangering the validity of the Stimpson patent, embarrassed the business of the company to some extent, and upon an assignment of that and other reasons, such as that the manufacture had become unprofitable, the company notified Stimpson of its election to abandon the contract. The notification was by a letter, of which the following is a copy:

"To Walter F. Stimpson, Detroit, Mich.—Dear Sir: Please take notice that we intend to discontinue, six months after you receive this notice, the manufacture and sale of scales under a contract made the 31st day of May, A. D. 1895, by and between yourself, as party of the first part, and the Stimpson Computing Scale Company of Tecumseh, Mich., as party of the second part. Witness our hand and seal this 6th day of March, 1899.

"Stimpson Computing Scale Co.

"By Mell Barnes, Secretary.

Edwin Finn, General Manager."

"[Seal.]

The receipt of this notice was acknowledged by Stimpson on the following day. Thereupon Stimpson associated other parties with him, and granted a license to the associates of the same scope and effect as that formerly held by the appellant. These persons, including Stimpson, shortly after organized a Michigan corporation, "The W. F. Stimpson Company," for the manufacture of computing scales. The Elkhart company continued to make and sell computing scales. Some of those made and sold were of the form B, being one of the forms—the later one—employed while that company operated under the license as above stated. They branded their product "The Stimpson Computing Scale," and sold it to the trade by that name. Stimpson's new Michigan company did the same, each party at the same time claiming it as a trade name or label exclusively their own, and each insisting that the other was violating its right thereto. In this state of affairs, the Elkhart company, the present appellant, filed its bill in the circuit court for the Eastern district of Michigan, against the appellees, to restrain their appropriation and use of the trade name "The Stimpson Computing Scale." The appellees answered, and filed a cross bill praying for like relief against the complainant in the original bill. The latter filed an answer, and on the pleadings and affidavits a motion was made for a preliminary injunction. The result was that the court granted the motion of complainants in the cross bill, and ordered a preliminary injunction against the original complainant. The effective part of the order was as follows: "It is ordered that the cross defendant, Stimpson Computing Scale Company, its officers, agents, servants, attorneys, workmen, and successors, be restrained until the further order of this court from continuing the manufacture and sale of the computing scale heretofore made and sold by said cross defendant under and by virtue of a certain license contract entered into May 31, 1895, between the cross complainant Walter F. Stimpson and the Stimpson Computing Scale Company, and which contract was surrendered to the said Walter F. Stimpson by said cross defendant on September 7, 1899, said scale

so manufactured and sold by said cross defendant under said license contract being known as the 'Stimpson Computing Scale.' This order is not to be construed, however, as restraining the cross defendant from making and selling any computing scale not within the scope and contemplation of said license contract and the Stimpson patent. It is further ordered that said cross defendant, its officers, agents, etc., be restrained, until further order of this court, from continuing the use of the names 'Stimpson,' 'Stimpson Computing Scale,' and 'Stimpson Grocer's Computing Scale,' in connection with the manufacture and sale of computing scales made and sold by said cross defendant, in such a way as to indicate that the scales so made and sold by said cross defendant are the scales heretofore made and sold by said cross defendant under said license contract and patent." The original complainant has appealed from the granting of the order for an injunction on the cross bill.

John M. Van Fleet, for appellant.

Edward Rector, De Forest Paine, and James Whittemore, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having made the foregoing statement of the facts, delivered the opinion of the court.

The first question to which our attention should be directed is that relating to the construction of the contract and license formerly held by the appellant from Stimpson, and more particularly to the interpretation and effect to be given to the clause which declared that the party of the second part (the appellant) should "have the right to determine this contract, and their obligation thereunder, by giving six months' notice in writing to said first party [Stimpson] of their intention to discontinue the manufacture and sale of such scales under this contract." An ingenious and labored effort is made in the brief for the appellees in support of the proposition that this provision is to be construed as meaning that the contract could only be determined by the appellant in case it should conclude to abandon the business of making and selling computing scales like these, and hence, if it should give notice of its election to abandon the contract, it was bound to discontinue the business. But we do not so interpret this stipulation. We think it gave the licensee the right to determine the contract by giving the prescribed notice of its intention not to proceed further under the contract after the time stated in the notice should expire. The manufacture and sale of such scales "under this contract" would then cease. Effect must be given to all the language of a contract where possible, and we see no difficulty in applying this rule of construction here. There was nothing in the contract which imposed a further disability upon either party after it should have been brought to an end by the exercise of a right reserved therein. After the termination of a license, the parties are freed from any estoppel resting upon them while in their former relation. The licensee may dispute the title or right of the former licensor to the same extent as a stranger might. The estoppel is raised for the protection of the interest which the assignor or licensor professed to convey, and has no further office. *Manufacturing Co. v. Robbins*, 75 Fed. 17, 21 C. C. A. 198; *Noonan v. Athletic Club Co.*, 99 Fed. 90, 39 C. C. A. 426; *Smith v. Ridgely*, 103 Fed. 875.

Much space has been given in the appellees' brief and pains in the argument to the discussion of the alleged bad faith and disingenuous

conduct of the appellant in breaking off the contract; but we are unable to see to what end. The right to abandon the contract and surrender the license, if it existed, was not affected by the motives with which it was exercised. It was a right resting wholly in contract, and the question of good faith is quite irrelevant to the deduction of the legal consequences flowing from the act of the party in determining his course. Besides all this, the surrender was accepted and the license transferred to other parties. It is no purpose of the present suit to set aside or declare null the abandonment.

There is nothing in the record to justify the conclusion that the appellant promised Stimpson's new company that it would discontinue the manufacture of the scales which it has since been making. Whether it had the right to continue such manufacture is the principal question presently to be considered.

This brings us to the ultimate question just indicated, which is, what were the relative rights of the parties to the use of the trade names, "The Stimpson Computing Scale," and "The Stimpson Grocer's Computing Scale," put upon their products? It appears that the name of Stimpson was embodied in the appellant's corporate name at his instance, and there is therefore some reason to doubt whether he could require that its use in that connection should be discontinued. It is not necessary, however, for us to determine that question. But the use of his name as a label for the scales, or in any such way as to denote that they were manufactured under his patent, involves another question. No doubt one may give to another such right to the use of his own name as to preclude him from using it himself, when the consequence would be to appropriate the good will acquired by the other party by the use of it, and the continued use is necessary to the preservation of the benefit of the good will thus acquired.

But we do not think this rule is applicable here. During the time when the appellant and Stimpson were doing business under the license it was known that the business was liable to come to an end at any time by the act of the licensee, and it must have been understood that upon the termination of it Stimpson might employ his patent either by his own use or by granting a license to use it, and it was not reasonable to expect that he or those using the license would be debarred from using Stimpson's name to characterize their product as made under his patent. If this were so, there must be a corresponding obligation on the part of the other party to the contract to refrain, after the termination of its license, from longer using the name of Stimpson upon its goods in such a way as to lead the public to understand that they were made under his patent. These consequences must have been anticipated. The appellant knew that it could only use Stimpson's name to distinguish its goods and support the good will of its trade, so long as they continued to operate under his patent. The validity of the patent is not in issue here. But the parties made their contract and prosecuted it upon the assumption of its validity, and their stipulations should be construed as made upon that assumption.

It follows that the appellants have not the right to use Stimpson's name in describing their scales, whether by label or otherwise, in

such a way as to denote that they still manufacture them under the specifications of his patent. By the use of the name "The Stimpson Computing Scale," or "The Stimpson Grocer's Computing Scale," the public would in all probability understand they were made in accordance with the mode of construction familiar to them from the use of scales made under his patent. He and his licensee are entitled to be protected against this invasion of their right. Whether his patent be good or bad, no one has the right to claim the privilege of making and selling his goods as though made under it, and thereby depriving the owner of such credit as belongs to it, and inducing the public to suppose that the seller has title to the invention supposed to be embodied in the subject of the sale. The phraseology of the order appealed from indicates that the circuit court proceeded upon the ground that the appellant was bound to discontinue the manufacture of such scales as it made under its contract with Stimpson in consequence of the stipulation that the licensee might surrender the license when it should determine that it would not go on with the contract,—a construction with which we do not agree. Counsel for the appellees disclaims the purpose of obtaining an adjudication respecting the validity of the patent, and it is therefore improper that an injunction should go to restrain the infringement of the patent. That being out of the case, we can find no ground on which to restrain the manufacture and sale by the appellants of the articles mentioned. It may expose the appellant to a suit for infringement, but that, as we have said, is foreign to the purpose of the present suit. Aside from the patent, there is nothing to prevent the appellant from selling the same kind of goods as it sold during the term of the contract. We therefore think that part of the order is erroneous, and should be reversed.

The other part of the order is to enjoin the use of the names "Stimpson," "Stimpson Computing Scale," and "Stimpson Grocer's Computing Scale" in such a way as to indicate that the scales made by the appellant were made under said "license contract and patent." This does not conform to the views we have expressed; for we do not think the appellant is estopped to deny, having regard to future manufacture, that the scales then made were, in law and fact, subject to the patent. This part of the order should be modified so as to restrain the use of the names mentioned in such a way as to indicate that the scales made and sold by the appellant were made under the Stimpson patent, or in substantial accordance with the form thereof. As thus modified, this part of the order will be affirmed. It is ordered accordingly.

THE ST. GEORG.

(Circuit Court of Appeals, Fourth Circuit. November 8, 1900.)

No. 327.

1. SHIPPING—DELIVERY OF CARGO—CONSTRUCTION OF BILL OF LADING.

Where the contract made by a bill of lading for a consignment of goods shipped by steamer provided that the goods should be discharged as soon as the steamer was ready to unload, and should be received by the consignee at the ship's dock as fast as she could deliver them, and be thereafter at his sole risk and expense, and the consignee was notified, and was present while the goods were being discharged upon an uncovered wharf, and made no objection to the time, manner, or place of delivery, there was an actual delivery and acceptance when they were so placed on the wharf, and the ship cannot be held liable for their subsequent damage by rain before their removal from the wharf by the consignee.

2. SAME—NEGLIGENT DELIVERY—PREDICTIONS OF WEATHER BUREAU.

The fact that a bulletin from the weather bureau had been posted and published in a port in the morning, predicting light showers or a moderate thunder storm at such port during the day, cannot alone be held sufficient to charge the master of a vessel with negligence in discharging a consignment of perishable goods on an open wharf during the morning, when the weather was at the time clear, such as would render the vessel liable for their subsequent injury by rain, and especially where the master was unacquainted with the English language, and it does not appear that he had actual knowledge of the forecast, and no objection to the time or place of delivery was made by the consignee.

Cross Appeals from the District Court of the United States for the District of South Carolina.

J. N. Nathans, for the St. Georg.

A. M. Lee (Smythe, Lee & Frost, on the briefs), for Wilmot D. Porcher.

Before SIMONTON, Circuit Judge, and PAUL and WADDILL, District Judges.

PAUL, District Judge. These are cross appeals from a decree of the district court for the district of South Carolina. The German steamship St. Georg, the respondent below, appeals from a decree of the district court (95 Fed. 172) in favor of the libelant as damages for injury by rain to 1,466 bags of rice, part of a consignment shipped on said steamship from Bremen to the libelant at Charleston, S. C. The libelant appeals from so much of the decree as fixes the amount of damages. The appeal taken by the libelant will be disposed of in connection with the appeal taken by the respondent the steamship St. Georg.

The record shows that the German steamship St. Georg arrived in Charleston Harbor on the evening of Thursday, the 21st of July, 1898, having on board as part of her cargo 3,039 bags of rice consigned to the libelant, Wilmot D. Porcher, of the city of Charleston, one half of which was to go to the custom house. The other half the consignee intended to deposit at his own store. On Friday, the 22d of July, due notice was given the consignee, Porcher, that the vessel would begin to discharge her cargo at 7 o'clock on the morning of July 23d. The bill of lading provided that the goods were "to

be delivered subject to the terms and conditions stated in this bill of lading, which constitute the contract between the shippers and the company, in like apparent good order and condition from the ship's deck (where the ship's responsibility shall cease) at the port of Charleston, S. C." "Also to discharge the goods from the steamer as soon as she is ready to unload into hulk, or temporary depot or lighter, or a wharf, at the shipper's or consignee's risk and expense after they leave the ship's deck. The goods to be received by the consignee as fast as the steamer can deliver them, and any extra charges incurred after being discharged, necessary for the steamer's quick dispatch, to be paid by the owner or consignee of the goods." The steamer began to discharge about 7:30 a. m. of July 23d. The agent of the consignee was sent to receive and remove the goods, and reached the wharf about 8 a. m. Porcher, the consignee, went to the wharf about 10 a. m. Klinck, the agent, had ordered a number of drays to remove the rice, but only two had reported at the time he arrived; the others not coming until about 11 o'clock. There were present at the unloading, besides the agent and libellant, the agents of several other consignees. The ship was being discharged at an uncovered wharf, which had previously been used for unloading and discharging perishable goods. The rice was at first piled indiscriminately on the wharf, but, on complaint being made, after 50 or 60 bags had been landed, the rice belonging to the separate consignees was put into separate piles. The wharf was to some extent obstructed by some railroad cars and by some piles of pig iron and resin for outward cargo. The entrance to the wharf was by a narrow gateway. These obstructions impeded the handling of a large number of drays at the same time. There was at the shore end of the wharf a granary, which the agent of the railroad company, the owner of the wharf, told Porcher he could use to protect his rice in the event of rain. A forecast of the weather for Saturday, July 23d, was inserted in the News and Courier, a newspaper published in Charleston. It was the custom of the weather bureau to distribute these forecasts generally throughout the city, and to post them in about fifty places in Charleston. The forecast from the bureau at Washington for South Carolina was: "On Saturday, showers and thunder storms; warmer," etc. The local forecast for Charleston and vicinity was: "Light showers, with a probable moderate thunder storm, followed by fair late in the day," etc. The morning of July 23d was clear until about 11 o'clock, when there came up suddenly a thunder storm and a heavy fall of rain, lasting over an hour. The precipitation was 1.60 inches. There had been rain on the evenings of the 20th, 21st, and 22d of July, varying in time from 4 p. m. to 10 p. m. The precipitation on the 20th was .15 of an inch, on the 21st, less than .01 of an inch, and on the 22d .20 of an inch. There were light rainfalls 25th and 26th of July. When the rain began on the 23d, the rice on the wharf was covered with tarpaulins, but, owing to the heavy down-pour, they did not afford protection. Some of the rice was damaged before it could be gotten under cover, and some by the water running under the bags on the wharf. Neither the consignee, nor

his agent, nor the agents of the other consignees, previous to the discharge of cargo nor at the time of the discharge, made any objection to the wharf, or to the time or the manner of unloading the rice and placing the same on the wharf.

The district court entered a decree for damages in favor of the libellant. The judge of the court below bases the decree on the negligence of the master in unloading the goods on an uncovered wharf in the face of a threatened storm, without making effective preparations for protecting the goods for such time as would afford the consignee fair opportunity for removing the same. This he holds to be culpable carelessness, not justified by any necessity, as covered piers were available. And, further, that it was not proved to his satisfaction that the consignee had fair opportunity to examine the rice, to separate it, and remove it before the rain commenced. The correctness of this decision must be determined by those provisions of the bill of lading which provide for the delivery of the goods. These constitute the contract of delivery, and by this agreement, construed in the light of principles pertaining to special contracts of affreightment, the parties are bound. It is clear and specific in its terms. It states that the goods are to be delivered in good order and condition from the ship's deck, where the ship's responsibility shall cease, at the port of Charleston. Also that the steamer is "to discharge the goods as soon as she is ready to unload into hulk, * * * or on a wharf, at shipper's or consignee's risk and expense after they leave the ship's deck." Under this contract the liability of the ship for the safety and security of the goods ceased when the goods were landed on the wharf, the consignee being present, and accepting the goods as delivered from the ship's tackle. In the absence of the consignee without notice, where there is a general bill of lading, it is the duty of the master to land the goods at a suitable wharf at a proper time, and give the consignee reasonable time after notice to remove the goods. But this doctrine is not applicable to the case at bar, though this is the view urged by the counsel for libellant, and is the view taken by the court below. We must determine this case on the principles applying where the consignee has had due notice, is present in person or by his agent during the delivery, and is engaged in receiving the goods. There is no usage shown as to the delivery of goods at the port of Charleston to change the general rule as to the responsibility of the carrier. The reason of the difference in the degree of liability of the carrier for the safety of the goods after their landing from the ship, where the consignee is present, receiving them, and where he is absent at the time of discharge, is that in the former case he has an opportunity, if the goods are not being delivered at a proper place and time and in a proper manner, to object to the delivery. In the latter case he has not that opportunity, and the general maritime usage extends the responsibility of the carrier, as to the protection of the property, after it passes from the ship's deck to the wharf. Contracts of affreightment in effect the same as that made in this case have been construed in a number of decisions. *The Santee*, 7 Blatchf. 186, Fed. Cas. No. 12,330, is a case frequently cited in admiralty

decisions, and quoted by text writers on the law of carriers. The law, as expressed in that decision, is thus stated in Hutch. Carr. (2d Ed.) 430, note; *The Santee*, Fed. Cas. No. 12,330, 5 Myers' Fed. Dec. 407:

"Where the stipulations of the bill of lading require the consignee to be present and receive the goods as soon as the vessel is ready to unload, and that they shall be at the consignee's risk as soon as landed on the dock, and the consignee is duly notified, and attends in order to accept the goods as landed, and takes more or less charge of them, the stipulation is held to exempt the ship from subsequent loss or damage."

In such cases, as the consignee has due notice of discharge, and accepts the goods, the duty of protecting the property is cast upon him, and the ship is released. *The Surry* (D. C.) 26 Fed. 791.

In *Willis v. The City of Austin* (D. C.) 2 Fed. 412, it was provided in the bill of lading: "It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof as soon as delivered from the tackles of the steamer at her port of destination," and that, if the goods were not taken away the same day by the consignee, they might, at the option of the steamer's agents, be sent to store, etc., at the expense and risk of the owner, shipper, or consignee. A case of merchandise had been delivered on the wharf, and was taken away by the draymen of a party to whom it was directed, though not the one for whom it was intended. The steamer was held not liable for the loss; *Choate, J.*, construing the bill of lading, saying:

"I think, therefore, the case is governed by the case of *The Santee*, and that the ship is not responsible, because the goods in question were delivered, within the meaning of the bill of lading, and the consignees had full notice to attend, and did, in fact, attend, upon the discharge of the vessel to receive their goods. Libel dismissed, with costs."

In the case of *The Tybee*, 1 Woods, 358, Fed. Cas. No. 14,304, 5 Myers' Fed. Dec. p. 362, the bill of lading contained this agreement:

"It is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof as soon as delivered from the tackles of the steamer at her port of destination, and they shall be received by the consignee thereof, package by package, as so delivered."

Justice Bradley, construing this contract, says:

"The carrier's liability ceases, of course, when he has delivered the goods according to the bill of lading. The general rule with regard to delivery, as laid down in the books, is that, in the absence of a special contract, the goods are to be regarded as delivered, so far as the carrier's responsibility is concerned, when they are deposited on the proper wharf, at their place of destination, at a proper time, and notice has been given to the consignee."

Applying the doctrine established by these authorities to the case before us, the facts fail to sustain the charge of negligence on the part of the master. Negligence rests upon a breach of duty, and the record in this case does not show wherein the master failed in the discharge of his duty under the contract embodied in the bill of lading. No question is raised as to his compliance with this agreement to the time the rice was landed on the wharf. The substantial complaint is that the goods were delivered on the wharf more rapidly than they could be removed by the consignee, and that

by reason of this rapid delivery and a failure to properly separate the goods the removal of the rice was delayed, in consequence of which it was injured by the rain. The evidence shows that the consignee had ample notice of the time and place at which the steamer would begin to unload. It further shows that he made inadequate preparations for the removal of the goods; that at 8 o'clock a. m. he had but two drays at the wharf, and that they had removed 40 bags of rice before the rain; that the consignee had ordered a number of additional drays, but these failed to appear until too late to remove the rice before it was injured. The consignee was told by the agent of the railroad company at the wharf of which the vessel was unloading that he could use the granary at the shore end of the wharf to store his rice for protection in the event of rain. Of this shelter he made no effort to take advantage. The evidence does not show that the unloading on the wharf was unusually rapid, and such that the master should have known that the consignee could not take proper care of the goods after delivery from the ship's deck. If the consignee, who knew his resources for removing the goods, believed they were being landed so rapidly as to delay him in their removal and in taking proper care of them, it was manifestly his duty to inform the master of that fact, in order that the goods might be discharged in a manner not to embarrass the consignee in their removal.

As to the mutual duties of the consignee and the master, Justice Clifford said in *Manufacturing Co. v. The Tangier*, 1 Cliff. 396, 5 Myers' Fed. Dec. p. 385, Fed. Cas. No. 12,266:

"Consignees and masters of vessels are expected to co-operate in the delivery of consignments; and, if they do so, it will seldom happen that any controversy will arise; and, when they do not do so, the delinquent party must abide the consequences."

The master cannot be presumed to know the facilities of the consignee for removing his goods. That is a matter over which he has no control; nor does the law make it his concern. He could not order one dray more or less, nor in any wise control the removal of the goods from the wharf to the store of the consignee. The *Santee*, Fed. Cas. No. 12,330, 5 Myers' Fed. Dec. 410. For him to have undertaken to interfere in any way in the transportation of the goods from the wharf would have been to go beyond the obligations of the contract which fixed his responsibility as a carrier, and an unwarranted interference in a matter that was entirely under the control of the consignee, and with which he alone was concerned. The consignee knew his resources for removing his goods. The same observation may be made on the failure of the consignee to object to the goods being landed on an open wharf, or to the time of the landing or the conditions of the weather. Had the master persisted, after objections by the consignee, in landing the goods in such way as to likely result in their damage, the ship might have been held liable therefor. The *Grafton*, 1 Blatchf. 173, Fed. Cas. No. 5,655, 5 Myers' Fed. Dec. p. 365. The consignee being present, acquiescing in the time, the place, and method of discharge, receiving the goods according to the special contract of lading, he thereby accepted

them, and the master was relieved of further responsibility for their preservation. They had passed from the custody of the master by actual, not constructive, delivery, to the custody and control of the consignee. They were in his custody when damaged, and the loss cannot be thrown on the ship.

As to the finding of the district court that the master was negligent in landing the rice in the face of a threatened storm, we have stated the evidence on which the district court rested this conclusion. It consists of the facts that on each of the preceding days there had been light showers—that of the 21st being less than one-hundredth of an inch, “a mere trace”—and the prediction of the weather bureau, published in a Charleston newspaper, and posted at about 50 places in the city on the morning the ship began to unload. We are not prepared to give these predictions of the weather bureau the character of established facts, the failure to observe which shall constitute negligence in any of the business relations of life. The science of forecasting the weather has not reached the degree of exactness which will justify the court in saying that men in their everyday avocations, whether seafaring men or others, are bound to take notice of and be guided by its local forecasts, and that it is negligence not to observe them. The case is different where storms are of great violence and extent, such as frequently occur on our Atlantic coast, and where information of their existence, course, and the probable time at which they will reach designated points is given by telegraphic communication and by storm signals, which, if brought to the notice of the master, or of which it is his duty to take cognizance. These he would be bound to observe. It may be questioned if there is anything of which the general public is expected to take cognizance that is less reliable than are the daily weather forecasts to which it is accustomed, and which are brought to its attention by newspaper notices and printed circulars. Were we disposed to give the weather forecasts the weight allowed them by the district judge, there is no evidence that they were brought to the notice of the master. Further, if the master was bound to take notice of the weather predictions, he should only be held liable for not providing against the light showers predicted, against which, as the record shows, the tarpaulins would have afforded sufficient protection for the rice; and not be required to provide against such an unexpected and heavy downpour of rain as that which did the damage, and was not predicted by the local weather notices. Again, the consignee had equal opportunity, at the least, with the master to anticipate the storm; the latter being unacquainted with the English language, the record showing that his deposition in this case was taken through an interpreter. In our view, the district court should have dismissed the libel, and it is ordered that the same be dismissed, with the costs of this and the district court for the appellant.

This conclusion disposes of the appeal of Porcher against the steamship *St. Georg*.

Decree of district court reversed, with costs, and cause remanded, with directions to dismiss the libel, with costs.

THE ALEXANDRA.

(District Court, D. South Carolina. November 14, 1900.)

1. DEPOSITIONS DE BENE ESSE—RIGHT TO TAKE IN FOREIGN COUNTRY.

Depositions de bene esse cannot be taken, under Rev. St. § 863, in a foreign country.

2. ADMIRALTY PLEADING—ISSUES—PETITION OF INTERVENTION.

Where the respondent in a suit in admiralty desires to raise a new issue, in addition to those raised by the answer as filed, it should be done either by amendment to the answer or by a proper plea. When the answer was filed by the master of the libeled vessel as agent for the owners, such owners cannot raise a new issue by a petition in intervention, filed without notice to the libellant, or the service of a copy on him.

3. SALVAGE—ACTIONS—PLEADING.

Where the respondent in a suit to recover for salvage services relies upon a defense of misconduct on the part of libelants which forfeited their right to recover salvage, he must specially allege the facts constituting such misconduct, with due certainty of time, place, and circumstances, and the proof must support such allegations.

4. SAME—AMOUNT OF AWARD.

A steamship grounded upon a reef off the Florida Keys. Her value with cargo and freight was from \$200,000 to \$225,000. She was rescued by libelants, who were licensed wreckers, without injury, and with the loss of but a small part in value of her cargo, which was jettisoned. She was off a lonely part of the coast, 90 miles from Key West, and there was considerable danger from storms at that season, although the weather was fair during the two days occupied in the salvage operations. Libelants employed in the service some 18 or 19 wrecking sloops and schooners, valued at about \$27,000, and 120 to 130 men, who unloaded upon the wrecking vessels, as lighters, 130 tons of cargo, which was afterwards reloaded, and jettisoned about 130 tons of lumber. They were also aided on the second day, for a few hours, by a tug valued at \$35,000. The service was attended by no great risk of life or property. The vessel was once floated and again grounded, and there was some evidence that the master wrecker was in part in fault for the second grounding, which rendered the services of the tug necessary. *Held*, that an award of \$11,500 was proper, to cover all the services.

In Admiralty. Suit to recover for salvage services.

Bryan & Bryan, for libelants.

Mitchell & Smith and C. B. Northrop, for respondents.

BRAWLEY, District Judge. The amended libel, filed December 5, 1899, in behalf of the owners and crew of sundry licensed wrecking schooners and sloops therein named, and of sundry wrecking sloop boats, and of the owners and crew of the steamtug Dauntless, claims salvage for services rendered to the Danish steamship Alexandra. The answer of A. G. Blom, master and claimant of the steamship Alexandra, filed January 2, 1900, admits the services, alleges unskillfulness and negligence in the performance of the same, and prays that the court should make a moderate award of salvage, and that the costs of the respondent be decreed against the libelants, for the reason that no settlement could be reached with libelants, because of their exorbitant and excessive demands, although efforts were made to come to an agreement with them. On February 1, 1900, Det Forenede Dampskibs Selskab, of Copenhagen, filed its petition and bond, and, in pursuance of an order of court granting leave to inter-

vene, filed its intervention, alleging that it was a corporation duly chartered under the laws of the kingdom of Denmark, and that it was the owner of the steamship *Alexandra*, and alleged that the master, A. G. Blom, had admitted that he had accepted an offer of gratuity from the wreckers and salvors who claimed salvage in this cause, and that said wreckers and salvors, by such offers of gratuity, had forfeited all salvage, and prayed that a decree be entered denying the same. The Danish steamship *Alexandra*, laden with cotton, cotton-seed meal, and lumber, bound from New Orleans to Copenhagen, while passing up the Straits of Florida went ashore on Conch reef, near Alligator light, about 9 o'clock on the night of September 12, 1899, through gross negligence in navigation. The testimony shows that Alligator light threw a red flash light, the signal of danger, across her course for a considerable period before she grounded. Shortly after the grounding of the vessel, she was spoken by Roberts, one of the libelants, who offered his assistance; and on the next day a number of sloops and schooners, regularly licensed by the United States district court for the Southern district of Florida, engaged in the business of wrecking on the coast of Florida, and who are required by the rule of that court to have their vessels properly equipped for such service, appeared in response to messages sent by Roberts, and, under his direction, with the aid of the ship's cranes and winches, about 130 tons of cargo, consisting of cotton and cotton-seed meal, was transferred to 15 of the schooners and sloops, and about 130 tons of lumber, etc., was jettisoned. Shortly after the grounding the crew of the *Alexandra* ran out a kedge anchor from her starboard quarter and her port bow anchor, and on the next morning, with the aid of the wrecking schooners, they ran out a large kedge anchor about 90 fathoms from the vessel's stern, and about 12 o'clock on the night of the 13th, at high water, the steamship, using her engines and winches, and hauling upon the anchors, came afloat, but in turning around she got aground for the second time. The tide having fallen, no further effort was made to get her off until the next morning, the 14th, when the steamtug *Dauntless*, on her way from Havana to Brunswick or Jacksonville, passing by the Florida reefs, was engaged by Roberts, the master wrecker, to assist in salving the steamship. With the assistance of the *Dauntless*, she was floated at 2:10 on that day, and hauled into the Gulf Stream and anchored. The cargo which had been lightered on the wrecking sloops and schooners was put aboard on the 15th, and the steamship proceeded on her voyage, intending to go to Newport News for coal; but about 24 hours after starting the crank shaft of the steamship was broken, and the vessel put into the port of Charleston, where she was libeled. Roberts, the master wrecker, and Albury, one of his associates, came aboard of her.

Before disposing of the case, certain questions of pleading and practice which have arisen in its progress demand attention. It will be observed that the issue made by the libel and answer is simply the amount of salvage. The intervention of *Det Forenede Dampskibs Selskab*, of Copenhagen, owner of the steamship, makes a new and entirely different issue. It claims that the salvage was forfeited

by misconduct of the salvors and their agents and representatives, in offering a gratuity to the master. The eighth rule of the wrecking rules of the Southern district of Florida provides:

"Any wreckers who give or agree to give the master any part of the salvage or other sum of money or make him any unlawful present or help him in any manner to make any money out of the wreck of his vessel, shall forfeit their salvage."

This intervention makes a new issue, which goes to the very root of the case. If supported by sufficient proof, the libel would be dismissed. It is an altogether different defense to that made in the answer, which went merely to the quantum of the award. No notice was given of the filing of such intervention, and no copy was served upon the proctors for libelants, who say that until the opening of a certain deposition, to be hereafter adverted to, they had no notice that such defense was interposed. Proctors for the intervener claim that notice was not necessary; that the libelants, being parties to the cause, were bound to take notice of the intervening petition and of the proceedings thereunder. There has been no motion to vacate the order allowing the intervention, which I think would have been the proper practice; but the question arises upon a motion to strike out certain questions and answers in the deposition of Blom, as being irrelevant to the issues made in the pleading. On the day of the filing of the intervention, notice was given that the "intervener herein" would take the testimony of A. H. Blom, at Copenhagen, in Denmark, before J. C. Ingersol, Esq., consul for the United States, in accordance with the provisions of sections 863 and 1750 of the Revised Statutes. The deposition of Blom was taken by said consul in the form of questions and answers, and returned by him to the clerk of this court; being received by mail March 28, 1900. On April 12, 1900, while the court was proceeding to hear the testimony in behalf of the libelants, a large number of witnesses from the south coast of Florida being in attendance, a motion was made to suppress the deposition on the ground that depositions *de bene esse* could not be taken in a foreign country. Proctors for intervener cited and relied on the opinion of Judge Blatchford in *Bischhoffsheim v. Baltzer* (C. C.) 10 Fed. 4, in which it was held that "depositions *de bene esse* in civil causes may be taken in a foreign country by any secretary of legation or consular officer." Upon the conclusion of the argument the court expressed its doubt that depositions could be so taken, and that it would take further time to examine and consider the question, whereupon proctors for libelants stated that their witnesses were poor, and had come from a considerable distance and at great expense, and it would be great inconvenience and might work great hardship if they had to return to testify as to any matter brought out in such deposition, in the event that the court should hold the deposition admissible, and moved that the deposition be opened. The court thereupon ruled that the deposition be opened, and that, if libelants examined witnesses in respect to matters contained therein, it would be held that they were estopped from raising hereafter any formal objection as to the manner of taking the deposition, but that they would not be thus estopped from objecting to any questions there-

in as leading or irrelevant. After such ruling, it becomes unnecessary to decide the point raised; but inasmuch as there is no authoritative decision upon it, that I have been able to find, it may be as well to say that, in my opinion, depositions *de bene esse*, under section 863 of the Revised Statutes, cannot be taken in a foreign country. This section relates to the taking the depositions of witnesses residing within the United States, and designates the officials before whom they may be taken, and must be strictly construed. *Cortes Co. v. Tannhauser* (C. C.) 18 Fed. 667; *Bird v. Halsy* (C. C.) 87 Fed. 677. Among those named in section 863 as authorized to take such depositions are notaries public, and it is contended that by section 1750 secretaries of legation and consular officers are authorized to take oaths, affirmations, affidavits, and depositions. There is no doubt that ordinary depositions may be lawfully taken before them, but depositions *de bene esse* are not ordinary notarial acts, such as a notary public could perform simply by virtue of his office.

Objection is made to nearly all of the questions propounded in this deposition because they are irrelevant to the issue. It is elementary that no evidence is properly admissible but what applies to matters in issue between the parties, and nothing is in issue but what is averred on one side and denied on the other. While in admiralty the formalities required in pleading at common law or in equity are not demanded, if the respondent wished to avail himself of any particular matter of defense he should present it with proper averments in his answer or plea, and should set out clearly and explicitly the facts relied on; and proofs should correspond substantially with the allegations, so as to prevent surprise. The pleadings here made but one issue, and that was the amount to be awarded. If respondents desired to set up another defense, it should have been made either by amendment to the answer or by proper plea. Certainly the libelants were entitled to some notice that a new defense was to be set up. In effect, the steamship company has attempted to make itself a party in the place of its legal agent, who, under the admiralty practice, was defending in its name, and has set up a new and altogether different defense. This cannot be done *ex parte*. The questions put to the witness are in flagrant violation of the rule which forbids leading questions. The story of the alleged offer of a gratuity is simply the story told by the counsel examining the witness, which receives his verbal assent. There is nothing to indicate that the witness was hostile or unwilling to testify, and none of those circumstances which frequently justify courts in allowing leading questions. Inasmuch, however, as the deposition was admitted under the circumstances above detailed, and the testimony of libelants has been taken, I have given to the testimony as to the alleged offer of gratuity such weight as it would be entitled to if free from the objections stated, and my conclusion is that it is insufficient to sustain the contention that the salvage has been forfeited by such alleged offer of gratuity. Roberts and Albury, who were examined before me, deny positively making any such offer. Their licenses from the district court of Florida are official certificates of good character. "In cases of misconduct set up, there must be a special allegation of facts, with due certainty of

time, place, and circumstance." Ben. Adm. § 486. In this intervention there is no allegation of the time or place of the offer of gratuity. Proper certainty and precision in a matter of this kind are of importance, because the party cannot regularly prove that which is not properly alleged. Nor does the testimony supply the deficiency. The amount offered is not stated. Everything relating thereto is vague and indefinite. The master states that it did not occur to him until some time afterwards that this offer was intended as a bribe. If there was any conversation tending that way, there is nothing in the record which shows that it had any effect, for there was nothing in the conduct of the master which showed any leaning towards the salvors.

It remains, therefore, to determine the amount of salvage which should be awarded. Among the ingredients of the salvage service are: First, the degree of danger to human life and to property, and the value of the property saved. It is not pretended that there was any danger to human life. The value of the steamship, as proved, is that the ship was built in 1894 at a cost of \$130,000. The experts who have testified to her value fix it at about \$100,000. The value of the cargo as shown by the manifest was about \$67,000, and the freight about \$13,000. A small part—the least valuable—of her cargo was jettisoned. The sum of \$200,000 to \$225,000 would be an approximate estimate of the value of the ship and cargo. As to the danger to the property, the testimony shows that the ship ran aground upon a coral reef about 90 miles from Key West, upon a lonely and desolate coast, at a time of the year when storms might naturally be expected; but during the time that she was aground there was but a slight wind, and an examination of the ship's bottom made by a diver after her arrival in Charleston showed that she was not injured. After she was floated and had been hauled into deep water on the afternoon of September 14th, there was not sufficient wind to enable the small boats upon which the cargo had been placed to go alongside in order to reload, but on the next day there was some wind and a rough sea. The extreme velocity of the wind during the 15th was 23 miles an hour, and the reloading required some care and was attended with some little risk. Second, as regards the salvors. The ingredients to be considered are the danger to human life, the danger to the property employed in the salvage service, and the value of such property, and the time, labor, and skill employed in the service. The testimony shows that 18 or 19 wrecking sloops and schooners assembled at the scene of the wreck. A few of them did not arrive until the steamship was hauled off, but 15 were used as lighters, upon which the cargo was placed. There were also some small boats, not licensed, which belonged to the man engaged in the service. There were 120 or 130 men gathered about the scene of the wreck, who unloaded the cargo that was placed in their boats. They also carried out the heavy anchor about 90 fathoms from the ship, upon which the ship heaved with her own engines, and thus the steamship got afloat. The service was unattended with any risk to human life, and the risk to the property engaged was that which might have followed if a storm had arisen while these boats were laden with so much of

the cargo as was lightered, about 90 miles from a port. These licensed sloops and schooners belonged to the men who live upon the Keys along the Florida coast. The men, as a rule, are farmers and fishermen, and their vessels are used in their business of fishing and in carrying freight along and about the Keys and Key West and Miami. The character of the coast is such that it is impracticable to have a large and expensive plant for wrecking purposes, such as is found at the commercial centers, and experience has shown that a light and inexpensive class of vessels, scattered along the entire length of coast for nearly 200 miles, is the best means for the protection of commerce. The district court of that district therefore has encouraged the keeping of this class of vessels, and grants licenses to these wreckers. There is not a sufficient amount of wrecking business to enable them to live entirely from such employment, and they are compelled to use their boats for other purposes. To entitle them to a license, they are required to provide themselves with certain appliances used in the wrecking business, such as additional ropes, tackle, and anchors. When a ship is found to be aground, the wrecker who lives nearest to the scene and first discovers it approaches and takes charge, and he generally sends for others, and is known as the "master wrecker." The rules of the court require the licensed wreckers to report to the scene of the disaster, and they agree among themselves as to the distribution of such award as is made. It is impossible to fix with exactness the value of the vessels that were engaged in this service. One of the witnesses has estimated the value of these licensed wrecking sloops and schooners at about \$27,000, which does not include the value of their wrecking apparatus. This, probably, is a full estimate of their value. The case did not call for the exercise of any great degree of skill. The unloading of the cargo and the reloading of it was a laborious service under a September sun. The wreckers assembled on the morning of the 13th, took out the anchors and unloaded the cargo during the day, and that night upon the high tide the ship came off the reef, using her own power in heaving.

The libel states "that at midnight on said 13th day of September, Anno Domini 1899, the said steamship was floated, but, owing to the heavy swell and strong current, she again went ashore." The answer charges "that by the unskillfulness and negligence of the libelants she was allowed to get ashore again." There has been a good deal of testimony as to the causes of the second grounding. Some of the libelants' witnesses say that it was owing to the fault of the master of the steamship in taking up an anchor which the master wrecker told him to leave down. It is the duty of the master wrecker to make a careful survey and soundings of the neighborhood where the wreck lies, and to devise the best means to save the property speedily. By rule 14 of the wrecking rules it is made the duty of the master of the wrecked vessel to remain by the wreck and superintend the operation of the salvors, in connection with the master wrecker. There was undoubtedly fault somewhere in allowing the vessel to get aground the second time. If it was entirely clear that this was the fault of the master wrecker, the award should

be reduced. I cannot say that the fault was entirely due to him, but it is not clear that he was entirely free from fault. He says that he told the master not to take up the anchor. If he had made a careful survey of the bottom, and had pointed out the danger which would follow, it is scarcely conceivable that the master would have disregarded his advice. While I cannot say that he should be condemned, I must conclude that he did not exercise that high degree of skill or show that decision of character which entitles him to special commendation and reward. It was this second grounding which made necessary the services of the steamtug Dauntless, that came up the next morning. Upon the arrival of the Dauntless on the morning of September 14th the Alexandra was aground. The master of the Dauntless made some arrangement with Roberts, the master wrecker, to assist in the salvage service; and, after making the necessary arrangements for carrying out the ship's anchors, she pulled upon her and floated her at high tide on the afternoon of September 14th. The Dauntless is a steamtug of considerable power, and she was on her way from Havana to her home port when she espied the Alexandra, early on the morning of September 14th. The time actually engaged in the service of pulling was from about 11 in the morning to 2:10 p. m.; and the Alexandra was hauled out into deep water, and the Dauntless proceeded on her voyage. The value of the Dauntless is about \$35,000. The service performed was meritorious. It was performed with the proper skill and dispatch, and was attended with no particular risk; the only risk or danger to the Dauntless being that, in the event of a hawser breaking, she might have gone aground upon some of the reefs. The bottom at that point is of coral formation, and care and skill were necessary to avoid going aground while engaged in the service. During the time when the service was performed the winds were light, and the weather fair.

The amount to be awarded for salvage service is always a question of delicacy and difficulty. Full and fair compensation for the work and labor actually done, and for skill and diligence, is always allowed, and consideration must be had of the dangers and difficulties of the service. This much the salvors are entitled to as of right, and to this amount should be added so much as, in the discretion of the court, is reasonable and proper, in the interests of commerce, to encourage others to like exertions to save life and property in peril. In view of the dangerous character of the south coast of Florida, and of the want of any extensive or expensive appliances for the aid of vessels in distress, the district court grants its license to certain people living on the Keys along the coast, and requires that they provide themselves with certain equipment and conform to certain regulations. This equipment is often inadequate to all the service demanded, but, such as it is, it is frequently the only means of relief immediately available; there being no large seaports near, nor means of telegraphic communication. Under these circumstances, the highest degree of skill and the best equipment are not to be expected. Promptness in repairing to the scene of peril, readiness to assist, and the faithful doing of all that limited powers enable to accomplish,

entitle such licensed wreckers to liberal compensation, which should be increased if there are circumstances of unusual danger, calling for heroic action or imposing uncommon hardship. This compensation is not to be diminished by reason of the fact that the persons engaged in the business eke out a precarious living by using their vessels for other services, as is shown by the testimony in this case. Scattered among the Keys that fringe the desolate and inhospitable coast whose reefs of jagged rock lie open to the infinite march of the Atlantic, and beckon to almost sure destruction when its black waves, lashed to rage, smite upon them, these men are the only hope of succor to the unhappy mariner. When one considers the greatness of the enemy that they must do battle with, the living fury of the waters, the unwearying and implacable enmity of the ocean, and the frail craft in which they breast its storms, and the death that lurks in the deep sea, there comes a feeling that the measure by which compensation pro opere et labore is commonly meted is infinitely inadequate. Yet nothing seems to be better settled in the law of salvage than that courts, in making their awards, shall be governed by the conditions actually prevailing at the time when the service was rendered; that merely apprehended or possible dangers are speculative and apt to be misleading. Governed by this rule, I cannot say that the testimony discloses any actual or immediate peril either to the salvors or to the salved. The court is asked to award a lump sum, to be divided as they may agree between the licensed wreckers and the owners and crew of the tug Dauntless. The service of the latter, meritorious and efficient as it was, is of the simplest known in the law of salvage. On her course from Havana to her home port, a happy chance brought her to the spot at the time of need. A few hours of work, to which she was well adapted, imposing no unusual strain, and accompanied by no uncommon peril, and it was done. Her work was made necessary by the second grounding, and as her share of the salvage will diminish the amounts received by the other salvors, they will suffer to that extent, whether the second grounding was due to their fault, as contended by the claimants, or to accident, as propounded in the libel, for the salvage service must be regarded as a whole. It would serve no good purpose to refer to the numerous cases cited by counsel. The books are full of them, and they have all received careful consideration; but, as each case must be determined by the facts peculiar to it, they furnish no guide to any infallible conclusion. The latest case on the Florida Reefs (decided in 1896) is *The Alamo*, 21 C. C. A. 451, 75 Fed. 602, in which the careful and well-considered opinion of Judge Locke, of the district court of Florida, sets forth the peculiar dangers and conditions that prevail in that region. His judgment, affirmed by the circuit court of appeals, seems to furnish the best, as it is the latest, rule by which cases arising in that quarter should be determined. The *Alamo* went aground on one of the coral reefs, about 15 miles from Key West, at a speed of about 12 miles an hour, upon the highest crest of an outside reef, in such manner that she had to be pulled off inside the reef, and not into the open sea. Licensed wreckers and one

steamtug went to her assistance and worked on her from the afternoon of January 22d to the morning of January 24th, and lightened her of 300 tons of cargo. During the time that she was aground the highest velocity of the wind was 18 miles an hour, which increased within two days to 43 miles an hour. Owing to the high wind and heavy sea, the work of lightering the cargo was dangerous, some of the vessels being injured; and the court comments on "the remarkable skill and daring of the salvors." The agreed value of the property salvaged was \$515,000, and the amount of salvage awarded below was \$15,000, which the court of appeals says was not so extravagant as to shock its conscience, but probably more than it might have allowed. In all essentials, this case would seem to justify a much higher award than that now to be determined. The property salvaged was twice as valuable. The difficulties and dangers attending the salvaging were more than twice as great. The number of vessels and men engaged on the Alamo is not stated in the opinion, though it appears that the ship was lightered of "seven loads of cargo, about 300 tons, measurement." In this case there were about 15 loads, of about 130 tons; the cargo of the Alamo lightered being of sugar, potatoes, oil, iron, whisky, liquors, coffee, and rice; that of the Alexandra being cotton and cotton-seed meal. The Alamo was 15 miles from Key West; the Alexandra, 90 miles. But the court says on this point that, "as far as being in a condition of safety or danger, she might as well have been on French, Conch, or Pickle reef"; that the "point upon which the ship rested was as fully exposed as it might have been a hundred miles distant, and the means of assistance at Key West were exhausted when the salvors who came to her aid offered themselves." In the Alamo all of the cargo was saved. In the Alexandra a part was lost,—not, however, through any fault of the salvors. I am of opinion that the amount offered in settlement was a full and liberal sum, and, if the money had been paid into court, no costs would have been allowed.

The claimants ask that costs be not allowed, because of the exorbitant bond demanded for the release of the ship. It appears that libelants demanded a bond for \$40,000, but the clerk, in the absence of the judge, very properly fixed the amount of the bond at \$20,000, which was given; and it does not appear that the claimants have suffered loss from the demand of what, under the circumstances, was an exorbitant requirement. A decree will be entered in favor of the libelants for \$11,500 and costs.

ANDERSON v. MUNSON.

(District Court, S. D. New York. November 16, 1900.)

1. SHIPPING—CONSTRUCTION OF TIME CHARTER—OVERRUNNING TIME.

Whether a clause in a time charter, "hire to continue from the time specified for terminating the charter until her delivery to owner," authorizes the charterer to dispatch the vessel on a voyage which, owing to the short time remaining, it is known cannot be completed until after the expiration of the charter, or whether it provides only for an unexpected detention beyond the charter period, since either construction is consistent with its language, is a question which may properly be determined by evidence of the custom and usage under such charters.

2. SAME.

A time charter, with extensions covering a year, contained a provision, "hire to continue from the time specified for terminating the charter until her delivery to owner." The charter specified voyages from ports in the United States to Cuban, Mexican, or South American ports, and the vessel in fact made four voyages to Mexico and two to Cuba during the year, and completed discharging from the last voyage 13 days before the expiration of the charter period. Her hire amounted to about \$150 per day. *Held*, that under a reasonable construction of such clause, in view of the practice and usage of the port of New York, as shown by the testimony, the charterer was entitled to dispatch the vessel on another voyage, although it could not be completed before the expiration of the charter period, but that, the only purpose of the custom being to enable him to obtain the beneficial use of the vessel during the remaining time for which he was bound to pay the hire, he could not reasonably require her to make a voyage to Mexico which would require 8 or 9 weeks, but could send her on another voyage to Cuba, which was the shortest contemplated by the charter, and was required to pay at the charter rate until her return and delivery to the owner.

In Admiralty. Libel and cross libel to determine rights under a charter.

Convers & Kirlin, for owner.

Wheeler & Cortis, for charterer.

BROWN, District Judge. The above libels have been filed in consequence of a dispute between the owner and the charterer of the British steamship *Jacob Bright* of 2,718 tons gross, as to their respective rights and obligations in regard to the despatch of the vessel on a new voyage a short time before the close of a time charter.

The charter was dated March 14, 1898, chartering the steamer to Mr. Munson—

"For the term of six calendar months from the day of delivery * * * to be employed as the charterers or their agents shall direct in lawful trades between safe port and/or ports in British North America, between May 1st and September 1st, and/or United States of America, and/or West Indies, and/or Central America, and/or Caribbean Sea, and/or Gulf of Mexico, and/or South America (not south of River Platte), and/or Europe, * * * at the rate of £925 per month, with an option of continuing the charter for a further period of three months, and/or three months more upon giving 15 days notice previous to expiration of first named term, with liberty of subletting if required."

The charterer used both options on due notice, and the vessel having been delivered under the charter on June 7, 1898, the full term

of 12 months expired on June 7, 1899, at the same hour of her delivery. The vessel was not in fact redelivered to the owner until July 26th. Freight in the meantime had considerably advanced, and the first libel was filed to recover the balance of charter hire remaining unpaid for the charter period, and also for additional compensation at the market rate of freight from and after June 7, 1899, to July 26th.

The provision of the charter as respects the hire was as follows:

"(3) That the charterers shall pay for the use and hire of the said vessel at the rate of £925 Br. Stg. per calendar month commencing on and from the day of her delivery and at and after the same rates for any part of a month; hire to continue from the time specified for terminating the charter until her delivery to owner (unless lost) at a port in the United States north of Hatteras."

On May 25, 1899, the vessel was in New York, having on that day completed her discharge on a prior voyage, and the charterer thereupon ordered her to Philadelphia to load a cargo for Tampico, Mexico. The time ordinarily occupied for such a voyage and return was about 60 days, which would overrun the termination of the charter by 47 days. The master, considering that the charterer had no right to the use of the steamer beyond the termination of the charter period, offered to proceed to Philadelphia as ordered, but refused to load a cargo for Tampico; the charterer insisted upon obedience to orders, and the vessel thereupon proceeded to Philadelphia, and arrived there on May 26th, when the master repeated his refusal to load for Tampico. After considerable negotiation, occupying four days, the master agreed under protest to load for Cuba, proceeded thither, and returned with cargo after many delays, and the ship was redelivered to the owner on July 26th, as above stated. The charterer in the meantime procured another vessel to carry the cargo to Tampico, which he had designed for the *Jacob Bright*, but was obliged to pay for the hire of the substituted vessel the sum of \$2,141.11 in excess of the charter rates of the *Jacob Bright* for the same period. In the cross libel, the charterer claims to recover this amount of the owner of the *Jacob Bright*, as well as a deduction of four days' hire for time lost during the dispute in Philadelphia, and also for further alleged unjustifiable delays of the vessel in Cuba.

1. The charter is obviously purely a time charter. The charterer would have no legal right to make use of the vessel a day beyond the expiration of the charter term, and he would be bound to pay for any such actual use the market rates after the lapse of the charter term, were it not for the following clause in paragraph 3: "Hire to continue from the time specified for terminating the charter until her delivery to owner." The rights of the parties must depend I think upon the construction and effect to be given to that clause.

Although this form of time charter with the same additional clause has been in use to a considerable extent for at least 20 or 30 years (see *Scrutton, Charter Parties*), no direct adjudication as to the charterer's right to despatch the vessel near the close of the term has been found, save the implication in *Gray v. Christie*, 5 Times L. R. 577. Other forms of charter party avoid the difficulty here encountered,

either by some express provision for a continuation of the charter until a return of the ship in case she shall be on a voyage at the end of the charter period, as in *McGilvery v. Capen*, 73 Mass. 525; or by providing "for as many voyages as the ship can enter upon" during the specified period, as in *Tully v. Howling*, 2 Q. B. Div. 182. In such cases it is clear that a vessel may enter upon a voyage up even to the last day of the charter period, and thereby obtain a virtual extension of the charter, paying for such extension either the charter rates or the market rates, as the charter itself shall provide. Where no such provision is made and there is no such clause as the one above cited, and the charter provides only for as many voyages as can be made within the specified period, the charterer takes all the risks, and may lose a considerable part of the charter period, if near the close of the charter another voyage cannot be completed within the specified term, as has recently been held in the case of *The Mary Adelaide Randall* (D. C.) 93 Fed. 222, affirmed in 39 C. C. A. 335, 98 Fed. 895.

The uncertainties of navigation, however, are so great that in all time charters contemplating several voyages, it is almost certain that the voyages cannot be so arranged as to precisely fill up the charter period without running over the time limit. An additional uncertainty, which may upset the charterer's best calculations, arises from the liability of the vessel to be laid up more or less for repairs during the charter period, as actually happened in this case. The charterer on the other hand is bound to pay in full to the last day of the charter period whether he uses the vessel or not, provided she is in condition to sail. In vessels of considerable value, therefore, like the present, where the charter rate is some \$150 per day, the charge for unused days, where a considerable number remain, would become very burdensome. If, for instance, the voyages contemplated occupied from 30 to 60 days each, and at the close of the last voyage only 20 days remained of the charter period, there would be a loss to the charterer of \$3,000 for the unemployed days in case he could not send the vessel out on another voyage; and with a larger number of days remaining, the loss would be proportionately greater. It is evident that commercial business by means of chartered vessels could not be carried on under such liabilities to certain loss; and considering that charters like this have been to a large extent long in use, there must of necessity have existed some ways of settlement by which such losses are avoided.

The charterer in the present libels contends that the clause "hire to continue," etc., was designed to provide against this liability and has been so customarily interpreted and applied; that by the charter he has the undisputed right to the beneficial use of the vessel until the expiration of the charter period, and that the intention of this additional clause was to authorize the charterer, up to the expiration of that period, to despatch the vessel upon a voyage in order that he might have the full beneficial use of the vessel during the whole charter term, and pay for any excess of time occupied in finishing that voyage at the rate provided in this clause.

The owner on the other hand contends that the object of this clause was to provide only for an involuntary and unexpected detention of the vessel beyond the charter period, and that this clause gives no right to the charterer to despatch the vessel on a voyage which he knows cannot be completed within the charter term. *Steamship Co. Munson* (D. C.) 95 Fed. 690, affirmed in 41 C. C. A. 156, 100 Fed. 1005. On the side of the owner, it is urged that it is important for him to know when the charter will expire in order that he may make other engagements for his vessel; that in case of any rise in freights he may at once obtain the benefit of the advance, and finally that the charterer's construction amounts to a material extension of the limits, at the mere option of the charterer. But it is evident that the clause in question does contemplate the detention of the vessel beyond the charter period, since its provision is express that "the hire shall continue from the time specified for terminating the charter until her delivery," etc. As respects the benefit to the owner from any rise in the market rate of freights, the provision that the "hire"—that is, the same rate of hire—"shall continue" operates equally as between the charterer and the owner. When such charters are made neither party knows whether at the close of the charter period, freights will be higher or lower. Had the clause read "hire to be at the market rates after the time specified for terminating the charter until her delivery," one or the other would have obtained the benefit of any change in the market rates. But that would not have shed any light upon the proper construction of the clause itself, as respects the right of a charterer to despatch the vessel on a voyage which would necessarily extend beyond the charter period; so that the provision as to rates has no bearing upon the construction of the clause in question. The provision that the same rate of hire shall continue, should be regarded, therefore, as a method adopted by the parties of avoiding any dispute as to market rates for any excess over the charter period during which the ship might be rightfully employed by the charterer. As respects any new charter of the vessel by the owner, I do not perceive that the difficulties in that regard are materially increased beyond those which commonly exist in the chartering of vessels, since many if not most charters are made while vessels are still engaged upon an unfinished voyage to take effect after arrival. The loss likely to be sustained by the owner from the continuation of the employment of the vessel by the charterer until the close of a voyage commenced during the charter period, through any rise in the market rate of freights is small compared with the loss which in the great majority of cases would certainly be incurred by the charterer, if he had no legal right to despatch the vessel upon a voyage which could not be completed within the charter term.

From the above view of the practical situation of the two parties, and the fact that neither construction of this clause is inconsistent with its language, I think that evidence of the practice, custom or usage as to the employment of vessels under clauses like this is competent, and may be resorted to in order to ascertain the pre-

sumed intention of this clause. 1 Greenl. Ev. § 292; *Steamship Co. v. Munson* (D. C.) 95 Fed. 690; *Insurance Co. v. Sherwood*, 14 How. 351, 361, 14 L. Ed. 452; *Marx v. Steamship Co.* (D. C.) 22 Fed. 680, 684, and cases there cited; *Hostetter v. Park*, 137 U. S. 30, 40, 11 Sup. Ct. 1, 34 L. Ed. 568.

The evidence of the experts examined, though lacking in precision as to the number of remaining days necessary to authorize an additional voyage, or the precise voyage which might be entered upon, is entirely uniform in stating that the charterer may despatch the vessel upon some of the voyages mentioned in the charter where any considerable period remains of the charter term, although the voyage cannot be completed within the term. These experts were all introduced by the charterer; none were called in behalf of the owner, not even the local agents of the vessel, who are presumably well acquainted with the ordinary practice under charters of this form.

Without commenting upon the details of the different witnesses as respects the custom and practice alleged, but giving full effect to the rule that every custom must be reasonable, I find that where there is an unexpired term of about 12 or 13 days which would involve the charterer in a loss of some \$2,000, if the vessel could not be employed by him during that time, that the practice of despatching the vessel upon some of the voyages authorized by the charter is reasonable and is in accord with the established usage of this port and should be allowed. On the other hand, considering that the only justifiable object of any such extension of the time limits of the charter is to enable the charterer to secure the beneficial use of the vessel for the whole charter period, I find that the only additional voyage that can be required of the vessel without the owner's consent, is the shortest of the voyages that are commercially practicable under the charter, or of those in which the vessel has in fact been employed, and for which she was presumptively engaged; and that any custom to despatch the vessel on a longer voyage is unreasonable and invalid, because unnecessary for the objects of the clause in question as respects the charterer, and an unnecessary extension of the time limits of the charter to the owner's prejudice.

In the present case, the steamer being a foreign vessel, could make no voyages between American ports. She had previously made six voyages, two to Cuba and four to Mexico. A voyage to Cuba and return with cargo, would occupy from three to six weeks; to Mexico from eight to nine weeks. To require the vessel to proceed upon the longer of these trips, overrunning the charter period from six to seven weeks, was an unreasonable demand and unjustifiable and ought not to be sustained. The voyage to Cuba, which was finally made, was the shortest of the voyages previously made and the shortest of those contemplated by the charter. Upon the evidence it was, therefore, one which could be reasonably and justifiably required.

I sustain, therefore, the captain's refusal to load for Tampico, and disallow the charterer's claim for extra hire in the employment of another vessel for that port. The loss of four days at Philadelphia

was owing to the charterer's insistence upon the Tampico voyage; there is no indication of delay by the captain to load for Cuba when that voyage was proposed to him, and the deduction of those four days' hire cannot, therefore, be allowed to the charterer. Nor do I find sufficient evidence of delay at Cardenas by any fault of the master, and that deduction is, therefore, disallowed. The captain's protest on sailing for Cuba is also overruled, and the recovery of hire for the overrunning days must be computed at charter rates.

The cross libel is therefore dismissed, and a decree may be entered for the libelant in the original libel for the balance of the charter hire only up to the day of delivery, with costs.

THE LIVINGSTONE.

(District Court, W. D. New York. October 8, 1900.)

No. 3,664.

1. ADMIRALTY — CONSTRUCTION AND EFFECT OF STIPULATION FOR RELEASE OF VESSEL—CLAIMS OF INTERVENERS.

A bond or stipulation given for the release of a vessel libeled in a suit for collision, brought jointly by the owner of the vessel sunk and the owner and bailee of her cargo, which runs to the libelants jointly and severally and to their and each of their successors and assigns, and is conditioned that the claimant of the vessel shall abide and answer the decree of the court in the cause, is not a mere personal security given to the libelants individually, but stands as well for the payment of any sums which may be decreed in favor of cargo insurers who have paid the loss thereon, and have intervened in the cause by leave of court claiming to be subrogated to the rights of one of the libelants who sued in behalf of all the cargo owners.

2. COLLISION—CHARTERER AS OWNER FOR VOYAGE—EFFECT OF VESSEL'S FAULT.

The charterer of a vessel for the season for a fixed sum, who pays all the expenses, and has full control, management, and charge of her navigation, becomes the owner for the voyages made during the term of the charter; and where the vessel, during such a voyage, has been sunk, with her cargo, in a collision for which the two vessels have been held equally in fault, he is affected by her contributory fault, and is entitled to recover against the other vessel but one-half the loss sustained by him as a cargo owner.

3. SAME—INTERVENTION BY INSURER—RIGHTS BY SUBROGATION.

An insurer of a portion of the cargo of a vessel sunk in collision, who has paid the loss and intervened in a suit to recover damages for the collision brought by the owners of the vessel and cargo, seeking to hold the respondent vessel solely liable for his loss, is subrogated only to the rights of his insured; and where the insured, as charterer and owner for the voyage, is affected by the contributory fault of the vessel, and entitled to recover from the respondent vessel but one-half his cargo loss, the insurer is likewise restricted in his recovery; but an insurer of a portion of the cargo owned by an innocent shipper, although his loss was sued for by the charterer as bailee, is not so affected, and, the insured in such case having the right at his election to hold either vessel liable for his entire loss, the intervener succeeds to the same right.

4. ADMIRALTY — RECOUPMENT FROM DAMAGES FOR COLLISION — NECESSITY OF CROSS LIBEL.

In a suit for collision, brought by the owner of one of the vessels, which was sunk, and the owners of her cargo, against the other vessel, in which

the two vessels were held equally in fault, and the recovery of the libelant vessel owner restricted to one-half his loss, but full recovery was decreed against the respondent vessel for the losses sustained by innocent cargo owners, where all the parties in interest were before the court, and participated in all the controversies arising in the suit, the failure of the libeled vessel to file a cross libel, and have process thereon issued and served as permitted by admiralty rule 59, will not preclude it from recouping from the amount awarded against it in favor of the other vessel one-half the loss of the innocent cargo owners, which it is required to pay in full.

On Motion for Decree and Exceptions to Commissioner's Report.

Harvey D. Goulder, for libelants.

William B. Cady, for interveners.

C. E. Kremer, F. H. Canfield, and Harvey L. Brown, for respondents.

HAZEL, District Judge. This is a cause of collision between the steamer *Grand Traverse*, owned by the Lackawanna Transportation Company, and the steamer *Livingstone*, owned by the Michigan Navigation Company. Both steamers were found in equal fault, and an interlocutory decree was rendered on January 3, 1899, that the loss and damage accruing to the steamers *Livingstone* and *Grand Traverse*, respectively, be apportioned between them in equal moieties. The *Livingstone*, 87 Fed. 769. The libel was filed by the Lackawanna Transportation Company, owner of the *Grand Traverse*, and by the Delaware, Lackawanna & Western Railroad Company as owner of 679 gross tons of nut coal and as bailee in divers other merchandise shipped upon the said propeller *Grand Traverse*. The *Grand Traverse* was chartered by the Delaware, Lackawanna & Western Railroad Company for the season of navigation on the Great Lakes for 1896. The libel upon which the suit is based was filed in the joint names of the Lackawanna Transportation Company and Delaware, Lackawanna & Western Railroad Company, and a joint right of recovery is averred therein. The *Livingstone* was seized under this libel, and was bonded by the Fidelity & Deposit Company of Maryland as surety. The bond runs to the libelants above named jointly and severally in the sum of \$75,250, to be paid to the said libelants, their and each of their successors or assigns, and conditioned that, if the claimant of the *Livingstone* shall well and truly abide and answer the decree of the court in said cause of libel without fraud or other delay, then the obligation to be void. The answer of the *Livingstone* to the libel denies fault on her part, and avers that the collision was caused wholly on account of the fault, negligence, and improper navigation of the *Grand Traverse*. The answer also alleges that the *Livingstone* suffered damages to the extent of \$6,850, which constitutes an enforceable lien against the *Grand Traverse*, and prays that the libel in the cause may be dismissed, and that such other and further order may be made as will protect the just rights of the respondent. After issue was joined, the Indemnity Mutual Marine Assurance Company, Limited, of London, England, filed its petition setting forth

that it was the insurer of 679 gross tons of nut coal shipped by the Delaware, Lackawanna & Western Railroad Company, and consigned to said Delaware, Lackawanna & Western Railroad Company; that the insurance on coal was against all perils that should come to the damage of said property; that the coal was totally lost, and was abandoned to the petitioner, the insurance company, and the amount insured thereon was paid by the insurance company to the consignee, the Delaware, Lackawanna & Western Railroad Company, and it thereby "became subrogated to the rights of the libellant the Delaware, Lackawanna & Western Railroad Company, as owner of the coal, against any vessel or person whomsoever on account of the injury and damage resulting to said coal by reason of the collision." The petitioner prays that it be allowed to intervene and prosecute its claim against the Livingstone and the sureties upon the bond or stipulation filed in the cause, and the court is asked by the petition to "decree that the claimant of the Livingstone and the sureties upon its bond pay to your petitioner the loss and damage sustained, with interest." An order was accordingly made permitting the petitioner to intervene, and in due time the Livingstone, as required by the order, made answer to the petition, denying, among other things, that she was in fault for the collision, and denying that the Indemnity Mutual Marine Assurance Company has a claim against the owner of the propeller Livingstone and the sureties on the bond and stipulation filed in the cause. After the entry of the interlocutory decree finding both steamers in fault, the Union Marine Insurance Company, Limited, of Liverpool, England, also petitioned to be allowed to intervene as insurers of certain cargo of the steamer Grand Traverse, shipped via the Lackawanna Transportation Company, and consigned to Johannes Bros., of Green Bay, Wis. It alleges that said last-mentioned merchandise was insured in the sum of \$813, and that said merchandise was at the time of the collision of the two steamers lost and destroyed; that on payment of the insurance the merchandise was abandoned to the last-named insurance company by the shippers and consignee, and that by the terms and conditions of the policy it became subrogated to the rights of said shippers and consignee against any vessel or person whomsoever on account of the injury and damage resulting to said merchandise by reason of said collision. To this petition the claimants of the Livingstone also made answer denying liability. The interlocutory decree, after finding that both steamers were at fault in bringing about the collision between the said steamers, respectively, and that the loss and damage occurring to said steamers be apportioned between them in equal moieties, decreed further that the question of the amount of damages sustained by said vessels on account of the collision, as well as to the cargo of the steamer Grand Traverse, be referred to a commissioner to take proof respecting said damage, and ascertain and report the amount thereof, together with such proofs, to the court; and that all questions as to the liability of said steamers for the loss and damage resulting from said collision to the cargo of the steamer Grand Traverse be reserved by the court for further consideration until the

coming in of the report of the commissioner and the entry of the final decree in the case. Pursuant to the decretal order, the commissioner reported to the court that the parties to the cause entered into a stipulation authorizing and directing him, as such commissioner, to report the damage to libelants by reason of the loss of the Grand Traverse at \$37,500, and he does so report accordingly, with interest from the date of the collision, October 19, 1896, amounting to \$45,316.17. As to the claim made by the owners of the Livingstone for the loss and damage sustained by that vessel, the commissioner found from a written admission signed by proctors for libelants and for respondent, and from the evidence before him in regard to certain disputed items, that the damage sustained by the Livingstone, with interest, amounts to \$7,815.16. As to the claim made by the intervening underwriters on cargo of the Grand Traverse, based on the stipulation of proctors for libelants and for respondents, he finds the damages sustained by them to be as follows: The Indemnity Mutual Marine Assurance Company, Limited, of London, England, the insurer of the coal, with interest, \$4,284.60; the Union Marine Insurance Company, Limited, of Liverpool, England, the insurers of merchandise consigned to Johannes Bros., with interest, \$955.41. As to the claim for personal effects of the master and crew of the steamer Grand Traverse he finds that their recovery against the Livingstone is limited to one-half of the value in each case of personal effects lost, amounting to \$402.99, including interest. In each case interest is computed from the date of the collision at 6 per cent., except as to the claims of the interveners, in whose behalf the computation of interest is from the time of payment by the interveners of the cargo damages. The claimant of the Livingstone, the Michigan Navigation Company, excepts to the report of the commissioner, and the question now to be considered arises upon the exceptions to the commissioner's report.

It is insisted: First. That the claims for the cargo should be disallowed, because the libel upon which the suit is based was filed in the joint names of the Lackawanna Transportation Company and the Delaware, Lackawanna & Western Railroad Company, and, a joint right of recovery being averred therein, and no new bond having been filed to answer the interveners' claim, the surety cannot be held liable on the bond in the case, as it simply runs to the joint libelants; that the bond obligates the surety company to answer to any claim which the libelants, to whom the bond was given, may establish in this suit, and does not obligate the surety company to answer to the claim of any other person or company. Second. If the underwriters have a right to intervene in the cause, that then they are entitled to recover only one-half of the value of the cargo. Third. If the respondent the Michigan Navigation Company or its surety is liable on account of the cargo loss, it is entitled to recoup one-half the amount over whatever may be allowed to libelants as owners of the Grand Traverse. I cannot accept the interpretation of the office of a bond or stipulation given in admiralty suits insisted on by the respondent. The bond runs to the Lackawanna Transporta-

tion Company and the Delaware, Lackawanna & Western Railroad Company, and to each of their successors or assigns. The purpose of the bond was to release the Livingstone from arrest, and the condition of the bond is that the claimant of the ship arrested shall well and truly abide and answer the decree of the court in the cause, without fraud or other delay. The bond was given not only to the libelants in behalf of themselves, but was given to the Lackawanna Transportation Company, as owner of the Grand Traverse, and the Delaware, Lackawanna & Western Railroad Company, cargo owners, or as trustee or bailee, for the owners of portions of the cargo with which the Grand Traverse was laden at the time of the collision. The interveners were made parties in interest, so far as the cargo is concerned, and became subrogated to the rights and remedies of the owners of the cargo or of the trustee or bailee for portions of the cargo, and the entire proceeding of the interveners was to recover against the bond theretofore given to answer to the claim for cargo loss. The respondent made answer to the interveners, contesting the claim for cargo damages and denying that it was at fault for the collision. The cause of action did not change. The insurance companies simply became parties to the suit, as they had a right, under general admiralty rules Nos. 34 and 43; and upon payment of the insurance to the owners of the cargo became subrogated to the rights of the owners of the cargo, and were put in place of one of the libelants, thereby obtaining all the rights of the party for whom they were subrogated. *The Monticello*, 17 How. 156, 15 L. Ed. 68; *The Potomac*, 105 U. S. 634, 26 L. Ed. 1194; *The Liberty No. 4* (D. C.) 7 Fed. 230. The parties who really sustained the cargo loss were substituted in place of the owner of the coal and bailee for other portions of the cargo. The liability of the surety was not increased or diminished, and subrogation to the rights of cargo owners will not affect the stipulation as against the sureties. The sureties are bound to well and truly abide and answer to the decree of the court without fraud or delay. *The Beaconsfield*, 158 U. S. 303, 15 Sup. Ct. 860, 39 L. Ed. 993; *The Nied Elwin*, 1 Dod. 50. In the *Nied Elwin*, *supra*, the court said:

"I cannot entirely accede to the position which has been laid down in behalf of the claimant that these bonds are mere personal security given to the individual captor, because I think they are given to the court as securities to abide the adjudication of all facts at the time impending before it. The court is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the courts of common law. * * * In this place they are subject to more enlarged considerations. They are here regarded as pledges or substitutes for the thing itself in all points fairly in the adjudication before the court."

The cases of *The Oregon*, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943, and *The T. W. Snook* (D. C.) 51 Fed. 244, are not at variance with this ruling. In the case first cited it was attempted to enlarge the liability of the stipulators by the inclusion of claims other than the ones which the stipulators agreed to pay. The court said:

"The stipulators may be so well satisfied that the claimant has a defense to the original libel as to be willing to take upon themselves the contingency of

a decree requiring its payment, but they may neither know nor be able to conjecture what other demands may be made against the property."

Nor is the case of *The T. W. Snook*, *supra*, applicable to the facts of this case. Here the stipulators had notice of the interveners' claims, and the respondents disputed their right of recovery. Afterwards, by stipulation entered into by proctors for all parties, it was agreed that the interveners were insurers upon certain cargo lost upon the propeller *Grand Traverse* on account of the collision which occurred between the two steamers, and that portions of said lost cargo were the property of certain shippers, whose interests were covered and protected under certain policies of marine insurance underwritten by the intervening companies. The amount of money which the underwriters paid to the owners of the cargo was also stipulated by proctors for respondents and for libelants, and reference was had in said stipulation to marine receipts, bills of lading, and proofs of loss, showing the interest of the interveners. Obviously, the respondents must now be precluded or estopped from asserting that the sureties are not liable to the interveners on the bond. The Delaware, Lackawanna & Western Railroad Company was the owner of a portion of the cargo, and also represented innocent parties. It is well settled (*The New York*, 175 U. S. 209, 20 Sup. Ct. 75, 44 L. Ed. 135; *The Atlas*, 93 U. S. 302, 23 L. Ed. 863) that "a plaintiff who has suffered a loss by the negligence of two parties was at liberty, both at common law and in admiralty, to sue both wrongdoers or either one of them, at his election." And the court in *The New York*, *supra*, reaffirming the principle laid down in *The Atlas*, said:

"It is equally clear that, if he [the plaintiff] did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss. He may proceed against all the wrongdoers jointly, or he may sue them all, or any one of them separately. * * * Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to the libellant; nor is it a question in this cause whether the party served may have process to compel the other wrongdoers to appear and respond to the alleged wrongful act."

In this case the interveners elected to proceed against the *Livingstone*, and to hold her solely liable for the cargo loss; but it is insisted that the interveners are entitled to recover only one-half the value of the cargo because of the fact that the railroad company was engaged in the navigation of the steamer either as charterer or as owner *pro hac vice*, and contributed to the disaster, and that, where a collision occurs through the mutual fault of both vessels, the entire damage resulting therefrom is to be divided between the two vessels. The evidence established that the *Grand Traverse* was chartered for the entire season of navigation of 1896 by her owner, the Lackawanna Transportation Company, to the Delaware, Lackawanna & Western Railroad Company, for the sum of \$12,000. The owner was to keep the vessel in condition and pay the insurance on her. In the years 1887 and 1888 the railroad company owned the vessel, but in the following year she was transferred to the Lackawanna Transportation Company, and each season thereafter was chartered by the railroad

company for a fixed sum, the railroad company paying the expenses for running the vessel. The superintendent of the Lackawanna Transportation Company was also the superintendent or manager of the owner of the steamer Grand Traverse, and the transportation company acted as agent for the railroad company in its business of carrying freight on the Great Lakes. It seems to me clear that the intention of the vessel owner and charterer was that the charterer should have possession, control, management, and navigation of the ship, and therefore must be considered as owner for the voyage. *Marcadier v. Insurance Co.*, 8 Cranch, 40, 3 L. Ed. 481; *Leary v. U. S.*, 81 U. S. 607, 20 L. Ed. 756. The master of the Grand Traverse was guilty of fault for which that steamer was condemned by a decree of this court. *Thorp v. Hammond*, 12 Wall. 408, 20 L. Ed. 419. The collision complained of having occurred under the management of the railroad company, which was likewise the owner of the coal cargo, how can the charterer be heard to complain that it was an innocent cargo owner, and therefore entitled to recover in full against the Livingstone? Both vessels being in fault, and the insurance company acquiring by subrogation the right only of the owners of the coal cargo owned by the libellant in charge of the navigation of the Grand Traverse at the time of the collision, the same principle, it seems to me, must be applied that exists in a case where a crew lost their effects by the collision, both vessels contributing to the collision being in fault. In such case the crew is entitled to recover only one-half their damages, and nothing from their own ship. *The Queen* (D. C.) 40 Fed. 694; *Jakobsen v. Springer*, 31 C. C. A. 315, 87 Fed. 953. It would be absurd to claim that the Delaware, Lackawanna & Western Railroad Company, owner, for the voyage, of the Grand Traverse, and in charge of her navigation, is able to recover for the entire cargo loss, of which it was the owner. It has been decreed that because of her fault in navigation the Grand Traverse contributed to the collision. No principle of law can be applied to hold that, notwithstanding her negligence, she can recover for the full amount of her own cargo loss by reason of the collision. The insurance company by subrogation obtained all the rights of the libellant for whom it was substituted against the Livingstone, and no more. The railroad company not being an innocent cargo owner, the insurance company certainly is no such stranger to the controversy as to entitle it to recover the entire cargo loss from the vessel which it proceeded against. In both *The New York* and *The Atlas*, supra, the court said: "A cargo owner is entitled to judgment for the full amount of his loss if he did not contribute to the disaster, and where the owners of the cargo are innocent of all wrong." An intervener proceeding to recover for cargo loss must come into court with clean hands. He cannot contribute to the disaster, commit a tortious act, then substitute another person in his place, and expect thereby to receive or gain an advantage, or aver a greater right than he himself possesses. In any form of remedy the insurer can take nothing by subrogation but the rights of the insured. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U.

S. 321, 6 Sup. Ct. 750, 1176, 29 L. Ed. 873; *Sheld. Subr.* § 44; *Railroad Co. v. Soutter*, 13 Wall. 517, 20 L. Ed. 543; *Wilkinson v. Babbitt*, 4 Dill. 207, Fed. Cas. No. 17,688; *Guckenheimer v. Angevine*, 81 N. Y. 394. The doctrine of subrogation will not be applied to relieve him of the wrongful act of one under whom he claims. *Boyer v. Bolender*, 129 Pa. St. 324, 18 Atl. 127; *Wilson v. Murray*, 90 Ind. 477. Judge Story said in the case of *Comegys v. Vasse*, 1 Pet. 193, 7 L. Ed. 108, that:

"By the act of abandonment the insured renounces and yields up to the underwriters all his right, title, and claim to what may be saved, and leaves it to him to make the most of it for his own benefit. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be saved from destruction."

In *The Potomac*, 105 U. S. 630, 26 L. Ed. 1194, the court said:

"The insurers of a ship which has been run down and sunk by the fault of another ship are, upon their payment of the total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and will be entitled to any damages which the insurer might have recovered from such owner."

The Chattahoochee, 173 U. S. 549, 19 Sup. Ct. 491, 43 L. Ed. 801, was held liable as one of two wrongdoers for all the damages suffered by cargo innocent of fault.

I am constrained to hold that the interest which passed to the insurer by subrogation is only that of the assured, and that the Delaware, Lackawanna & Western Railroad Company had no such right of recovery as is here pursued by the intervener the Indemnity Mutual Marine Assurance Company, Limited, of London, England. The claim for cargo loss because of the fault of the charterer is of the same class as that of the general owners. *The Geo. W. Roby* (D. C.) 103 Fed. 336. The recovery from the *Livingstone*, therefore, by the insurer of the coal cargo, can be only one-half the value of 679 gross tons of nut coal. This principle is not, however, applicable, as we have seen, to the rights of recovery of innocent cargo owners to the full amount of their damages against the *Livingstone*. The Union Marine Insurance Company, Limited, intervened in behalf of an innocent cargo owner who had not contributed to the disaster. Following the doctrine laid down in *The Atlas*, *The New York*, and other cases, it is entitled to recover from the *Livingstone*, against whom it had the right to proceed, the full amount of its cargo damage. It is insisted, however, by proctors for the *Livingstone*, that, if the *Livingstone* is liable on account of the cargo loss, or any part thereof, she is entitled to recoup one-half the amount from whatever may be allowed to the libelants, as owners of the *Grand Traverse*; and the court is referred to *The Eleanor*, 17 Blatchf. 88, Fed. Cas. No. 4,335; *Leonard v. Whitwill*, 10 Ben. 649, Fed. Cas. No. 8,261; *The C. H. Foster* (C. C.) 1 Fed. 733; *Insurance Co. v. Alexandre* (D. C.) 16 Fed. 279; *The Canima* (D. C.) 17 Fed. 271; *The Hercules* (D. C.) 20 Fed. 205; *The Job T. Wilson* (D. C.) 84 Fed. 204; *Jakobsen v. Springer*, 31 C. C. A. 315, 87 Fed. 948; and *The*

Albert Dumois, 177 U. S. 244, 20 Sup. Ct. 595, 44 L. Ed. 751,—to sustain this contention. The proctors for the libelants strenuously insist that the Livingstone is precluded from making a claim for recoupment because of her failure to plead recoupment or to file a cross libel. The pleadings in the cause consist of the original libel filed, the several petitions filed by the interveners above named against the Livingstone and the several answers of the respondents to said libel and said petitions. No cross libel was filed by the respondents, nor has the respondent, by any pleading filed in the cause, claimed to recover or recoup any sum from the libelants in personam, or any of them, or asked for any decree against any of the libelants by way of recoupment or otherwise for cargo damages. Nor has any proceeding been had under general admiralty rule No. 59 to bring any party into the suit to respond for any loss or damage to the cargo resulting from the collision. The principle of recoupment was undoubtedly recognized and enforced in *The Eleanora*, 17 Blatchf. 88, Fed. Cas. No. 4,335, and in many other cases, wherein both vessels were decreed to be in fault, and the damages not only to the respective vessels, but to the cargo, were divided between the vessels found at fault. It is insisted that since *The Eleanora* decision and decisions of a like nature a change has been made in the practice in collision cases by admiralty rule No. 59. By this rule it is provided that a party whose vessel is libeled for a collision, where he claims that another vessel is involved, may petition for process against such vessel or her owners to bring her or them into the cause, so that the court, having the parties before it, may dispose of the rights of all by one decree. This rule the Livingstone failed to follow, and therefore it is contended that the owner of the *Grand Traverse* was not before the court on the question of the cargo damages, and that she had no opportunity to interpose a defense against the claim for cargo damages; that the only issue between the two steamers was the liability for the collision of the steamers respectively, and the damages sustained by reason thereof; that the intervening petitioners elected to pursue their remedy against the Livingstone for damages sustained by reason of the cargo loss; and the Livingstone, having failed to avail herself of the remedy afforded by the rules and practice in collision cases, is estopped from claiming recoupment in the manner in which she does. The attention of the court is called to *Ward v. Chamberlain*, 21 How. 572, 16 L. Ed. 219; *The Dove*, 91 U. S. 381, 23 L. Ed. 354; *Ebert v. Reuben Doud* (D. C.) 3 Fed. 520; *The Juniata*, 93 U. S. 337, 23 L. Ed. 930; *The Beaconsfield*, 158 U. S. 307, 15 Sup. Ct. 860, 39 L. Ed. 993; and other cases, holding that it is the practice in courts of admiralty to institute cross libels to recover damages against the libelants, and that the parties proceeded against should file their libels or cross libels, and have them served in the usual way. It is no doubt true that by the promulgation by the supreme court of admiralty rule No. 59 it is intended to simplify and make uniform a system of proceedings and practice in collision cases. The purpose of the rule is to permit a vessel libeled to have process

against another vessel involved, or her owners, to bring her or them into the cause, so that the court, having all the parties before it, may dispose of the rights of all by one decree. The rule was adopted by the supreme court in 1883. In the case at bar the owners of both vessels contributing to the collision were before the court, the one as libellant and the other as respondent. The interveners, however, as we have seen, proceeded solely against the Livingstone, being entitled, if they did not contribute to the disaster, to recover to the full amount of their damages against the Livingstone, notwithstanding the Grand Traverse might also be in fault for the collision.

The question arises whether recoupment for cargo damages recovered against the Livingstone by the interveners can be had from the amount of damages to be paid to the Grand Traverse by the Livingstone for and on account of the damages sustained to the Grand Traverse by reason of the collision, without filing a cross libel. No affirmative decree is sought against the Grand Traverse or her owners by the respondent. No case to which my attention has been called has had the question, as applicable to this case, under consideration. After the most careful consideration, I have reached the conclusion that the controversy on this point must yield to the flexibility of procedure in admiralty courts of the United States. "The practice of this court has never been conducted on the strict rules of procedure of the common law. An endeavor always exists to determine the cause submitted to it on equitable principles, and to do so the court will sometimes disregard mere technical rules and forms, and only look to rules of natural justice." *Davis v. Adams* (C. C. A.) 102 Fed. 523; Ben. Adm. (3d Ed.) 190. Whenever the court deems necessary to adjust the equities of the parties, amendments to pleadings are allowed, and relief will be afforded to bring all the parties in court, so that the rights of the parties may be adjusted. I do not think this necessary. The record sufficiently shows that the owner of the Grand Traverse is before the court on all the questions in the case. Although not proceeded against by the interveners, nor cross libeled by the respondent, her owner is voluntarily on the record as waiving the failure to file cross libel. The Lackawanna Transportation Company, owner of the Grand Traverse, on the 26th day of April, 1898, and again on the 4th day of October, 1898, entered into a stipulation of record with all the others concerned as parties in the cause, whereby the interests of the interveners in the cargo of the Grand Traverse at the time of the collision, and the amount paid for insurance, the loss, the subrogation, and the value of the cargo are expressly stipulated. It has certainly assumed a position recognizing the right of the interveners to recover, and waiving any defense which the owner of the Grand Traverse might have or which it might interpose to a cross libel if any were filed. It was held that:

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right of opposition to such consent, if his conduct or act of encouragement induced the other party to change his position, so that he will be peculiarly prejudiced by the assertion of such adverse claim." *Dodsworth*

v. Iron Works, 31 U. S. App. 292, 13 C. C. A. 552, 66 Fed. 483; Davis v. Cornwall, 35 U. S. App. 315, 15 C. C. A. 559, 68 Fed. 522.

Manifestly, the owners of the Grand Traverse are estopped from now complaining that no opportunity was afforded to defend against cargo liability, and it seems to me clear that the Livingstone may recoup one-half of the amount of recovery by the Union Marine Insurance Company, Limited, of Liverpool, England.

The findings of the commissioner in respect to the damages sustained by each of the steamers, and his findings allowing the claims of seamen for personal effects alleged to have been lost by reason of the collision, are sustained, with interest at the rate of 6 per centum, as computed by him. The proctors for the Grand Traverse consenting thereto on the argument of this case, the finding of the commissioner making an allowance to the libelants on account of supplies on the steamer Grand Traverse is disallowed. The interlocutory decree having found both steamers in fault, the Grand Traverse, being a total loss, can recover one-half her value from the Livingstone, less one-half the damages suffered by the Livingstone, as shown by the record in this case. The Indemnity Mutual Marine Assurance Company, Limited, of London, England, insurer of 679 gross tons of nut coal on board the Grand Traverse, of which the Delaware, Lackawanna & Western Railroad Company was the owner at the time of the collision, and to whose rights the insurance company was subrogated, is entitled to recover only one-half its damages from the Livingstone, with interest thereon at the rate of 6 per centum from the time of payment of the insurance to the cargo owners. The Union Marine Insurance Company, Limited, of Liverpool, England, representing innocent cargo owners, is entitled to recover full amount of its damages from the Livingstone, with interest at the rate of 6 per centum from the time of payment of the insurance to the cargo owners, but the Livingstone is entitled to recoup one-half the damages so decreed to be paid to the Union Marine Insurance Company, Limited, and deduct the same from the amount awarded to the owners of the Grand Traverse. The libellant the Lackawanna Transportation Company and the respondent or its surety must pay each one-half the costs of this action. Let a decree be entered accordingly.

LORD v. LEHIGH VAL. R. CO.

(Circuit Court, E. D. New York. October 29, 1900.)

REMOVAL OF CAUSES—TIME FOR FILING PETITION—EXTENSION OF TIME TO ANSWER.

It is the settled practice in the Second circuit that an extension of time to answer by an order entered in a state court extends the time for filing a petition for removal.

On Motion to Remand to State Court.

Robert L. Stanton, for plaintiff.

Alexander & Green, for defendant.

THOMAS, District Judge. The proceedings to remove this action from the state to the federal court were instituted after the granting of an order extending the time to answer, and upon a motion to remand it is urged that the petition for removal must be filed at or before the defendant is required to plead by the rules of the courts of the state, and that an order extending the time to answer is not such a rule. In support of this proposition the plaintiff cites *Howard v. Railway Co.* (N. C.) 29 S. E. 778; *Mining Co. v. Hunter* (U. S. C. C., S. D. 1894) 60 Fed. 305; *Velie v. Indemnity Co.* (U. S. C. C., Wis. 1889) 40 Fed. 545; *Austin v. Gagan* (U. S. C. C., Cal. 1889) 39 Fed. 626, 5 L. R. A. 476; *Delbanco v. Singletary* (U. S. C. C., Nev. 1889) 40 Fed. 177, 178; and *Kaitel v. Wylie* (U. S. C. C., Ill. 1889) 38 Fed. 865.

In *Rycroft v. Green* (C. C.) 49 Fed. 177, Judge Lacombe stated:

"It is the law and practice of this circuit that an extension of time to answer by order of court, whether made on stipulation or not, extends the time for removal. This was settled practice here before the decisions in other circuits which are referred to on the argument, and, in view of what an extension of time to answer is, under the Code rules and practice of the courts of this state, seems conformable alike to the letter and the spirit of the removal act."

This holding was followed or justified in the following cases arising in the Second circuit: *Winberg v. Lumber Co.* (C. C.) 29 Fed. 721; *Simonson v. Jordon* (C. C.) 30 Fed. 721; *Dwyer v. Peshall* (C. C.) 32 Fed. 497; *Price v. Railroad Co.* (C. C.) 65 Fed. 825; *Schipper v. Cordage Co.* (C. C.) 72 Fed. 803; *Allmark v. Steamship Co.* (C. C.) 76 Fed. 614; and *Mayer v. Railroad Co.* (C. C.) 93 Fed. 601. A similar ruling has been made in other circuits. *Lockhart v. Railroad Co.* (U. S. C. C., Tenn. 1889) 38 Fed. 274; *People's Bank v. Aetna Ins. Co.* (U. S. C. C., S. C. 1892) 53 Fed. 161; *Chiatovich v. Hanchett* (U. S. C. C., Nev. 1897) 78 Fed. 193, 195; *Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co.* (U. S. C. C., S. C. 1894) 60 Fed. 929. The practice of this circuit requires a denial of the motion to remand.

CHAMPLAIN CONST. CO. v. O'BRIEN et al.

(Circuit Court, D. Vermont. November 19, 1900.)

1. REMOVAL OF CAUSES—TIME FOR FILING PETITION—EFFECT OF FILING ANSWER BEFORE TIME REQUIRED.

The filing of an answer in a state court before the time required, for the purpose of enabling the defendant, under the rules of the court, to move for the dissolution of a preliminary injunction, does not affect his right to file a petition for removal within the time allowed by the state laws or rules of court for answering.

2. SAME—PROCEDURE AFTER REMOVAL—MOTION TO DISSOLVE INJUNCTION.

Under the provision of the removal statute (18 Stat. 470) which continues in force any injunction granted before removal until dissolved by the court to which the suit shall be removed, when a cause has been entered in a circuit court after its removal a motion to dissolve a preliminary injunction granted by the state court, and then in force, may be made at once.

3. PRELIMINARY INJUNCTION—HEARING ON MOTION TO DISSOLVE—AFFIDAVITS.

Where a preliminary injunction has been granted against an apprehended waste or destruction of property, ex parte affidavits in support of the bill and against the denial of the answer, setting out copies of notices the legal effect of which is in dispute, may be used on the hearing of a motion to dissolve the injunction.

4. CONTRACTS—RAILROAD CONSTRUCTION—NOTICE OF FORFEITURE.

Where a contract for railroad construction authorized the company, if at any time, in the opinion of its chief engineer, the contractors were not complying with their contract, to serve notice on the contractors, and take possession of the work, together with the tools and materials of the contractors, and to complete the work at their expense, and hold their property as security for any damages sustained by reason of their default, such a notice, to entitle the company to take possession of the contractors' property, must set out the opinion of its chief engineer as an essential condition precedent; but the company would have the right to take possession of its own property without such notice, and to proceed with the work as it saw fit, taking the risk of the legal consequences of its action.

5. LIENS—INSUFFICIENCY OF CONTRACT—EFFECT OF OBTAINING POSSESSION.

Where a contract between a railroad company and contractors for work on its line gave the company a lien on the property of the contractors used in the work for advances and general balances, although the contract was not so executed as to create a valid mortgage, it will be held valid as a pledge after the company has taken possession of the property, but it will not authorize the company to use the property in the prosecution of the work.

In Equity. On motions by defendants to dissolve a preliminary injunction, and by complainant to remand to state court.

F. H. & W. H. Button, for plaintiff.

T. W. Moloney and F. M. Butler, for defendants.

WHEELER, District Judge. The plaintiff is building the Rutland-Canadian Railroad, and the defendants are contractors for doing the work, under a written contract, with specifications by which it was to be done by October 1, 1899. The contract provides:

"Third. It is further agreed that if at any time the progress of the work or the character of appliances and materials furnished is not such as, in the opinion of the company's chief engineer, will secure the completion of this contract within the time stipulated herein, or is not in accordance with the said specifications, then the company may serve written notice upon the contractors personally, or by leaving the same at their office, No. 233 Broadway in the city of New York, the contractors shall fail to furnish the company sat-

isfactory evidence of their efforts, ability, and intentions to increase said progress or improve said materials, the company, if it so elect, may thereupon enter and take possession of the said work, or any part thereof, with the tools, materials, plant, and appurtenances thereon, and hold the same as security for any or all damages that may arise from the nonfulfillment of this contract within the time herein stipulated; and the company may use and employ said tools and other appurtenances and other proper means to complete the work at the expense of the contractors, and may deduct the cost thereof from any payment then due or that thereafter may become due to the contractors."

The time for completing the work was, from time to time, extended to May 20, 1900, and the last contract of extension provided:

"Fourth. All rights of said company to take over the plant and other appliances of said contractors and complete the work provided in said contract shall be continued on the same conditions as contained herein for said time of extension, and for all time thereafter up to the final completion of said work, and no rights secured to the said company by the terms of said contract shall be in any manner waived by any of the provisions thereof."

June 1, 1900, the company, by letter of its president to the defendants, specified several points where the number of men employed and the work and materials were not satisfactory, and June 14th inclosed to them a report of the chief engineer of the Rutland Railroad upon the state of the work, and said:

"I would call your attention to the clause in the contract and in the various supplemental contracts which provides that this shall be of the essence of the contract, and also for liquidated damages to the amount of \$400 per day. The loss to our companies in not having this road to operate in connection with the Rutland system will, in my judgment, exceed this amount, and this company will insist upon all its rights in regard to damages under its contract, and will hold you for the amount of damages therein specified."

July 20th the parties agreed in writing that, for an advance of \$49,000, the plaintiff should "have a lien upon all of the plant, appliances, and supplies of the party of the second part now engaged in or upon constructing said railroad, or which may hereafter be used in or upon the construction of said road, as security for any balance that may be due from said parties of the second part to said party of the first part on account of the constructing of said railroad under said contract and supplemental contracts on the final accounting between said parties"; and on September 19th they further contracted that:

"In consideration of the advance by said party of the first part of a sum sufficient to discharge said wages, it is mutually agreed between the parties hereto that said party of the first part shall have a lien upon all the plant, appliances, and supplies of said parties of the second part now employed in or upon the construction of said railroad, or which may hereafter be employed in or upon the construction of said railroad, as security for any and all sums which have been advanced or which may hereafter be advanced to said parties of the second part for work under said contract and supplemental contracts, and for whatever balance may be due from said parties of the second part to said party of the first part on a final settlement for all work under said contracts and in constructing said railroad. It is further agreed that the advance of said sum shall in no wise prejudice or alter any rights which said party of the first part now has under said contract and supplemental contracts to take over said plant, appliances, and supplies, and complete said railroad, or to deduct its damages for noncompletion of same or any other rights which it may have under said contract or supplemental contracts."

—And thereupon \$64,000 was advanced.

October 1st the president wrote again:

"I was over that part of the road between Burlington and Mooney cut on Saturday, and am very much disappointed at the progress of the work. There are not enough men on the line to finish the ballasting before winter, and the men who are working are not effective. I am surprised to see how little has been done in the last two weeks. You will remember that I have told you I would increase the price which we are to pay you for some parts of the work, provided you would increase your force 500 men by Saturday night last. Instead of an increase of 500, there is an actual decrease, so, of course, I do not expect to pay you any increase, inasmuch as you have not complied with the very first condition precedent thereto, namely, to increase your force 500 men. Conditions on the Mooney cut and Pearl cut are still very bad, and the work is progressing very slowly. At the rate you are going now, I do not expect to see the road open for traffic this winter."

On October 11th this suit was brought in the state court of chancery, returnable to the March term, setting out defaults, and liens, and notice for taking possession and taking over the work, materials, and plant under the contracts, and refusals, and praying for an injunction against further refusal, interference with taking possession and operations; and a preliminary injunction was granted therein restraining the defendants "from in any way interfering with the orator in the above-entitled cause, and from in any way preventing said orator in taking over and using the plant and other property mentioned in said bill now upon the work along the line of the Rutland-Canadian Railroad, or in any manner connected with said work, whether upon said line or elsewhere, including all steam and other boats, steam shovels, locomotives and stationary engines, cars, derricks, hoists, pipes, drills, pile drivers, pumps, dredges, chains, cables, coal, powder, and all other tools, appliances, and supplies of every kind and description, and from prosecuting and completing the work on said railroad, and from in any way interfering with the said plant or other property and with the men now employed on said work, and by threats, inducements, or other promises preventing said orator in securing their services for the completion of said work." The rules in chancery of the state court provide that a motion to dissolve an injunction will not be heard till after an answer is filed. Pursuant to this rule, the defendants answered, denying any notice to take over the work and plant under the contract, alleging that delays and defaults were due to the plaintiff, and setting up that there was due to the defendants under the contract much more than the amount of the two liens, and moved to dissolve the injunction. The motion was heard in part, and continued for further hearing. Then the defendants removed the cause to this court, and have moved here for a dissolution of the injunction. The plaintiff has moved to remand because the defendants have answered in compliance with the rule of the state court, and denies the right to move to dissolve in this court before the first day of the next session.

By the act of 1888 the defendant may file a petition for removal in the state court "at the time or any time before the defendant is required by the laws of the state or the rule of the state court to answer or plead." 25 Stat. 433. These defendants were not "required" to answer in the state court till the March term. They could answer

before that, in order to move to dissolve the injunction, but this was at their option. They lose the right only by going beyond the absolutely required time. Leave to delay, by rules of practice, beyond that time, does not save the right. Deciding to answer in compliance with a rule of practice for a preliminary purpose would not cut it off. The preliminary injunction and the proceedings in respect to it stood by themselves, apart from the subpoena and the requirement to appear and answer. A new answer may be filed, as of right, within the time for answering generally, and this voluntary answer as a part of those preliminary proceedings is not what is required by the removal statute. The statutes provide:

"That when a suit shall be removed to a circuit court of the United States, * * * all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed." 18 Stat. 470.

Under this statute, when the case is actually entered in the circuit court, a motion to dissolve a preliminary injunction seems to be in order. *Hamilton v. Fowler* (C. C.) 83 Fed. 321.

Question has been made as to the admissibility of ex parte affidavits in support of the bill against the denials of the answer. That generally they are not so admissible is recognized, and that there are exceptions in cases of waste and of patents is well known. *High, Inj.* 1007, 1008. This is a case of apprehended destruction of property and of conflict, and seems to well fall within the exception. The exact terms of the notices upon which the possession of the roadway and of the plant and materials were taken are shown by copies of the letters quoted from belonging to an affidavit in support of the bill, and they qualify the denials of notice in the answer according to their extent. The right to take over the defendants' property, and to use it, in proceeding with the work, at their expense, rests upon the opinion of the chief engineer of the plaintiff, and the notice required by the contract should set that forth as a part of an intended proceeding for that purpose, so that the defendants might understand the object and comply with the requirements of the notice. These communications contain no reference to any opinion of that chief engineer, and do not point to any taking over of the property for want of compliance. The exclusion of a person from his property under such proceedings is so contrary to common right that the provisions for them should be strictly followed; and these do not appear to have been so followed, nor to have afforded sufficient ground for taking it over. But the roadway upon which the work was being and to be done belonged to the plaintiff, and not to the defendants; and the plaintiff would not have to await the convenience or necessities of the contractors, but would have the right, without notice, but with the risk of legal consequences, to take possession of its own property peaceably, and proceed with the work as it should see fit. *Danforth v. Walker*, 37 Vt. 239. Such possession appears to have been taken under the protection of the injunction. The defendants have not disavowed any intention to resume possession of the roadway if the injunction should be dissolved, and to this extent, for the protection of this possession, the injunction should, for the

present, stand, with the legal consequences of the taking of this possession and of its protection by the injunction left to be determined. These views would lead to a dissolution of the injunction as to the defendants' plant and property but for the liens given for security of advances and general balances. They are not executed according to the law of personal property mortgages, and perhaps would not hold the property without possession; but with the possession that the plaintiff has they amount to a pledge for security according to their terms. The general balance of the whole may turn out to be in favor of the defendants, and, if so, they will be entitled to this property of course; but this cannot be assumed to be so, nor properly be found to be so at this stage of the case and proceedings. The plaintiff is, therefore, entitled to hold possession of the property for the present for the purpose of the security. But a pledgee has no right as such to use the pledge, and the plaintiff does not appear to have any right to the possession of this property for use. The injunction should, therefore, by strict legal right, be dissolved as to this personal property, except as to custody of it for the security. Apparently, however, the use of the property in the completion of the work, to be accounted for by the plaintiff, will be for the best interest of all. Such use and accountability appears to be made safe to the defendants by the injunction bond, and the propriety of it is confirmed by the provision for it in the contract if the work should be taken over on notice. Motion overruled as to roadway and work, and also as to defendants' plant and property, but with accountability of plaintiff to defendants for the use of these latter, without prejudice to other rights of parties.

STEVENS et al. v. MISSOURI, K. & T. RY. CO. et al.

(Circuit Court, E. D. Missouri, E. D. April 19, 1900.)

1. DEPOSITIONS—EQUITY CAUSES IN FEDERAL COURTS.

Rev. St. § 863, construed in connection with rule 68 of the supreme court, which relates to such section, does not authorize the taking of testimony by deposition *de bene esse* in an equity cause until after it is at issue.

2. SAME—AUTHORITY OF CLERK TO ISSUE SUBPŒNAS.

There is no statutory provision conferring power upon a clerk of a circuit court to issue subpœnas requiring witnesses to appear and give depositions before a notary, to be used in another federal court, except where such depositions are to be taken under a commission, as provided in Rev. St. § 863, and subpœnas so issued in other cases are without any lawful authority.

On application for an order requiring witnesses to show cause why they should not be punished for contempt.

Harris Lindsley, for complainants.

James Hagerman, for defendants.

ADAMS, District Judge (orally). In the case of Stevens v. Railway Co., which case is pending in the circuit court of the United

States for the Southern district of New York, it appears that in the progress of that cause in New York, and before issue was joined, notice was given by the complainants to take testimony in St. Louis before a notary public. The parties appeared here, subpoenas were issued by the clerk of this court to witnesses, and the witnesses appeared, but declined to be sworn. Application is now made to this court for an order upon these witnesses, as recalcitrant witnesses, to show cause why they should not be punished for contempt, in that they refused to be sworn in the proceeding before the notary public. The chief objection made to this is that the issue in the main case pending in New York, as appears by the papers now before the court on this application, has not been joined. In other words, the case stands there on the bill, there is no answer filed, and, of course, no replication, and it is contended, by reason of that fact, there is no power to take the testimony of witnesses.

In determining, now, what is to be done with this application, reference, of course, must be had to the provisions of the law in relation to taking testimony in equity cases. It is well known, of course, that congress delegated power to make rules for taking testimony in equity and admiralty jurisdiction to the supreme court of the United States, vesting that court with power to make rules determining the mode of proof in causes of that kind, and conferring on that court power to change them from time to time. It is not necessary, probably, to refer to the general line of decisions which have established the legality of the power conferred upon that court. It originally was contended, and has been contended at divers times, that the delegation of power upon the supreme court of the United States to formulate rules for the taking of testimony in admiralty and equity causes was delegating power of a legislative nature on the courts of the United States, but it has been held and established now as the law that it is not a delegation of legislative power, but is simply imposing on the supreme court of the United States power judicial in its nature and character, regulating the manner of taking testimony in the courts of the United States. Accordingly, in disposing of the question now under consideration, the rules of the supreme court of the United States in equity and admiralty have all the force and effect of statutes of the United States governing the taking of testimony in such cases. It is incumbent upon the courts to consider not only the statutes, but the rules of the supreme court which have been promulgated in relation to the mode of taking testimony. Now, looking at these rules and the statutes together, it is clear that there has been for a long time a well-regulated system of taking testimony in such cases. First, testimony was taken under commissions duly issued by the court in which the cases were pending, under which the testimony was taken upon interrogatories and answers. This commission was sent to some commissioner of the United States for that purpose. This was enlarged so as to permit the taking of testimony by a special examiner or a general examiner. Afterwards the congress of the United States, with the view of enlarging the provisions with respect to that,

and making the taking of testimony more convenient, passed several acts, which are embraced in section 863 in the Revised Statutes. This but enlarges the power of the court and the opportunities of litigants for securing testimony, and provides, in a general way, that testimony may be taken in equity and admiralty causes in practically the same manner as it was taken in legal actions; that is, by depositions *de bene esse*, where all that is required is that a litigant shall give notice to the opposite party that he proposes to take the testimony of certain witnesses, to be named, according to this section, before any notary public, anywhere. In such a proceeding the parties go before such notary public, and he takes their testimony, in equity and admiralty causes, the same, practically, as hitherto was done in legal actions.

Now comes the question which is at issue here,—whether this particular section (section 863, Rev. St.) is to be so construed as to permit the taking of testimony in an equity cause before issue joined. This section reads at the outset, "The testimony of any witness may be taken in any civil cause depending in the district or circuit court by depositions *de bene esse*," etc. This section must be construed in the light of the previous section (section 862), which makes provisions for the promulgation of rules in equity by the supreme court of the United States, and, of course, in connection with the rules of the supreme court of the United States pursuant thereto. The rules which that court has adopted in this respect are rules 67-70. Rule 67 is one which relates to the old-time method of taking testimony, namely, testimony taken on commission duly issued, and testimony taken by examiners, either a general examiner of the court, or a special examiner to be appointed in each case. This rule provides at the outset, "After the cause is at issue commissions to take testimony may be taken out in vacation as well as in term," etc. Rule 69 is another rule promulgated for the purpose of expediting the taking of testimony. This rule provides that "three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or judge shall extend the time," etc. Now, in the light of the provisions of section 863 of the statutes, the supreme court promulgates another rule, known as rule 68, providing that "testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of congress, but in such cases when no notice is given to the adverse party of the time and place of taking the deposition, he shall, on motion and affidavit of the fact, be entitled to cross-examination of the witness, either under a commission, or by a new deposition taken under the act of congress," etc. This rule 68 manifestly and clearly relates to section 863. As I say, section 863 is a combination or codification of the several acts of congress passed before that time in relation to taking depositions in equity causes, and especially a codification of the acts of congress of February 26, 1853, July 29, 1854, and May 9, 1872. I say this rule 68 clearly relates to that, because it relates to the taking of testimony by a deposition according to the acts of congress. There is no other act of congress which relates to the taking of testimony by deposition, except this sec-

tion 863; and, further, it seems to me that this rule necessarily relates to that section, because of the provisions made for taking testimony in case notice is not given to the adverse party. That manifestly relates to that provision of section 863 which provides for the taking of testimony by deposition *de bene esse* in case of the absence of a party, so that service or notice cannot be given to him. Therefore, construing this in the light of the manifest purpose of the supreme court in promulgating the rule, it must simply be held to mean, I think, that when a person proceeds to take testimony *de bene esse* on a notice, merely, he must proceed in accordance with rule 68. The language of section 863, that "the testimony of any witness may be taken in any civil cause depending in any district or circuit court," must, in the light of the rules to which I have called attention, be understood to mean so depending in any district or circuit court of the United States as, under the rules which are enforced in relation thereto, to entitle a party to take testimony. "So depending" necessarily means that the issues must have been framed.

I am aware, in reaching this conclusion, that I differ with Judge Lacombe, of New York; but I cannot help but think that the statement of the conclusion reached by Judge Lacombe, to the effect that a cause is depending, within the meaning of section 863, prior to the joining of the issues, is incorrect. I cannot see how that construction can be given to the act, in the light of the rules of the supreme court, which must have the same force and effect as statutes enacted on the subject.

It follows that, inasmuch as this case is not at issue, no testimony can be taken in it. I have in mind, of course, the statement made in the argument of counsel to the effect that the proceedings in New York are at the stage affecting the question of jurisdiction, and that it becomes necessary to take the testimony on that issue, and they say it is impossible to secure it without compulsory process; but this is a misfortune, and I know of no law that can relieve them from such a condition of things. The determination of questions of jurisdiction or other preliminary matters is, as a rule, by affidavit, and not by this process of taking testimony.

There is another reason which seems to me to be determinative of this matter, and that is that I am not aware of any provisions of the statutes of the United States conferring upon the clerk of this court, under such circumstances, any power to issue subpoenas. There is such power conferred by section 863 upon the clerk in cases where a deposition is to be taken under a commission, but the power is limited to such cases. Under such circumstances it seems to me that the issuing of the subpoena by the clerk was without any authority in law whatsoever in this case.

For both these reasons the application made here for an order on these defendants to show cause why they should not be punished for contempt should be denied.

I alluded a moment ago to the fact that Judge Lacombe expressed an opinion differing from these views, and I think it but just to so eminent a jurist to say this: That in consideration of his judg-

ment. I mistrusted my own, after reaching a conclusion that I thought was right, and regretted that this matter had not been so presented that it could have been heard by a circuit judge alone, or sitting with me; but, that not having been done, I consulted Judge Thayer on the subject, and he authorized me to say, after going over this matter, that he concurs in the conclusion which I have reached in this case.

DAUGHERTY et al. v. BOGY.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1900.)

No. 1,369.

1. APPEAL—REVIEW—QUESTIONS OF FACT.

A finding by the court in an equity case that a note and mortgage were fraudulent in fact because executed with intent to hinder and delay the other creditors of the mortgagor will not be disturbed on appeal, where the evidence is conflicting, unless some serious or important mistake has been made in its consideration.

2. FRAUDULENT CONVEYANCES—EXEMPT PROPERTY—IMPROVEMENTS ON INDIAN LANDS.

Under Act May 2, 1890 (1 Supp. Rev. St. [2d Ed.] p. 734, c. 182), which exempts improvements on Indian lands, unless made by persons or companies operating mines, railroads, or other industries, from attachments or from sale on execution except on the judgment of an Indian court, and permits their sale in supplemental proceedings only when owned by adopted citizens of a tribe or a resident who is not a citizen, a creditor of a citizen of an Indian tribe by blood cannot attack as fraudulent a conveyance by his debtor of improvements on agricultural lands, since, in a legal sense, he has no interest in the property.

3. SET-OFF—RIGHT TO PLEAD—EQUITABLE GARNISHMENT.

A defendant in a suit by a judgment creditor in the nature of an equitable garnishment, who is sought to be charged as a debtor of the judgment defendant, may make any defense which would be available against his creditor, including that of offset; and, since the plaintiff has no rights beyond those of his own debtor, he cannot compel the defendant to resort to a mortgage to secure payment of a note of the judgment defendant which he has pleaded as an offset.

Appeal from the United States Court of Appeals in the Indian Territory.

On March 19, 1897, Alexander M. Bogy filed a bill of complaint against L. C. Perryman, George B. Perryman, and J. M. Daugherty, the appellants, which contained substantially the following allegations: That he (Bogy) on December 4, 1893, had recovered a judgment against L. C. Perryman and George B. Perryman, the defendants, for \$6,127, in the United States court in the Indian Territory, which was still unpaid, an execution having been issued and returned nulla bona; that the defendants have from time to time, and then had, large numbers of cattle and horses in their possession, which belonged to them, but upon which they were in the habit of executing mortgages to other persons immediately upon the arrival of such stock in the Indian Territory, so that under the law of the territory the complainant was unable to levy execution upon the property; that said defendants were also the owners or possessors of large tracts of pasture land in the territory, which was inclosed by wire fences, and from which they derived a revenue to the extent of \$20,000 per annum, and on account of which they had been receiving such sum annually for many years; that the defendant J. M. Daugherty was the agent or lessee of the Perrymans with reference to said pasture land, and that by

and through him they had been enabled to collect said sum of \$20,000 per year, and to appropriate the same to their own use, in disregard of the rights of the complainant; and that the said Daugherty was at the time of the filing of the complaint indebted to his co-defendants in a large sum of money, growing out of his relations to them and their ownership of the aforesaid pasture lands. Afterwards, on December 14, 1897, the complainant filed an amendment to his bill, wherein he charged, in substance, that Daugherty had conspired with the Perrymans with intent to cheat, hinder, and delay the creditors of the latter, and that as a part of said scheme they had executed in favor of Daugherty mortgages or bills of sale upon all the property of the Perrymans, including farms, pastures, goods, and chattels; and that said Daugherty had during the past three or four years paid to his co-defendants more than \$50,000, while their creditors were hindered and delayed in the collection of their debts. On May 21, 1897, the Perrymans filed an answer to the bill, which had not at that time been amended, the answer being, in substance, a general denial of all of the allegations therein contained. On May 29, 1897, before Daugherty was served with process or had answered the bill, a receiver of all the property of the Perrymans was appointed at the instance of the complainant. By said order the receiver was authorized and directed to take charge of and hold any and all interests which the Perrymans, or either of them, had in any large border pasture or pastures in the Creek Nation. On May 27, 1897, an order was made appointing a master in chancery to take such testimony as might be produced before him, and to make a report thereon at the earliest time practicable. During the pendency of the case before the master, and on November 5, 1897, the defendant Daugherty filed his answer to the bill of complaint, which was to the following effect: He denied that he was or had been the agent of the Perrymans, as charged, with respect to the pasture land, or that by and through him the Perrymans had been enabled to collect money from persons who were using said pastures, and he denied that he was at the time of the service of process upon him indebted to the Perrymans in any sum whatever. He further averred the fact to be that he had a contract with George B. Perryman for the use, for grazing and other purposes, of certain border pastures belonging to Perryman which were situated in the Creek Nation, for which he had obligated himself to pay said Perryman the sum of \$14,500 per year; that prior to the service of process upon him, and even before the institution of the suit, he had paid the rent due under said contract for the year 1897 and prior years, and that his contract for the use of the pastures would expire with the year 1898. He further alleged that George B. Perryman was indebted to him in the sum of \$20,000, to secure the payment of which the said Perryman had theretofore executed in his favor a chattel mortgage, which was wholly unpaid, with the exception of a few payments made on account of interest; that the said Perryman had been induced to execute the aforesaid contract with reference to the pasture lands and the aforesaid chattel mortgage by a promise on his part that he would advance to Perryman the rent which would accrue for the use of said pasture lands, and would not apply the same on his mortgage, and that he had in fact advanced money in this wise, almost all of which was paid directly to various creditors of Perryman, and among them to the complainant; that the rent of said pasture land for the ensuing year, 1898, was to be applied, however, upon the indebtedness of \$20,000, secured by the chattel mortgage aforesaid, which Perryman then owed; that the property covered by said chattel mortgage was insufficient to pay the mortgage debt, or any considerable portion thereof, and that he held no property in which the Perrymans had any interest, except as last stated; and that he was not indebted to either of the Perrymans in any sum whatever, but that, on the contrary, George B. Perryman was indebted to him in the sum of \$20,000. The master subsequently filed a report, to which certain exceptions were taken. After passing upon the exceptions, some of which were sustained and some overruled, the trial court entered the following decree, in substance: That the complainant was entitled to receive from the receiver theretofore appointed an amount of money sufficient to pay off his judgment and interest according to the tenor and effect thereof; that the receiver be ordered and directed to take charge immediately of all of the property covered by the chattel mort-

gage executed by George B. Perryman in favor of the defendant Daugherty, and to apply the proceeds of the leases on the pastures to the payment of the complainant's judgment on which the bill was founded, according to its tenor and effect. The court of appeals in the Indian Territory on appeal (53 S. W. 542) modified this decree by directing the receiver to collect the rent of the pasture lands for the year 1898 which Daugherty was obligated to pay, and apply the money so collected to the discharge of the complainant's judgment. The defendants below excepted to the decree and the modification thereof, and the present appeal brings it before this court for review.

Edgar Smith and F. B. Kellogg (William M. Mellette, Cushman K. Davis, and C. A. Severance, on the brief), for appellants.

J. P. McCammon (George E. Nelson, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The evidence contained in the present record tends to show and does show the following facts: George B. Perryman and L. C. Perryman are citizens of the Creek Nation by blood. From and after the year 1890, George B. Perryman held extensive tracts of pasture lands in the Creek Nation, called "border pastures," which he had lawfully acquired from the Creek Nation, and had fenced, and for which he paid to the nation a royalty of five cents per acre. During the years 1890, 1891, 1892, 1893, and 1894, J. M. Daugherty, who resided at Abilene, Tex., and was an extensive cattle raiser and a dealer in cattle, rented portions of Perryman's pasture land in the Creek Nation, for which he paid rent. He had many other transactions with Perryman during those years, in the course of which the latter became justly indebted to him in the sum of at least \$20,000. On February 17, 1894, Perryman executed his note in favor of Daugherty, due in one year, and to secure the same also executed a mortgage, which covered the bulk of the mortgagor's property in the Creek Nation. This mortgage included improvements on the pastures of the mortgagor, houses, outbuildings, and barns which he owned in Tulsa, Ind. T., farms in and around Tulsa, one large farm in the Arkansas river bottom, and a large amount of live stock. Contemporaneously with the execution of the mortgage an agreement was entered into between Daugherty and Perryman whereby the former secured the right to occupy and use all of Perryman's border pastures in the Indian Territory, which embraced many thousand acres, for a rental of \$14,500 per annum, the agreement being that Daugherty should pay the rent for these pastures directly to Perryman, or as he might direct, and that Daugherty should not apply the rent on the mortgage indebtedness aforesaid. This arrangement continued without interruption until this action was commenced in May, 1897, at which time, by the agreement then in force, Daugherty was entitled to the use of the pastures until April 1, 1899. On January 24, 1896, Perryman executed another note for \$20,000, at one year, in renewal of his former note, and another mortgage, which embraced the property covered by the prior mortgage and some additional property. No part of this note had been paid when the present action was instituted, but it remained

a valid and subsisting indebtedness. After the agreement aforesaid, none of the rental money for the pasture lands was applied by Daugherty to the payment of the mortgage indebtedness, but the same was paid by Daugherty to the Creek Nation on account of the royalty which Perryman was under an obligation to pay, or it was paid directly to Perryman, or to such of his creditors as he indicated. The agreement to thus pay the rent was the inducement which led Perryman to execute the aforesaid mortgage. When this action was brought, the rent to accrue from the lease of the pastures for the season of 1898, which was to terminate April 1, 1899, was unpaid. Daugherty used the pastures subsequent to 1895 to pasture his own herds as well as the cattle of other persons, and he realized by such use a profit of about \$10,000 per year over and above the amount of the rental which he himself paid to Perryman or to Perryman's creditors. Within one year after the mortgage of February 17, 1894, was executed, Daugherty paid debts of Perryman, either with money or by giving his own notes, which amounted to about \$25,000. He intended to apply the rent for the year 1898—the same being the last year of his term—to the extinguishment of the aforesaid mortgage indebtedness. The master before whom the testimony in this case was taken, the trial court, and the court of appeals in the Indian Territory all agreed in the conclusion that the arrangement existing between Perryman and Daugherty which comprehended the making of the mortgage and the contract for the use of the border pastures was fraudulent as to Perryman's creditors. The decree below was the result of that conclusion. The only difference of opinion on this issue seems to have been that, while the trial and the appellate courts believed the arrangement to be fraudulent in fact, the master was of opinion that the evidence was insufficient to warrant him in finding that it was concocted in pursuance of an actual intent to hinder and delay Perryman's creditors. He held, however, in substance, that the necessary result of the arrangement was to hinder Perryman's creditors, and in this respect his conclusion was approved by the court of appeals.

In view of the character of the agreement that was entered into between Perryman and Daugherty, and in view of the facts and circumstances which the record discloses, we are not prepared to overrule the finding of the trial court, concurred in by the court of appeals, that the arrangement was fraudulent in fact, in that it was entered into for the purpose of hindering and delaying Perryman's creditors in the collection of their debts. The mortgage seems to have covered all of Perryman's personal property which was vendible on execution for a sum considerably in excess of its value, and, that being so, the express agreement between the parties that Daugherty should not apply any of the rent of the pastures to the extinguishment of the mortgage, but allow it to stand indefinitely, and that he should pay the rent directly to Perryman or as he might direct, excites a grave suspicion that Perryman intended to hold his creditors at bay, and that Daugherty participated in that intent. Possibly, the arrangement was fraudulent in law without reference to the actual motives of the parties thereto, but it is unnecessary to

express a definite opinion upon that point. The finding of the lower court concerning the fraudulent character of the contract and mortgage must be allowed to stand in obedience to the rule which has been so frequently announced by this and other courts, that the finding of a master or chancellor upon an issue of fact, where the evidence is conflicting, will not be disturbed unless an obvious error has intervened in the application of the law, or unless some serious or important mistake has been made in the consideration of the evidence. *Warren v. Burt*, 12 U. S. App. 591, 7 C. C. A. 105, 58 Fed. 101; *Paxson v. Brown*, 27 U. S. App. 49, 10 C. C. A. 135, 61 Fed. 874; *Snider v. Dobson*, 40 U. S. App. 111, 21 C. C. A. 76, 74 Fed. 757; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664.

It does not follow, however, as a result of the conclusion last announced, that the decree below in its present form can be sustained. That decree, as it was modified by the court of appeals in the Indian Territory, commands Daugherty to pay over to the receiver the sum of \$11,000, with interest at 6 per cent. per annum from October 26, 1899, out of the sum due to Perryman as rental for the border pastures for the year 1898; the same to be appropriated to the payment of the complainant's judgment, and the residue, if any, to be paid to George B. Perryman. In other words, the lower court deemed it competent to seize the rent due for the year 1898 on account of the pastures, and to apply the same on the complainant's judgment, notwithstanding the fact that Perryman was justly indebted to Daugherty to the amount of \$20,000, which sum was then due and payable. The question arises whether these rentals could be so seized and applied, even if it be true that the contract for the use of the border pastures and the mortgage were contrived by the parties thereto for the purpose of hindering and delaying Perryman's creditors. And this question must be considered in the light of an act of congress approved May 2, 1890 (1 Supp. Rev. St. [2d Ed.] p. 734, c. 182), which contains the following provisions:

"No attachment shall issue against improvements on real estate while the title to the land is vested in any Indian nation, except where such improvements have been made by persons, companies, or corporations operating coal or other mines, railroads, or other industries, under lease or permission of law of an Indian national council, or charter, or law of the United States.

"That executions upon judgments obtained in any other than Indian courts shall not be valid for the sale or conveyance of title to improvements, made upon lands owned by an Indian nation, except in the cases wherein attachments are provided for.

"Upon a return of nulla bona, upon an execution upon any judgment against an adopted citizen of any Indian tribe, or against any person residing in the Indian country and not a citizen thereof, if the judgment debtor shall be the owner of any improvements upon real estate within the Indian Territory in excess of one hundred and sixty acres occupied as a homestead, such improvements may be subjected to the payment of such judgment by a decree of the court in which such judgment was rendered. Proceedings to subject such property to the payment of judgments may be by petition, of which the judgment debtor shall have notice as in the original suit. If on the hearing the court shall be satisfied from the evidence that the judgment debtor is the owner of the improvements on real estate, subject to the payment of said judgment, the court may order the same sold, and the proceeds, or so much thereof as may be necessary to satisfy said judgment and costs, applied to the

payment of said judgment; or if the improvement is of sufficient rental value to discharge the judgment within a reasonable time the court may appoint a receiver, who shall take charge of such property and apply the rental receipts thereof to the payment of such judgment, under such regulations as the court may prescribe. If under such proceeding any improvement is sold only citizens of the tribe in which said property is situate may become the purchaser thereof."

The prohibition contained in this statute against attaching improvements on Indian lands other than such improvements as may have been made by persons or corporations owning mines, railroads, and other industries, under lease from an Indian national council or by virtue of a charter or a federal statute, and the general provision therein contained that executions on judgments obtained in any other than the Indian courts shall not be valid to sell improvements on Indian lands, places such improvements beyond the reach of judicial process for the collection of debts, except such process as is issued on judgments obtained in the Indian courts. The only exception to the general prohibition against seizing improvements on Indian lands which is contained in the statute is found in that clause which permits improvements on Indian lands "in excess of 160 acres occupied as a homestead" to be sold when they belong to adopted citizens, or to persons residing in the territory who are not citizens. The right so conferred to levy upon improvements belonging to adopted citizens and to residents of the territory who are not citizens plainly implies that all improvements belonging to a member of an Indian tribe by blood shall be exempt from seizure and sale without reference to the amount or value of such improvements. The court of appeals in the Indian Territory reached this conclusion in the case at bar; also in the case of *Mays v. Frieberg*, 49 S. W. 52, and with the views expressed in that case as to the object and effect of the statute we fully concur. Perryman's border pastures, which were leased to Daugherty, as well as his farms and buildings in the Creek Nation which were mortgaged to Daugherty, were improvements on Indian lands, and, being property of that nature, no part thereof could have been seized by the complainant below under an execution or attachment, and subjected to the payment of his claim, even if the lease and the mortgage had not been executed. It follows, therefore, that Perryman's creditors cannot challenge the validity of the lease of the border pastures, nor the validity of the mortgage in so far as it conveyed property which was at the time exempt from execution, since a creditor is only entitled to complain of a conveyance of property by his debtor, even if it be voluntary, when the property alienated is of that kind which the creditor is authorized to seize and subject to the payment of his claim. If a creditor is powerless to seize certain property of his debtor, either by virtue of an execution or an attachment, while it is owned by his debtor, this disability is not removed by the transfer of the property to a third party; nor can such transfer be successfully assailed by the creditor, although in making the transfer the debtor may have been actuated by a bad motive. In a legal sense, a creditor has no interest in the property of his debtor that is exempt from seizure and sale either under an execution or an attachment, and for that reason the

creditor cannot complain of any disposition which the debtor may see fit to make of such property. Wait, Fraud. Conv. (3d Ed.) § 46. It is contended, however,—and so the lower courts appear to have held,—that the rent which Daugherty agreed to pay for the use of the border pastures can be seized and appropriated to the payment of Perryman's debts, notwithstanding the fact that the improvements out of which the rent issued were wholly exempt from seizure and sale; in other words, it is claimed that, if an owner of an improvement on Indian lands sees fit to lease it for the purpose of deriving an income therefrom, the rent accruing under the lease is not exempt, but may be subjected to the payment of the owner's debts. This view of the law is claimed to be erroneous by learned counsel for the appellants, and we have been favored with an elaborate argument in opposition thereto, but on the present occasion we have found it unnecessary to decide the question, and would not be understood as expressing an opinion thereon. The decree of the lower court, in so far as it subjected the rent due for the border pastures to the payment of the complainant's judgment, was clearly erroneous, because it ignored the fact heretofore mentioned and found that Perryman was justly indebted to Daugherty for an amount which appears to have equaled, even if it did not exceed, the rent that was then due to Perryman on account of the border pastures. The complainant below claims these rents in right of Perryman, and any defense which would be available against Perryman if he were suing for the same is clearly available against the complainant, including the right of offset. *Schuler v. Israel*, 120 U. S. 511, 7 Sup. Ct. 648, 30 L. Ed. 707. While the present action is termed a "creditors' bill," it is in the nature of an equitable garnishment in so far as the rents accruing from the pastures are concerned, and, being a proceeding of that nature, Daugherty is entitled to offset against the rents which he owes whatever sum is due to himself from Perryman on the note which the latter executed on January 24, 1896, and is in part unpaid. Even if that note is amply secured by a chattel mortgage, we are not aware of any rule of law in virtue of which the holder of the note may be compelled in a proceeding of this nature to resort to the security, and foreclose it, when he has money of the maker in his hands which is adequate to discharge the obligation either in whole or in part. If he was sued for the rent by Perryman, he could doubtless use the note as an offset; and he is not disabled from so doing in a proceeding of this nature, brought by one of Perryman's creditors. In the answer that was filed by Daugherty he alleges, in substance, that an agreement then existed between himself and Perryman by virtue of which the rent to accrue for the border pastures for the season of 1898 was to be applied on the note; and we have found no evidence in the record which tends to disprove that allegation. But, even if there was evidence tending to disprove the existence of such an understanding, and if no such agreement had been made when the present action was instituted, we are aware of no ground on which Daugherty's right to offset the amount due on the note against the rent due for the use of the border pastures could be denied. Daugherty did not

forfeit his right to offset the amount due to him for borrowed money against the rents, even if he did enter into a fraudulent arrangement with Perryman for the purpose of hindering and delaying the latter's creditors. The fraud complained of renders the chattel mortgage voidable in so far as it covered property which was subject to execution for Perryman's debts, but the alleged fraudulent arrangement did not extinguish the indebtedness evidenced by the note, or deprive Daugherty of the right to plead that indebtedness as an offset against the rents when, in a proceeding of this nature, a creditor of Perryman attempts to appropriate them to the satisfaction of his claim.

In view of the conclusions already announced, it will be apparent that the only relief which can be afforded in the case at bar is a decree annulling the mortgages of date February 15, 1894, and January 24, 1896, in so far as such mortgages convey property other than improvements on Indian lands which was and still is liable to seizure and sale for Perryman's debts. There appears to have been some property of the latter kind, which was covered by both of the mortgages,—such as cattle and some other live stock. The complainant is entitled to have the mortgages vacated and annulled in so far as they embrace property that was not exempt from execution by the terms of the statute, but he is not entitled to have them vacated in so far as they cover improvements on Indian lands which are within the exemption created by the act of congress. The decrees that were entered by the lower courts are accordingly reversed and annulled at the cost of the appellee, and the case is remanded to the United States court in the Indian Territory, Northern district, sitting at Muskogee, with directions to that court to enter a decree to the effect heretofore stated, vacating both of the mortgages in so far as they describe and convey property which is subject to seizure and sale for the debts of George B. Perryman.

If it shall so happen that the receiver who was appointed by the lower court to take charge of the property described in the aforesaid mortgages has in his hands at present any property which is subject to execution for the debts of George B. Perryman, the decree should provide that such property be sold on reasonable notice, to be prescribed by the court, and that the proceeds of the sale be applied, after the payment of all costs which may have been incurred, to the satisfaction of the complainant's judgment so far as the same will extend. If the receiver has no such property, or funds realized therefrom, in his possession, he should be required to settle his accounts, and, having done so, should be forthwith discharged, and the costs incident to the receivership should be assessed against the complainant below. In the settlement of the receiver's accounts inquiry should be made as to whether the receiver has in his hands any personal property, or money realized therefrom, which was exempt from seizure and sale for Perryman's debts; and, if so found, he should be required to account for the same, and restore it to the person or persons to whom it of right belongs. In the event that there is no property or funds in the receiver's hands on the rendition of the decree

applicable to the payment of costs, the decree should provide that each party to the action pay the costs which they have respectively incurred or created. It is so ordered.

COHEN v. DELAVINA.

(Circuit Court, D. Maine. November 12, 1900.)

No. 534.

1. PRELIMINARY INJUNCTIONS—GROUNDS—RULES GOVERNING.

Where the effect of a preliminary injunction will be to hold matters substantially in statu quo without inflicting any serious loss on the defendant, it may be granted, although the right of the complainant is not clear, and the matter will be determined by balancing the relative detriment to the parties which will result from granting or refusing it without prejudging the case by entering upon questions of fact in regard to which, as disclosed by the affidavits, there is a serious conflict.

2. SAME.

Preliminary injunction granted upon plaintiff's filing an indemnifying bond.

In Equity. On application for preliminary injunction.

Edward M. Rand, for complainant.

Bird & Bradley, for respondent.

PUTNAM, Circuit Judge (orally). This case comes before the court on a motion for an ad interim injunction. On the affidavits of the complainant he clearly is entitled to the injunction asked for. The case does not come within *Hatch Storage-Battery Co. v. Electric Storage-Battery Co.*, 41 C. C. A. 133, 100 Fed. 975, 976 (decided by the court of appeals for this circuit on March 16, 1900), because the rules there stated do not apply where the effect of the injunction would be only to hold matters statu quo, or substantially so, or where its refusal would seriously and irretrievably impair the business of the complainant, and the granting of it would cause only a temporary minor loss to the respondent. The case comes back to the general rules applicable to granting injunctions under such circumstances that the court is compelled to balance the relative detriments to the parties before it.

The difficulty the court has to deal with, however, is that there is on nearly every point in the case a very serious conflict of fact, as shown by the respondent's affidavits; a conflict which, on final hearing, may require an investigation of a very large amount of testimony, extending over a long period of time and through an extensive range of localities. The objections to disposing of motions for preliminary injunctions under such circumstances, except according to formal rules, are very serious; because, if the court undertakes to investigate the testimony pro and con, it gets a twist which is very detrimental on final hearing. Therefore the court must find some way of disposing of this matter without undertaking to pass on the conflicting proofs before it.

The court, however, is clear that the use by the respondent of the red color on the outside of the box and the inside of the lid violates the rules of the law with reference to unfair trade. This red color is very peculiar, and is the particular thing which a customer would carry in his mind. One who has purchased the cigar manufactured by the complainant, seeing this red, would naturally be so struck by it that he would carry that without carrying in his mind anything else. The other differences between the two packages would not ordinarily impress his mind as would the red color. The red used by the complainant is very peculiar, and novel in the cigar trade, and that used by the respondent is exactly the same. Although it is used in different quantities, and covers different portions of the box, yet it is apparent to the court that these diversities were created merely for the purpose of avoiding the charge of infringement while making use of this peculiar distinctive feature.

An injunction may issue to prohibit the respondent from using any red color whatever on either the inside or the outside of his boxes. With reference to the word "Keystone," the injunction will also prohibit the respondent from using it except in connection with stamping or printing on the outside of his boxes and on the inside of his covers, in clear and conspicuous letters, the name of the manufacturer from whom he obtains the cigars. So far as the use of the word "Keystone" at large is concerned, no injunction can be granted, unless the complainant files a bond to respondent in the penal sum of \$1,000, with sufficient sureties, for damages in case the respondent prevails.

Let a decretal order be entered under rule 21 in accordance with this opinion.

RUCKGABER v. MOORE, Collector.

(Circuit Court, E. D. New York. November 7, 1900.)

1. CITIZENSHIP—WOMEN MARRIED TO ALIENS.

The political status of a native-born American woman who marries a citizen of France or England, and removes with him to his country, follows that of her husband.

2. INTERNAL REVENUE—WAR REVENUE ACT OF 1898—LEGACY TAX.

War Revenue Act 1898, § 29 (30 Stat. 464), which imposes a tax upon legacies and distributive shares of personal property which pass "either by will or by the intestate laws of any state or territory," does not apply to a bequest of property, unless such property, in the absence of a will, would be distributable under the intestate laws of some state or territory.

3. SAME.

Such act contains no provision evidencing an intention to give property, for the purposes of the tax, a situs separate from that of the owner; and it must therefore be presumed that it was intended to apply only in cases where the persons and property have a recognized legal situs within the United States, and not in cases where the transmission of the property which is the subject of the tax is governed by the law of a foreign country, owing to the domicile there of the decedent, although the property itself may be within this country, and be here administered upon.

4. SAME—LAW GOVERNING TRANSMISSION OF PERSONAL PROPERTY.

Code Civ. Proc. N. Y. § 2694, which provides that the validity and effect of a testamentary disposition of personal property situated within the

state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death, does not make the foreign law a part of the law of the state in such sense that the primary source of power to transmit or receive property owned by a non-resident alien decedent is found in the laws of the state, so as to bring it within the provisions of War Revenue Act 1898, § 29 (30 Stat. 464), but is merely declaratory of the generally recognized rule, and the title transmitted springs from the foreign, and not the domestic, law.

5. SAME—REQUEST BY NONRESIDENT ALIEN.

A woman who was a citizen of, and domiciled in, France, died abroad, and by her will, which was executed and probated in New York, bequeathed to her daughter, also a nonresident alien, property consisting of an account against citizens of New York and stock and bonds of American corporations which were actually within the state. *Held*, that such bequest was not subject to the tax imposed by section 29 of the war revenue act of 1898.

Action to recover the amount of a legacy tax paid under protest under the war revenue act of 1898. On demurrer to complaint.

F. W. & A. E. Hinrichs, John G. Carlisle, William Edmond Curtis, and Henry M. Ward, for plaintiff.

George H. Pettit, U. S. Atty., for defendant.

THOMAS, District Judge. A testatrix, sojourning in the state of New York, duly made her last will, which was admitted to probate in the county of Kings, in that state, where the person confirmed as executor resided. The testatrix was a creditor of persons residing in such county, and the owner of some shares of stock and bonds issued by American corporations. The executor collected the debt, and received the shares and bonds. The will gave all the estate to the testatrix's daughter, and on such gift the collector of internal revenue of the district embracing Kings county laid and collected a tax under the war revenue act of 1898. This action is to recover the sum paid under protest, and the present questions arise upon demurrer that the complaint does not state a cause of action. The plaintiff alleges that the gift was not subject to the tax because it was made by a woman, who was a resident of, and domiciled in, France, to her daughter, who was a resident of, and domiciled in, Germany. The complaint does not indicate whether the testatrix or her daughter ever resided within the United States. However, from statements made upon the argument and in the briefs submitted, if not from the allegations of the complaint, the court may interpret the complaint as declaring that the testatrix, formerly an American citizen, married a French citizen, that thereafter her residence was abroad, and that for several years immediately preceding her death it had been in France. By the several statutes of America, France, and Great Britain, the marriage of a citizen of such country with an alien wife confers upon the latter the citizenship of the husband; and this policy of three great powers, in connection with section 1999 of the Revised Statutes, which proclaims that expatriation is an inherent right, establishes that the political status of the wife follows that of her husband, with the modification that there must be withdrawal from

her native country, or equivalent act expressive of her election to renounce her former citizenship as a consequence of her marriage. Some serious objections to this, or even the opposite conclusion, exist, but it has been reached after due consideration of the subject, and pertinent authorities, including *Shanks v. Dupont*, 3 Pet. 243, 7 L. Ed. 666; *Pequignot v. City of Detroit* (C. C.) 16 Fed. 211; and *Comitis v. Parkerson* (C. C.) 56 Fed. 556. Hence the testatrix must be regarded as having been a nonresident alien at the time of her death. For the same reason the daughter of the deceased, and her legatee, who had intermarried with a citizen of Germany, and for eight years previous to her mother's death had resided there, should be regarded as a citizen of that country.

Hence the discussion will be undertaken at the outstart upon the assumption that the gift was by a nonresident alien to a nonresident alien. It is undoubtedly true that neither a state legislature nor congress may lay an inheritance tax unless it has the jurisdiction of the donor or donee or the property donated. In the present case there is no dominion over the donor or the legatee. Hence there can be no proper tax unless there is a relation to the property justifying it. It will be assumed for the moment that the property was within the state of New York. In such case the state of New York could lay a direct tax upon it, which would be a usual exercise of the power of taxation. But the inheritance tax laid by the state is not based upon the theory of direct taxation of the property. It has been deemed a tax on the transmission of the property, based upon the right of the state to regulate the disposition of the same upon the owner's death. While the United States has no such power of regulation, yet it may lay a tax similar to that here involved upon property of a nonresident which was in the state at the time of his death. This follows from the statement of principles in *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969.

The next inquiry, then, is, was the property within the state of New York? The property consisted of a certificate of stock issued by a new York corporation, bonds and coupons of corporations within one of the states, and an account current against citizens of New York. An account owing by a resident of the United States to a resident citizen of France does not and cannot have a situs in the state of New York, but its situs is that of its owner. There is no property here. What there is of property is abroad. The complaint states that the property taxed was in the state of New York at the decedent's death. This could not be true of a simple indebtedness to an alien, actually resident abroad at the time of his death. Such property is incapable of a situs apart from its owner, and is in this regard unlike public bonds and circulating notes of banking institutions (In re *State Tax on Foreign-Held Bonds*, 82 U. S. 300, 324, 21 L. Ed. 179); or bonds of private corporations (In re *Whiting's Estate*, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232); or certificates of stock (In re *Bronson's Estate*, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238; *Tappan v. Bank*, 86 U. S. 490, 22 L. Ed. 189); or tangible property, such as goods and chattels

(Pullman Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; W. U. Tel. Co. v. Attorney General, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790; State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 669; Marye v. Railroad Co., 127 U. S. 117, 8 Sup. Ct. 1037, 32 L. Ed. 94; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715). But it may be asked, if a simple indebtedness can have no separate situs, how can a different conclusion be reached if the obligation be embodied in a writing, which is only evidence of a debt? Kirtland v. Hotchkiss, 100 U. S. 491, 498, 25 L. Ed. 558.

In *Re State Tax on Foreign-Held Bonds*, 82 U. S. 300, 21 L. Ed. 179, Mr. Justice Field said:

"But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. * * * It is undoubtedly true that the actual situs of personal property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions. The former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner. The latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no situs independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners."

The learned judge also illustrates by authorities, of which *People v. Eastman*, 25 Cal. 603, is a type, that a mortgage has no existence independent of the thing secured by it; that a payment of a debt discharges the mortgage; that the thing secured is intangible, and has no situs distinct and apart from the residence of the holder, but pertains to and follows the person. It may be observed that in the case then before the court the bonds were beyond the territorial jurisdiction of the taxing power.

The court of appeals of New York has determined that, when the owner is a nonresident, bonds of domestic corporations are taxable under the New York transfer act, if they are in fact in the state for safe-keeping, but not when they are actually without the state; and that the stock of such corporations is taxable in New York, irrespective of the actual situs of the certificate, and that deposits with a domestic trust company are taxable, although technically the property of the nonresident is a mere indebtedness from the trust company. See *In re Bronson*, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238; *In re Whiting's Estate*, 150 N. Y. 27, 44 N. E. 715, 34 L. R. A. 232; *In re Morgan's Estate*, 150 N. Y. 35, 44 N. E. 1126; *In re Houdayer*, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235. Obviously the legislature in this instance left none of its taxing power unexercised, and expressed a policy to exact duties from such nonresidents as should lend their credit to the local enterprises of the state, provided the

evidences of debt be within the state. The decision interpreting this act stops short of holding that an account current, due from a resident of New York to a resident of France, could be the subject of a death duty to the state government, although the holding respecting deposits with trust companies may be differentiated with difficulty. Yet, as is *Beers v. Shannon*, 73 N. Y. 292, it is high authority for holding that if the statute fairly include bonds of private corporations, having an actual situs within the state, although the owner be an actual nonresident, they would be subject to a death duty. That bonds of corporations may, for the purposes of taxation, have a situs separate from that of the owner, probably accords with judicial expression; but it is considered that there would be a presumption against the intention of the taxing power to give such property a separate situs. What theory underlies statutes imposing death duties? "It is the power to transmit or the transmission or receipt of property by death, which is the subject levied upon by all death duties." *Knowlton v. Moore*, 178 U. S. 41, 57, 20 Sup. Ct. 753, 44 L. Ed. 969. This power of transmission is wholly created by law (*Magoun v. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037), with the result that the right of a person to dispose of his property by will is within legislative control (*U. S. v. Perkins*, 163 U. S. 625, 627, 16 Sup. Ct. 1073, 41 L. Ed. 287). In several instances (*Magoun v. Bank*, 170 U. S. 289, 18 Sup. Ct. 594, 42 L. Ed. 1037; *Plummer v. Coler*, 178 U. S. 126, 20 Sup. Ct. 829, 44 L. Ed. 998) the supreme court has quoted with apparent approval the statement of Judge Taney in *Mager v. Grima*, 8 How. 490, 493, 12 L. Ed. 1168, that a state may refuse to allow an alien, either as heir or legatee, to take personal property within its limits, and may direct that such property shall belong to the state. And in *Plummer v. Coler*, *supra*, the statement in the opinion in *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372, is quoted, which is to the effect that the legislature has discretion to determine what limitations shall be imposed on the power of disposition by will. Now, the theory of a death tax is that it is a limitation upon the power of disposition. Would a statute based upon such theory presumptively include the personal property of a nonresident alien, present in the country of the taxing power, without apt words necessarily indicating such inclusion? It was said in *Wallace v. Attorney General*, L. R. 1 Ch. App. 1, respecting the taxation of the personal property of nonresidents under St. 16 & 17 Vict. c. 51: "Parliament has, no doubt, the power of taxing personal property in this country; but I can hardly think that we ought to presume such an intention, unless it is clearly stated." The opposite presumption is reasonable. The property, by a rule of the widest adoption and long establishment, is regarded as not separated from the situs of the owner, and some fitting expression of legislative intention to sever it and give it an independent situs for the purposes of taxation must be contained in the statute imposing the tax. Statutes should not be presumed to obliterate long-established laws respecting rights of property and the place of its taxation; and when the legislature would have jurisdiction neither of the donor or donee, nor in legal theory of the property, a statute imposing special taxes

should be presumed primarily to apply only to persons and property having a recognized legal situs within the territorial jurisdiction of the taxing power. *State v. Ross*, 23 N. J. Law, 517, 522. The transmission of property which is the subject of the tax, in the present instance, is governed by the law of the domicile, and not by the law of the actual situs, and the presumption would be that the taxing power did not intend to lay an inheritance tax on property transmitted, without its intervention, from a person to a person absolutely beyond its jurisdiction. Especially should it be presumed that a state did not intend to apply to nonresidents the theory upon which inheritance taxes are based, since the doctrine finds no practical expression in the actual policy of modern states. Notes, bills, and bonds at the death of the owners, under great diversity of circumstances, are found in foreign jurisdictions; but an attempt by a foreign power to appoint beneficiaries for such property, or permanently to appropriate the same, "would justly incur the rebuke of the intelligent sentiment of the civilized world." *State v. Ross*, 23 N. J. Law, 517, 521. Hence it is not to be presumed that a state has, even to a limited degree, put in force this theory, unless the words of the statute clearly indicate it. But the present statute is fashioned according to all the legal rules and observances of nations, to which attention has been called, and expressly excludes the property of nonresident aliens.

Section 29 of the act of 1898, now under consideration, provides:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, * * * passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons; or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows; that is to say," etc. 30 Stat. 464.

It is undoubted that the statute did not intend to subject to the tax the property when transmitted by will, unless in the absence of such will it would be distributable under "the intestate laws of any state or territory." The present property, in the absence of the will, would not have been distributed according to the intestate laws of the state of New York, but pursuant to the statute of distribution of the country where the deceased resided. Hence not only is there present the presumption that there was no intention to tax the intangible personal property of a nonresident alien, but a declaration, in simple words, that only such property may be taxed under the act as would pass under the intestate laws of the state, which necessarily excludes all personal property that would not so pass. It is not jurisdiction over the fund for the purposes of administration that determines its taxable quality, but the statute embodies the theory that usually underlies all inheritance taxes, viz. transmission of title by virtue of the law of a state or territory within the jurisdiction of the taxing power. Has the state undertaken to appoint persons to whom such property shall be dis-

tributed upon the death of the first owner? The attorney for the United States, in referring to the similar argument by the plaintiff, states that "he entirely overlooks the fact that the law of France has, and can have, no operation or effect whatever in the state of New York, except by such state's authority and permission; that is, by such state's law. And this is also the same error that pervades the court's opinion in the Hunnewell Case"; and that such authority and permission of the state are to be found in Code Civ. Proc. §§ 2694, 2701. This last section, after stating the recognized law for the devise and descent of real property, continues:

"Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country of which the decedent was a resident at the time of his death."

Section 2701 provides that the court having—

"Jurisdiction of an action to procure an accounting, or a judgment construing the will, may, in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the state; or, if the amount of all the decedent's debts, here and elsewhere, exceeds the amount of all the decedent's personal property, applicable thereto, to pay such a sum to each creditor, residing within the state, as equals that creditor's share of all the distributable assets, or to distribute the same among legatees or next of kin, or otherwise dispose of the same, as justice requires."

The defendant urges that the last section shows—

"The state's purpose to retain control of the nonresident decedent's property, giving the surrogate's court, or any other court of the state which has jurisdiction of the action, full power to administer the estate of the decedent here, not only as it affects the rights of the state under the transfer tax act and otherwise, but also as between the parties interested, including resident creditors of the deceased, and his legatees or next of kin themselves; and that section 2694 regulates the succession to the property of deceased nonresidents, and provides a definite rule for the settlement of their estates. As to real property, it declares that the validity and effect of a testamentary disposition of real property, or the course of its descent, where it is not disposed of by will, shall be regulated by the laws of the state, without regard to the residence of the decedent. However, with regard to personal property (which is included in the term 'other property'), it provides that the validity and effect of a testamentary disposition by a nonresident of personal property situated within the state, or its distribution where not disposed of by will, shall be regulated by the laws of the state or country of which the decedent was a resident at the time of his death, except where otherwise prescribed by the law of this state. The purpose of the legislature is apparent in adopting this section. It is intended to regulate the succession to the property of deceased nonresidents, and provide a rule by which our courts could administer the property of such nonresident decedents, located in this state, and to retain control of the same. It makes the law of the testator's residence or domicile the law of this state, for the purpose of administering the nonresident decedent's property; and a legacy, etc., of nonresident's property, situated within this state, thus passes 'either by will or the intestate laws' of that state, as the case may be; for otherwise the laws of such other state or such foreign country could have no operation or effect within this state."

The answer to this is clear. The title to the estate transmitted springs from the foreign, not the domestic, law. The statute in this regard is declaratory.

In *Ennis v. Smith*, 14 How. 424, 14 L. Ed. 483, it is said by Mr. Justice Wayne:

"For several hundred years upon the Continent, and in England, from reported cases, for a hundred years, the rule has been that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord Thurlow speaks of it as such in the house of lords, in the case of *Bruce v. Bruce* [2 Bos. & P. 229, note]. Erskine, in his *Institutes of the Law of Scotland* (book 3, p. 644, tit. 9, § 4), says this rule is founded on the laws of nations."

Mr. Justice Wayne calls attention to one of the reasons for the rule given by Lord Hardwicke, in these words, so pertinent to the present controversy:

"A contrary rule would be extremely mischievous, and would affect our commerce. No foreigner could deal in our funds but at the peril of his effects going according to our laws, and not those of his own country."

In *Dammert v. Osborn*, 141 N. Y. 564, 567, 35 N. E. 1088, 1089, it is said:

"The fundamental error that pervades all the reasoning of the learned counsel on this subject is to be found in the assumption that the courts of this state can annul a disposition of personal property in a foreign will, valid by the law of the domicile, and distribute the property to claimants here, contrary to the terms of such disposition, as interpreted by the law under which it was made. No controlling authority can be found in support of such a proposition."

In *Cross v. Trust Co.*, 131 N. Y. 330, 339, 30 N. E. 125, 127, 15 L. R. A. 606, 608, Judge O'Brien states:

"It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile as well in respect to a disposition of it by act *inter vivos* as to its transmission by last will and testament and by succession upon the owner dying intestate. This is, in substance, the language in which Judge Denio stated the law in this court, and which he concisely and clearly extracted from the authorities cited by him. *Parsons v. Lyman*, 20 N. Y. 112. The learned judge added that the principle, no doubt, has its foundation in international comity, but it is equally obligatory, as a rule of decision on the courts, as any legal rule of purely domestic origin. It does not belong to the judges to recognize or to deny the rights which individuals may claim under it at their pleasure or caprice; but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the state to change it whenever a change becomes desirable." * * * Should our legislature deem it for the public good to repeal the statute relating to wills, and to provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property, actually within the territory of the state, but owned by a person domiciled in another state, would still be valid, providing it was valid by the law which governed the owner."

These quotations are not made because the rule stated by them is in doubt, but for the purpose of meeting the suggestion of the defendant that the Code of Civil Procedure is the primary source of the power to transmit or of the power to receive. Such statute is merely declaratory of the law. It is not the source of title, but simply points out in general terms where the courts shall look for the law which governs the transmission of the title.

Lastly, the authority for the construction adopted is ample. The war revenue act of 1898, so far as it imposes a legacy tax, as appears in *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L.

Ed. 969, is a reproduction of the act of 1864, which last act, as regards duties on legacies, substantially adopts the English system. Under the act of 1864 it was decided by the United States circuit court, district of Massachusetts (Gray and Lowell, JJ.), in *U. S. v. Hunnewell* (C. C.) 13 Fed. 617, that the legacy duty imposed thereby is made payable on the estates of those persons only whose domicile at the time of their death is in the United States, and that it is not payable when the person possessed of such property dies intestate; so it would not be payable if such person die intestate, and if an heir takes a distributive share by the intestate laws of the place of domicile of the ancestor at the time of the latter's death. The facts involved in that case show that the action was to recover a tax on a legacy alleged to be due upon American securities, given by the will of a woman who at the time of her death was a citizen and resident of France, to her son, then and thereafter a resident of France. The will was executed in conformity with the law of France, was proved there, and a copy thereof was filed in the probate office of the county of Suffolk, state of Massachusetts, and the defendant, a citizen of such state, was appointed by the probate court of that county executor. The *Hunnewell Case* was followed in *U. S. v. Morris* (D. C.) 27 Fed. 341. See, also, upon this general subject, *Orcutt's Appeal*, 97 Pa. St. 179; *In re Enston's Will*, 113 N. Y. 174, 21 N. E. 87, 3 L. R. A. 464. The English act was similarly interpreted in *Thomson v. Advocate General*, 12 Clark & F. 1, 13 Simon, Ch. R. 153 (house of lords 1845). See, also, *Wallace v. Attorney General*, L. R. 1 Ch. App. 1. The opinion of Judge Gray in the *Hunnewell Case* is obviously a correct exposition of the law. It results from the foregoing views that the demurrer should be overruled.

KELLY v. JUTTE & FOLEY CO.

(Circuit Court of Appeals, Third Circuit. November 23, 1900.)

No. 10.

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Defendant company, which was engaged in the construction of a bridge, furnished for use in the work a steam derrick, which was complete and properly constructed, but required to be set in position and secured before being used; and employes were directed to perform that work, and materials therefor were furnished them. Before they had completed the fastenings they were temporarily called away, and a foreman, who was a fellow servant with plaintiff, ordered the derrick to be used, although he had been told by one of the workmen that it was not yet secured and its use was unsafe. The derrick gave way by reason of the absence of such fastenings, and plaintiff was injured. *Held*, that the injury was not due to the failure of defendant in its duty to furnish a reasonably safe place to work or a safe appliance, but solely to the negligence of the foreman, plaintiff's fellow servant, for which defendant was not liable.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

E. Spencer Miller, for plaintiff in error.

Joseph H. Taulane, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. Whatever may have been the cause of the plaintiff's injury, it is certain, as matter of fact, that it was not due to any negligence committed directly by the defendant, but to the conduct of one or more persons who, under the now settled law, were the plaintiff's fellow servants. *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. It was neither alleged nor proved, and is not now asserted, that the defendant was at fault in the selection of those servants, or that its retention of them up to and at the time of the accident in question was culpable. It is, however, contended that the disaster which befell the plaintiff was occasioned by the failure of the defendant to discharge its own personal duty to exercise due care respecting the safety of the place and of the instrumentalities provided for doing the work. We agree that such a duty is owing by the master to the servant, and that his liability for its breach cannot be shifted or evaded by intrusting its performance to another; and the only question in this case, as we understand it, therefore, is whether any dereliction in this regard was the proximate cause of the plaintiff's hurt. The obligation of the master as to place does not require him to do more than select (if selection be possible) a place which, under the circumstances, and especially in view of the nature of the particular work, shall not be an unreasonably dangerous one; and as, in this instance, the work in hand was the building of a bridge, we are at loss to conceive how any other place than that at which it was to be built could have been reasonably chosen. Moreover, the plaintiff had had considerable experience in such labor as he was then performing; and the ingenious suggestion which has been made, that the derrick presently to be referred to was an "erection," an "environment," which rendered the place itself especially unsafe, is, we think, too subtle and refining to be practically applied. The plain fact is that the derrick was not a part of the place, but was brought there for use precisely as the other implements and the materials were. It was an appliance, and as an appliance, though the distinction may not be important, we will deal with it.

The Jutte & Foley Company, defendant below and here, being engaged in the construction of a bridge, employed Michael Kelly, plaintiff below and here, to do certain work in and about that construction. On the morning of the day upon which the accident occurred, and previously, a certain "bucket" had been raised and lowered by a boat derrick. The foreman of the carpenters and his gang had been engaged for two days in preparing a shore derrick to be used instead of this boat derrick. These carpenters were called to the opposite side of the river before the shore derrick had been fully made ready, but everything had been done except boring holes in the cap log upon which it was to rest, and inserting the proper bolts therein to hold it in place. These bolts, however, were at hand, and one of the carpenters was about to go for the auger to bore the holes when the work was interrupted. This man told his

foreman, in the presence of one Bennett, who, though described as a superintendent, was none the less a fellow servant, that the cap log had not been made fast, and particularly called attention to the fact that this would render any present use of the mechanism unsafe. Yet the engineer, early in the afternoon, started the engine and attempted to operate the derrick with a full bucket attached; but the bucket could not be raised, and the engineer was then told by Bennett to increase the supply of steam. Accordingly another effort was made, and thereupon the unfastened cap log was forced out of place, the derrick fell, its boom struck Kelly, and he was seriously hurt. That the derrick in question was, in itself, a reasonably safe appliance, is undeniable. It was a complete and perfect implement. All that it was necessary to do was to put it where it was to be used, and there properly fasten it; and the work which this involved was, in our opinion, an incident which belonged to the general employment, and which, therefore, the employer could rightfully commit to the employed. The structure, as it had been supplied, lacked nothing which was essential to its existence as a derrick. Its individuality was palpable and distinctive. It was a perfected "apparatus for lifting and moving heavy weights." Cent. Dict. & Enc. Under a contract to furnish a derrick, its delivery would, beyond question, have been a conforming delivery; and if, in such a case, its wholeness would be evident, how, in this case, can it be possible to gainsay its integral completeness merely because something additional, but not intrinsically affecting it or any of its components, had still to be done to make it serviceable? It might have become necessary, as the work progressed, to use it at some other point than that at which it was originally placed. This would have involved its removal and refastening. But surely these matters would, in transferring the derrick, pertain to the general employment, and we do not perceive that any distinction in this respect can reasonably be made between the first occasion of setting it up and any subsequent similar occasion. A composite construction is not necessarily suggested whenever it is proposed that two distinct things shall be physically connected, and the adjunct which was designed to support this derrick was no more made a part of it than the adjacent soil would have been made, had a hole been dug directly in the ground for reception of the mast. It could hardly be supposed, we think, that the Jutte & Foley Company was obliged, at its peril, to itself attend to the mooring and adjustment of the boat derrick; and yet, as we apprehend it, the very ingenious argument which has been presented on behalf of the plaintiff would be quite as pertinent to a derrick afloat as to a derrick ashore. It is conceded, or, if not conceded, may be assumed, that this derrick, separately considered, was a fit one; for it is not claimed that the accident in question was in the slightest degree due to any imperfection in it. The sole complaint is that it was not properly bolted, but it certainly was intended that it should be, and the bolts, as well as the necessary mechanics and tools, had been actually and adequately supplied. In what, then, even with respect to the fastening of the derrick, was there any negligence? The most that can

be said is that it was not continuously accomplished, and we are not aware of any rule of law which prescribed that it should have been. The derrick was, it is true, set in motion when it ought not to have been, but that was done by a fellow servant; and this quite separate and distinct default, not the absence of the bolts from the cap log, was the proximate cause of Kelly's injury. "In order to warrant a finding that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances"; and obviously the harm which Kelly suffered was not the natural and probable consequence of the interruption of the work of the carpenters, and one which ought to have been foreseen as likely to flow from it. It resulted from "a new cause, and a sufficient cause,"—the premature and forced operation of the engine; and for that act the appellee was not, under any possible aspect of the case, responsible. It did not do it, nor order it to be done, and cannot be said to have even tacitly or passively induced it; for it is admitted—indeed insisted—that it was really directed by Bennett, who in fact, and as the plaintiff further admits, had been expressly warned that the work of preparation was unfinished. It may be conceded that the engineer, in view of Bennett's direction to him, was not at fault; but the only effect of this concession is to cast the blame upon Bennett, who, as well as the engineer, was a fellow servant of Kelly. It does not fix it upon the Jutte & Foley Company, which, as to all three of them, stood in the legal relation of master. *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Dredging Co. v. Walls*, 28 C. C. A. 441, 84 Fed. 428; *Railroad Co. v. Conroy*, *supra*. The judgment is affirmed.

SYRACUSE TP., HAMILTON COUNTY, KAN., v. ROLLINS.

(Circuit Court of Appeals, Eighth Circuit. October 29, 1900.)

No. 1,360.

1. APPEAL AND ERROR—REVIEW—FINDINGS OF FACT.

The sufficiency of the evidence to support special findings of fact made by a circuit court cannot be reviewed on a writ of error.

2. MUNICIPAL BONDS—DEFENSES—ESTOPPEL BY RECITALS.

A municipal corporation cannot attack the validity of negotiable bonds issued by it in the hands of bona fide purchasers for value on the ground that the records do not show a proper and legal canvass of the votes cast at the election called to determine whether such bonds should be issued, where the bonds recite the performance of all required conditions precedent to their issuance. Even if the recitals could be contradicted, it could only be by showing the nonassent of the voters, and not merely formal omissions.

3. SAME—VALIDITY.

That municipal bonds which were to run 10 years are made payable more than 10 years after their date does not affect their validity where they were not actually issued until within 10 years prior to their maturity.

4. TRIAL—ERRONEOUS ENTRY OF FINDINGS—POWER TO CORRECT RECORD.

That what purported to be the findings of the court in a case, but were not in fact such findings, were inadvertently entered of record, did not preclude the court from setting them aside when the error was discovered, or deprive it of jurisdiction to proceed with the consideration of the case as though they had not been entered.

In Error to the Circuit Court of the United States for the District of Kansas.

The trial court made a special finding of facts which supersedes the necessity of any other statement of the case. The court's findings are as follows:

"(1) That the plaintiff is a resident and citizen of the state of New Hampshire.

"(2) That the defendant is a resident and citizen of the state of Kansas, and a municipal township and body corporate, in the county of Hamilton and state of Kansas, duly organized and existing under the laws of Kansas, and possessed the power and authority as such to issue the bonds and coupons in suit, to contract and be contracted with, to sue and be sued, and do all other acts and things necessary and convenient for the exercise of its corporate powers.

"(3) That the plaintiff herein filed his petition and began this action on the 25th day of August, 1897, and that the defendant has been duly served with process, filed its answer, and made a general appearance herein; and that the matter in dispute and in controversy in this action, exclusive of interest and costs, exceeds the sum and value of \$2,000.

"(4) That the defendant duly issued, executed, and delivered the bonds and coupons in suit, being bonds of the face value of \$4,500, being forty-five bonds for \$100 each, with interest thereon at 8 per cent. per annum, payable semi-annually, as evidenced by interest coupons attached to each of said bonds, all of said bonds and coupons bearing date the 1st day of June, 1887, which bonds were due, and payable to bearer at the fiscal agency of the state of Kansas in the city of New York on the 1st day of July, A. D. 1897, on presentation of the same; as also said coupons were payable at the same place on presentation as they respectively became due.

"(5) That each of the bonds in suit is negotiable in form, and payable to bearer, and recites on its face the following: 'This bond was issued in accordance with the provision of an act of the legislature of the state of Kansas entitled "An act amendatory of and supplemental to chapter sixty-eight of the Session Laws of 1872 entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith, and to repeal chapter 29 of the Session Laws of 1869, and to provide for the issuing of railroad and other bonds, and to limit the issuing of school bonds, and to punish the officers herein named for a violation of the provisions of this act," approved March 9, 1874." And it is hereby certified and recited that all acts, conditions, and things required to be done precedent to and in issuing of said bonds have been properly done, happened, and performed in regular and due form as required by law.'

"(6) That the bonds in suit were duly presented to the auditor of the state of Kansas, and by him duly registered, as provided by law; and said auditor, under his seal of office, duly certified upon each of said bonds that it had been regularly and legally issued, and that the signatures thereto were genuine, and that the same were registered in his office according to law on the 12th day of August, 1887, and within thirty days after said bonds had been delivered.

"(7) That on or about the 25th day of March, 1887, a petition signed by about one hundred and sixty voters of said Syracuse township, the same being more than two-fifths of the voters of said township, was duly presented to the trustee, clerk, and treasurer of said Syracuse township, they being the township board of said township of Syracuse, asking that a special election be called and ordered, and a vote be taken upon the question as to 'whether bonds shall be issued whose face value shall be \$5,200 with which to secure for the public

a free bridge over the Arkansas river, beginning at the N. W. corner of lot number two, section number eighteen, township number twenty-four, and range forty, and terminating on the opposite bank of said river.

"(8) That on the 25th day of March, 1887, the township board of said township of Syracuse, as aforesaid, after consideration of said petition, ordered a special election to be held in said township on the 26th day of April, 1887, for the purpose of 'determining whether the proposition to purchase the bridge now spanning the Arkansas river at the N. W. corner of lot number two, section eighteen, township twenty-four, range forty, and terminating on the opposite bank of said river, and issue the bonds of said Syracuse township, whose face value shall be \$5,200.00 in payment for said bridge.' That due notice of such election by publication was given as provided by law, and said election was duly held in said township in pursuance of said order and notice on the 26th day of April, 1887; at which election one hundred and seventeen legal votes were cast in favor of said proposition and the issuance of said bonds, the same being more than three-fifths of the votes cast at such election, and which was unanimous, there being no votes cast against said proposition and against the issuance of said bonds at said election.

"(9) That the judges and clerks of said election, they being the election board, duly conducted said election, received the votes, and counted and returned the same as provided by law; and said election and votes and return were duly canvassed, and the result of said election declared in favor of the issuing of said bonds as provided by law, by the township board at a meeting at which W. H. Olmsted and H. W. Stillhamer, treasurer and trustee, were present, the record not showing that the clerk was present.

"(10) That the officers of said township of Syracuse at a regular township board meeting on the 20th day of July, 1887, duly issued the bonds and coupons in suit, the bonds being forty-five in number, of the face value of \$100 each; said township of Syracuse and the officers thereof having been enjoined, and judgment rendered in an action brought for that purpose, from issuing more than \$4,500 face value of said bonds, because it was alleged that such excess was more than 5 per cent. value of the taxable property of said township of Syracuse, and said \$4,500 face value of said bonds, being not greater than 5 per cent., inclusive of all other bonded indebtedness, of the taxable property of such township; and said injunction judgment is still in full force and effect.

"(11) That said bonds so issued as aforesaid were duly and legally registered by the officers of said township in the book kept for that purpose, and the township officers of said township of Syracuse at the time of issuing said bonds duly made out and transmitted to the auditor of the state of Kansas a certified statement of the number, amount, and character of the bonds so issued, as provided by law, which statement was duly attested by the clerk of said township, and the corporate seal of said township attached thereto.

"(12) That within thirty days after the delivery of the bonds in suit the same were duly presented to the auditor of the state of Kansas for registration, and said auditor of state duly registered the same in his office in a book kept for that purpose, and under his seal of office certified in writing upon each of said bonds that it had been regularly and legally issued, that the signatures thereto were genuine, and that the same was registered in his office according to law on the 12th day of August, 1887.

"(13) That the bonds and coupons sued on in this action were issued and delivered in payment for a bridge spanning the Arkansas river in said Syracuse township, Hamilton county, state of Kansas, and sold to the defendant by one James H. Bullen; that said bridge was received by said defendant in payment of said bonds about July 30, 1887, since which time the defendant has owned, and the citizens of said township have used and enjoyed, and still use and enjoy, said bridge, and have participated in all the benefits and advantages attending such ownership and use.

"(14) That shortly after the issuance and registration of said bonds, and before they, or any of them, or any installment of interest became due or was due thereon, or any of said coupons became due, the plaintiff in good faith, for a valuable consideration, in the usual course of business, and relying upon the facts as recited therein, and the registration indorsed thereon, as aforesaid, and without any notice of any defect in the preliminary proceedings or require-

ments in the issuance or execution thereof, purchased said bonds and coupons, and is now the holder and owner of the bonds and coupons in suit in good faith. And that the defendant during each year after the issuance of said bonds up to the year 1897 levied and caused to be collected of the taxpayers of said township of Syracuse taxes for the purpose of paying the interest on said bonds as evidenced by coupons thereto attached as such coupons respectively became due, and paid all and singular said interest, except the last two installments or coupons falling due on the 1st day of January and of July, 1897, and sued on herein.

"(15) That there is due the plaintiff from the defendant on and on account of the bonds and coupons sued on herein the sum of \$5,619.06."

George Getty, for plaintiff in error.

A. B. Jetmore and A. P. Jetmore, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Six of the assignments of error are to the effect that the facts found by the trial court are not supported by the evidence. But it is well settled that when the trial court to which a cause has been submitted makes a special finding of facts this court has no authority to inquire whether the evidence supports the findings, but only whether the facts found support the judgment. *Lehnen v. Dickson*, 148 U. S. 71, 77, 13 Sup. Ct. 481, 37 L. Ed. 373; *Myers v. Hettinger*, 37 C. C. A. 369, 94 Fed. 370; *Supreme Lodge v. England*, 36 C. C. A. 298, 94 Fed. 369; *Minchen v. Hart*, 36 U. S. App. 534, 18 C. C. A. 570, 72 Fed. 294; *Hill v. Woodbury*, 4 U. S. App. 68, 1 C. C. A. 206, 49 Fed. 138.

It is assigned for error that "no lawful canvass had been made by the board of county commissioners, or by any one, of any election held for the purpose of issuing the bonds in suit." The eighth and ninth findings of fact distinctly state that the election was held; that the vote was unanimous in favor of a proposition to issue the bonds, there being 117 votes in favor of it and none against it; and "that the judges and clerks of said election, they being the election board, duly conducted said election, received the votes, and counted and returned the same as provided by law, and said election and votes and return were duly canvassed, and the result of said election declared in favor of the issuing of said bonds as provided by law, by the township board at a meeting at which W. H. Olmsted and H. W. Stillhamer, treasurer and trustee, were present, the record not showing that the clerk was present." This assignment cannot prevail in the face of these findings. Moreover, under our decisions the recitals in the bonds preclude the defendant from raising this question. *Brown v. Ingalls Tp.*, 57 U. S. App. 611, 30 C. C. A. 27, 86 Fed. 261. In the case last cited it was distinctly held by the court that it is the fact of the assent of the voters, and not the certificate of that fact, or the canvass of the vote, which confers the right to issue the bonds.

It is next assigned for error "that the bonds run for a longer period than that specified in the petition presented to the township board asking for the election." The recitals in the bonds are a con-

plete answer to this objection. Moreover, it is shown to be without foundation in fact by the special finding of facts. The bonds were to run 10 years. They were payable on the 1st day of July, 1897, and, though they bear date the 1st day of June, 1887, the court finds they were not issued until the 20th day of July, 1887, so that they matured in a little less than 10 years from the date of their issue, which is the date from which to compute the time they had to run. They became binding obligations on the township from the date of their issue only. *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449, 455.

Another assignment of error is "that the sum appropriated for the issuance of said bonds was in excess of the sum which could be appropriated by a township in the construction and purchase of a bridge." It is not very clear what is meant by this assignment. In appellant's brief it is treated in a double aspect: First, as raising the question that the bonds voted were in excess of 5 per cent. of the value of the taxable property of the township; and, second, as raising the question that the township could not, under the laws of Kansas, purchase a bridge costing more than \$200. Conceding both of these points to be properly raised, they are without merit. The amount of bonds voted for the purchase of the bridge was slightly in excess of the 5 per cent. limit, but as to this excess the township officers were enjoined from issuing bonds, and the bonds actually issued were not in excess of 5 per cent. of the value of the taxable property of the township. See eleventh special finding. At the time the bonds in suit were voted and issued, we understand, from the brief of counsel, that chapter 68 of the Session Laws of 1872, found in chapter 12a, Gen. St. Kan. 1889, was in force. Section 1 of that act provides:

"The board of county commissioners of any county, the mayor, and common council of an incorporated city, and the trustee, clerk and treasurer of any municipal township in this state are hereby empowered to issue the bonds of such county, city or township, in any sum not greater than five per cent., inclusive of all other bonded indebtedness, of the taxable property of such county, city or township, for the purpose of building or purchasing bridges, free or otherwise, * * *."

It will be observed that the only limitation imposed on the power of a township to issue bonds for the purpose of building or purchasing bridges is that the amount shall not be greater than 5 per centum, inclusive of all other bonded indebtedness, of the taxable property of the township. The validity of the bonds was not affected by legislation subsequent to their issue.

It appears from the record that, after the cause was duly submitted to the court, what purported to be findings of fact and conclusions of law of the court in the cause inadvertently found their way onto the record. Subsequently, when the error was discovered, the court entered the following order:

"The findings of law and fact and order heretofore made in the above-entitled cause, and filed on the 2d day of December, 1898, are hereby set aside for the reason that the same were inadvertently filed and entered. The attorneys for the plaintiff and the defendant are allowed until the second day of the

next term of court to submit special findings of fact and conclusions of law for the consideration of the court."

The parties did submit special findings of fact and conclusions of law to the court in pursuance of the leave given them in this order. It is now for the first time objected that when the order which we have quoted setting aside the findings of fact inadvertently filed was entered, the court could not proceed further to consider the case "without a new waiver of a jury and a new trial and submission of the cause"; but there had been no trial of the cause in the sense that the court had reached a final judgment therein. The findings of fact and conclusions of law which found their way upon the records are shown to have been inadvertently entered of record, and not to express the judgment of the court in the case. For that reason the court very properly set them aside, and continued to consider the case upon the proofs submitted at the trial. No suggestion was made that it had lost jurisdiction to try the case, or that a new agreement to try the case before the court was necessary, but both parties acted on the assumption, supported by the record, that the trial of the case had not been completed by any finding or judgment of the court, and that it was still before the court on the original submission and the testimony heard at that time. In view of these facts, the suggestion that the court had lost jurisdiction to try the case, and that its judgment is erroneous for that reason, cannot be entertained.

The writer of this opinion has not heretofore concurred in the very extended and sweeping operation and effect given to recitals in municipal bonds by the majority of this court; but the views of this court are very little in advance of the recent decisions of the supreme court of the United States (*Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689), and as a law-abiding citizen the writer acquiesces in these decisions, though he does not believe in the doctrine to the extent to which it has been carried, and which compels municipal corporations to pay bonds issued illegally, fraudulently, and without consideration because a rascally officer inserts a false recital in them. It is a gratifying fact that this case presents none of the odious features which often characterize the issue of municipal bonds. Here the bonds voted by the people were honestly applied by the officers of the township to the purpose for which they were voted. The people of the township got just what they voted for, and for a less price than they were willing to pay for it, and have had the use and enjoyment of the property from the date of its purchase. Interest was paid on the bonds for nine years, and the effort to repudiate them at this late day is, upon the facts found by the circuit court, without legal or moral merit. The judgment of the circuit court is affirmed.

In re PLOTKE.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1900.)

No. 678.

1. BANKRUPTCY — JURISDICTION OF PROCEEDINGS — DISTRICT OF BANKRUPT'S PLACE OF BUSINESS.

Proof that an alleged bankrupt, whose residence and domicile had for years been in another state, had her principal place of business in the district where the petition was filed, up to a time four months prior to the filing of such petition, after which she had no place of business, is not sufficient to give the court jurisdiction of the proceedings under Bankr. Act 1898, § 2, subd. 1, which confers jurisdiction over the estates of bankrupts who have had their principal place of business within the territorial jurisdiction of the court "for the preceding six months or the greater portion thereof."

2. SAME—JURISDICTION MUST AFFIRMATIVELY APPEAR.

The essential facts which give a court jurisdiction of bankruptcy proceedings must appear affirmatively and distinctly, and where such jurisdiction rests solely upon the allegation that the alleged bankrupt had her principal place of business within the district for the greater portion of the preceding six months, and it further appears that four months before the filing of the petition she made a general assignment under the state laws, it cannot be presumed, in favor of the jurisdiction, that her assignee continued the business for more than a month thereafter, even assuming that such fact, if shown, would constitute, in legal effect, a continuation of business by the alleged bankrupt.

3. SAME—EFFECT OF ACT ON ASSIGNMENTS—STATE DECISIONS.

The question of the effect of the bankruptcy law upon the validity of a general assignment made after its passage, in accordance with the provisions of a state statute, is not one which is governed by any rule of decision in the state, but will be determined independently by the federal courts.

Appeal from the District Court of the United States for the Northern Division of the Northern District of Illinois.

James R. Ward, for appellant.

Fred D. Silber, for appellee.

Before WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge. The alleged bankrupt, Emily Plotke, appeals from an order of the district court whereby she is adjudicated a bankrupt upon a creditors' petition filed May 3, 1899. The petition states that "Emily Plotke has for the greater portion of six months next preceding the date of filing this petition had her principal place of business and her domicile at Chicago," in said district, and "owes debts to the amount of \$1,000 and over"; that she is insolvent, and within four months next preceding "committed an act of bankruptcy," and on January 3, 1899, made "a general assignment for the benefit of her creditors to one John Poppowitz," which was duly filed and recorded. The subpoena issued thereupon was returned by the marshal as served within the district on Emily Plotke, "by leaving a true copy thereof at her usual place of abode, with Charles Plotke, an adult person, who is a member of the family." On May 29, 1899, the appellant filed a verified plea, which reads as follows:

"And the said Emily Plotke, specially limiting her appearance for the purposes of this plea, in her own proper person comes and defends against the foregoing proceeding, and says that she has not had her domicile within the territorial limits and jurisdiction of this court for the six months next preceding the filing of the petition herein, to wit, six months next preceding May 3, A. D. 1899, nor has she had her domicile within the territorial limits of the jurisdiction of this court as aforesaid during any part of said period of six months, nor has she now her domicile therein, nor has she had her principal place of business within the territorial limits and jurisdiction of this court for the greater part of the six months next preceding the filing of the petition herein, to wit, six months next preceding May 3, A. D. 1899, but that before and at the time of the filing of the petition herein as aforesaid, on, to wit, May 3, A. D. 1899, and for more than five years prior thereto, she, the said Emily Plotke, was, and from thence hitherto has been, and still is, residing in the city of St. Louis, and the state of Missouri, and not in the said Northern district of Illinois, and state of Illinois, and that she, the said Emily Plotke, was not found or served with process in this said proceeding in said Northern district of Illinois, or in said state of Illinois. Wherefore she says this court is wholly without jurisdiction in the premises, and this she is ready to verify. Wherefore she prays judgment, if this court here shall take jurisdiction and cognizance of the proceedings aforesaid."

The petitioning creditors filed a replication, and the issues thereupon were referred for hearing to a referee, who reported the testimony taken, with findings sustaining the plea and recommending that the petition be dismissed for want of jurisdiction. The finding was overruled by the district court, and an adjudication of bankruptcy entered, from which this appeal is brought.

The record presents two questions, only, under the several assignments of error: (1) Whether, upon the undisputed facts shown, the case is within the bankruptcy jurisdiction of the district court; and (2) whether jurisdiction appears over the person of the alleged bankrupt.

The first issue challenges the jurisdiction of the district court over the estate of the bankrupt, the subject-matter of the proceeding, irrespective of the question of jurisdiction in personam. The facts are undisputed that the bankrupt has neither resided nor had her domicile within the district for any period during the 6 months preceding the filing of the petition, and has resided continuously in the state of Missouri for the past 12 years; that she carried on business in Chicago, within the district (conducted by one Charles Plotke), from April 30, 1897, up to January 3, 1899 (the petition being filed May 3, 1899); and that she executed a voluntary assignment for the benefit of creditors, under the statute of Illinois, on January 3, 1899 (the assignee taking possession forthwith, and subsequently disposing of the assets and closing out the business under orders of the county court). The question is thus narrowed to an interpretation of the provisions of the statute. Section 2, subd. 1, of the bankruptcy act (30 Stat. 545) invests district courts with jurisdiction to "adjudge persons bankrupt who have had their principal place of business, resided or had their domicil within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicil within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts

of competent jurisdiction without the United States and have property within their jurisdiction." As both residence and domicile of the bankrupt were beyond the territorial jurisdiction, the adjudication of bankruptcy rests alone upon the provision respecting the "principal place of business." The appellees contend, in effect, (1) that the proof of a principal place of business in the district for two months, and of no place of business for the remaining period of limitation, establishes a case within the meaning of the words "greater portion thereof," in the section above quoted; and, if not so construed, (2) that the voluntary assignment was void under the law of the forum, and business was carried on thereunder for the requisite period, and was constructively the business of the bankrupt. We are of opinion that neither of these contentions is tenable. The first calls for a departure from the plain meaning of the language used in the statute to make it applicable to conditions which may have been overlooked in framing the provision, but are not within the terms which were adopted; and however desirable it may seem to have such conditions brought within its scope, to carry out the general intent of the act, the correction can be made by legislative amendment only, and not by way of judicial construction. So far as applicable here, the provision confers jurisdiction over bankrupts "who have had their principal place of business" within the territorial jurisdiction "for the preceding six months, or the greater portion thereof." Whether thus considered apart from the provision as to residence and domicile, or as an entirety, the language is unambiguous, if not aptly chosen. The expression "greater portion" of a month or other stated period is frequently used as an approximate measure of time, and its meaning is well understood as the major part or more than half of the period named. No justification appears for construing like terms in this provision otherwise than in the ordinary sense. With jurisdiction dependent upon the single fact of having the principal place of business within the district, the statute then imposes the further prerequisite that such business shall have been there carried on for more than half of the preceding six months. In other words, the limitation is made with reference alone to the duration of the business in the district, and regardless of the fact that its location may be changed short of that period, and thus be carried on in different districts without exceeding the three months in either, or that it may be discontinued entirely without reaching the time limited in any one; and the provisions in reference to domicile and residence are equally restricted, except for the distinction as to residence, that it may be retained in one district after domicile is changed to another. With this meaning clearly conveyed by the language of the statute, the policy of so restricting jurisdiction is not open to judicial inquiry. In support of the construction for which the appellees contend, two decisions are cited whereby section 11 of the bankrupt act of 1867 (section 5014, Rev. St.) is so construed,—one by Judge Blatchford (*In re Foster*, 3 Ben. 386, Fed. Cas. No. 4,962), and the other by Judge Lowell (*In re Goodfellow*, 1 Low. 510, Fed. Cas. No. 5,536). However instructive these cases may be in interpreting the present statute, they are not applicable by way

of precedent, because of the clear diversity in the respective provisions. Section 11 of the former act gave jurisdiction over petitions filed by voluntary bankrupts to "the judge of the judicial district in which such debtor has resided or carried on business for the six months preceding the time of filing such petition, or for the longest period during such six months"; and the limitation thus stated was held to mean "the longest space of time that the bankrupt has resided or carried on business in any district during the six months." In *re Foster*, *supra*. It may well be conceded that the language of that provision was susceptible of no other fair interpretation; that "the longest period" of business "during such six months" was clearly implied, and, as remarked by Judge Blatchford, "not the period which, mathematically considered, is the greatest part of the six months." But section 2, subd. 1, of the act of 1898 states the jurisdictional requirements in terms clearly distinguishable from those which were thus construed, namely, that a principal place of business shall have existed within the district "for the preceding six months or the greater portion thereof," thereby establishing as the test continuance of the business in the district for the "greater portion" of the six months, and not "the longest period" of business "in any district during the six months." This departure from the provisions of the prior act is marked both in the change of words and in their collocation, and is not a mere substitution of synonymous words, as argued by counsel.

The further contention that the requisite period of carrying on business appears in the conceded facts of the voluntary assignment made January 3, 1899, and the transactions thereunder, is not well founded. The question discussed on the argument, whether the bankrupt act made the assignment void *ab initio*, or voidable only in the event of an adjudication of bankruptcy, as affecting the subsequent possession, however important in one phase, is not material in the absence of a distinct showing that the business was continued under the assignment for more than one month. Where jurisdiction of the federal courts is made dependent upon citizenship or other specific fact, "the presumption in every stage of the cause is that it is without their jurisdiction, unless the contrary appears from the record." *Bors v. Preston*, 111 U. S. 252, 255, 4 Sup. Ct. 407, 28 L. Ed. 419; *Railway Co. v. Swan*, 111 U. S. 379, 383, 4 Sup. Ct. 510, 28 L. Ed. 462. The essential fact must appear affirmatively and distinctly, and "it is not sufficient that jurisdiction may be inferred argumentatively." *Wolfe v. Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; *Parker v. Ormsby*, 141 U. S. 81, 83, 11 Sup. Ct. 912, 35 L. Ed. 654. In the case at bar the record fails to show that the business was carried on by the assignee for any definite period, and the proof is insufficient to confer jurisdiction, within the rule stated, even on the assumption that the transactions of the assignee were, in legal effect, the carrying on of business by the assignor. It is true that a sale of the assigned property (a stock of goods) appears to have been made by the assignee as an entirety, thus closing out the business; but the time is not stated, and it may well be inferred from the testimony that such sale occurred soon

after the assignment was made. The mere fact that proceeds of such sale are retained in the hands of the assignee for distribution is not carrying on business, in the sense of the statute. The active business then ceased, and the liability to account for the proceeds is no more operative to save the limitation than would be the case if the business were closed out directly by the bankrupt, either with or without subsequent payment of debts out of the proceeds. No evidence being produced to overcome the presumption of fact against jurisdiction, the question of the legal status of the assignment does not require consideration. It may be remarked, however, that the validity of the assignment is not questioned under the state statute, and its status depends upon a construction of the provisions of the national bankruptcy act in that regard, and the inquiry is not one which is governed by any rule of decision in the state. In so far, therefore, as *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363, passes upon the effect of such act on voluntary assignments made after its passage, the decision is not necessarily controlling, as contended by counsel; but that question, when presented, will call for independent judgment, in the light of all the authorities. In *Mayer v. Hellman*, 91 U. S. 496, 500, 23 L. Ed. 377, a different construction appears to have been placed upon the bankrupt act of 1867; and in *Simonson v. Sinsheimer*, 95 Fed. 948, 952, 37 C. C. A. 337, 342, that ruling is cited as equally applicable under the present act. See, also, *Davis v. Bohle*, 92 Fed. 325, 34 C. C. A. 372; *In re Gutwillig*, 92 Fed. 337, 34 C. C. A. 377; *In re Gutwillig* (D. C.) 90 Fed. 475, 478, cited with approval in *West Co. v. Lea*, 174 U. S. 590, 596, 19 Sup. Ct. 836, 43 L. Ed. 1098.

We are of opinion, therefore, that the district court was without jurisdiction of the cause alleged in the petition, and the question whether the want of personal service was waived by appearance does not call for solution. The order of the district court is reversed, accordingly, with direction to dismiss the petition for want of jurisdiction.

STEELE et al. v. BUEL et al.

(Circuit Court of Appeals, Eighth Circuit. November 12, 1900.)

No. 1,394.

1. **BANKRUPTCY—APPEALS—TIME OF TAKING.**

The limitation of 10 days for taking appeals prescribed in Bankr. Act 1898, § 25, applies only to appeals from the particular judgments enumerated in such section; but a general right of appeal is given by section 24, which is applicable to all other controversies, and which is without any limitation as to time other than that fixed by the law for the regulation of appeals generally.¹

2. **SAME—EXEMPTIONS.**

The provision of Bankr. Act 1898, § 6, that "this act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws," etc., establishes the rule of exemption which pervades the entire act, and must be read into every other section and provision thereof.

¹ Appeal and review in bankruptcy proceedings, see note to *In re Eggert*, 43 C. C. A. 9.

8. SAME—INSURANCE POLICIES.

Bankr. Act 1898, § 70, provides that the trustee in bankruptcy shall be vested, by operation of law, with the title of the bankrupt, "except in so far as it is to property which is exempt, to all * * * (5) property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value * * * he may, within thirty days after the cash surrender value has been ascertained, * * * pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claim of creditors: * * * otherwise the policy shall pass to the trustee as assets." *Held*, that the entire section is limited in its application, by its own terms, and by section 6, which establishes the rule of exemption, to property which is not exempt under the state laws, and that the proviso to clause 5 applies only to insurance policies which are not so exempt, and is intended in such case to give the bankrupt the preferred right to retain such policies on payment of their cash surrender value.

Appeal from the District Court of the United States for the Southern District of Iowa.

The firm of Steele & Co. and Daniel Steele, Anna M. Steele, William M. Steele, and Daniel H. Steele, the individual members composing the firm, were duly adjudged bankrupts in the district court of the United States for the Southern district of Iowa, Eastern division. All the parties were, when the proceedings in bankruptcy were instituted, heads of families, and citizens and residents of the state of Iowa. At the date of the adjudication the bankrupts severally held policies of insurance on their lives as follows: Daniel Steele, three on his life; William M. Steele, two on his life; Daniel H. Steele, one on his life. The bankrupts claim that these policies of insurance and their cash value were exempt under the laws of Iowa from the payment of their debts, and that, being so exempt, neither the policies nor their cash value passed to the trustee in bankruptcy as assets of their estates under the bankrupt act. The referee in bankruptcy reported to the district court that the policies were not exempt under the bankrupt act, but passed to the trustee as assets of the bankrupts' estates; and the district court, somewhat doubtfully, confirmed the ruling of the referee, on the authority of a previous decision of that court in *Re Lange* (D. C.) 91 Fed. 361, and thereupon the bankrupts appealed the case to this court.

W. B. Collins (H. R. Collins, on the brief), for appellants.

James C. Davis, W. J. Roberts, and Hillhouse Buel, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is objected by the appellees that the appeal was not taken within 10 days, as required by section 25 of the bankrupt act, but the limitation of 10 days prescribed by that section is by its terms limited to appeals "in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be." This case does not fall under either of the three heads mentioned in the section. The rule, therefore, applicable to this case is found in section 24, which gives the right of appeal in absolute

terms, without any limitation as to time other than that fixed by law for the regulation of appeals generally.

The remaining question is, were the policies exempt under the bankrupt act? The learned district judge, in his opinion in this case, concedes that policies of life insurance are exempt from the payment of the assured's debts under the Code of Iowa. The broad and comprehensive provisions of section 1805 of the Code of that state leave no room for doubt on this question. The claim of the trustee is that the proviso to section 70 of the bankrupt act abrogates the state law and section 6 of the bankrupt act, so far as relates to the exemption of policies of life insurance held by the bankrupt. Section 6 of the act declares:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

This section establishes the rule of exemption in the most absolute and unqualified terms, and that rule is the state law. The phrase, "this act shall not," is the exact legal equivalent of the expression, "nothing contained in this act shall." This rule of exemption, therefore, pervades the whole act, and is to be read into every other section and provision of the act. If congress had intended to diminish or lessen the state exemptions in any case, and particularly if it had intended to subject to the payment of the bankrupt's debts his policies of life insurance which were exempt under the state law, that intention would undoubtedly have found expression in clear and unmistakable language in section 6. That was the appropriate place for limiting or qualifying the state exemptions, if it was to be done at all. "If a general provision is merely to be negated in some particular, the negative should be expressed in immediate contact with the general words." Bouv. Law Dict. tit. "Proviso." Additional exemptions or benefits not granted to the debtors by the state laws might be provided for, in the proper connection, anywhere in the act, as was done by this proviso in relation to policies of life insurance in states which do not exempt them, as we shall presently see. In construing the proviso to section 70, not only the whole of that section, but the whole act, must be considered. That section reads as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own,

and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

The only right or title the trustee has to any of the bankrupt's property is acquired under this section. It vests the title of the property in the trustee, "except in so far as it is to property which is exempt." How is it to be known what "is exempt"? There is but one source of information on that subject, and that is the state law adopted by section 6, and the legal effect of this exception is precisely the same as if it read, "except property which is exempt under the state law." This exception must be read into every other clause and provision of the section. The fifth clause of this section shows conclusively that the construction of the proviso contended for by the trustee is wholly inadmissible. By the plain language of this clause of this section, the trustee is invested with the title to all the bankrupt's "property which prior to the filing of the petition he could by any means have transferred. * * *" Now, the bankrupt could have transferred every particle of property he owned prior to the filing of the petition, and why does not the trustee set up a claim to all of it under this clause? Because it is felt that if such a claim was made it must fail, for the reason that it would be perceived at once that to grant it would completely nullify section 6 and all exemptions under state laws, leaving the bankrupt without any exemption whatever. But there is just as much reason for the trustee claiming under this clause all the property exempt under the state law as there is for claiming a part of it. The difference is one of degree only. It is obvious that section 6 must be read into this clause, if that section is to have any effect at all, and the bankrupt to be allowed any exemptions. But the clause of the fifth paragraph immediately preceding the proviso, and to which the proviso, according to the accepted rule for the construction of provisos, must be referred, removes all doubt as to what is meant by the proviso. In connection it reads: "The trustee * * * shall be vested by operation of law with the title of the bankrupt * * * to all property which might have been levied upon and sold under judicial process: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value," etc. What kind of an insurance policy is here meant? Plainly and obviously an insurance policy "which might have been levied upon and sold under judicial process," and as to such policies the proviso makes a provision by which the bankrupt may retain his policy by paying its cash surrender value, and thus retain the benefit of the low rate of premium obtained when he was younger, and which could not be obtained on a new policy. Moreover, the proviso is to be read in the light of section 6, and made to harmonize with it and the other provisions of section 70, and, giving due effect and operation to this rule of construction, the proviso means precisely what it would if it read, "provided, that when any bankrupt shall have any insurance policy *not exempt*." The italicized words or their equivalent are necessarily implied from the other provisions of this section as well

as from the sweeping provisions of section 6, and what is implied in a statute is as much a part of it as what is expressed. *U. S. v. Babbitt*, 1 Black, 61, 17 L. Ed. 94; *Gelpcke v. City of Dubuque*, 1 Wall. 221, 17 L. Ed. 519; *Wilson Co. v. Third Nat. Bank*, 103 U. S. 770, 26 L. Ed. 488; *Thurber v. Miller*, 32 U. S. App. 209, 14 C. C. A. 432, 67 Fed. 371. This construction gives effect to every provision of the act, and renders them harmonious.

It has always been the policy of congress to exempt to debtors and bankrupts the property exempt to them by the state law. From the organization of the federal courts under the judiciary act of 1789, the law has been that creditors suing in those courts could not subject to execution property of their debtor exempt to him by the law of the state. *Judiciary Act 1789* (1 Stat. 93, c. 21); *Wayman v. Southard*, 10 Wheat. 1, 32, 6 L. Ed. 253; *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. 197, 31 L. Ed. 238; *Dartmouth Sav. Bank v. Bates* (C. C.) 44 Fed. 546. Confessedly, the creditors, who through the trustee are now seeking to subject these policies to the payment of their debts, could not have subjected them to the payment of their debts by execution or other legal process issuing either from the state or the federal courts. The same rule has obtained under the bankrupt acts, which have sometimes increased the exemptions, notably so under the act of 1867 (section 5045, Rev. St.), but have never lessened or diminished them. An intention on the part of congress to violate or abolish this wise and uniform rule observed from the creation of our federal system should be made to appear by clear and unmistakable language. It will not be presumed from a doubtful or ambiguous provision fairly susceptible of any other construction. If congress was going to attack the state exemptions and lessen or diminish them in any degree, the exemption of life insurance policies would be the very last exemption to be attacked. They are very generally esteemed the best and safest means by which a man of limited means, or one dependent on his daily earnings for his support, can make provision to preserve his family from suffering and want after his death. This is the view taken of life insurance policies by the supreme court of the United States. In the case of *Bank v. Hume*, 128 U. S. 195, 211, 9 Sup. Ct. 41, 46, 32 L. Ed. 370, 377, Chief Justice Fuller, delivering the unanimous judgment of the court, said:

"This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out."

Instead, therefore, of nullifying the fundamental and basic rule of exemption established by section 6, and curtailing the exemption under the state law, the proviso in question was intended to and does give the bankrupt a right which, in states whose laws do not exempt

policies of life insurance, he would not have without it. The proviso is operative in those states only whose laws do not exempt policies of insurance, and has no application in states whose laws do exempt them. This construction removes all seeming conflict or inconsistency between section 6 and the proviso of section 70, and gives that effect to each which congress plainly intended they should have.

The judgment of the district court is reversed, and the cause remanded, with instructions to that court to set aside the referee's report, and enter judgment in favor of the bankrupts for the policies of insurance claimed by them, respectively.

In re SCHAEFER.

(District Court, E. D. Pennsylvania. November 22, 1900.)

No. 650.

BANKRUPTCY—PROVABLE DEBTS—CONTRACT OF INDORSEMENT.

Under Bankr. Act 1898, § 63a, subd. 1, which provides that debts may be proved against the estate of a bankrupt which are "a fixed liability, as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him," a note of a third person, payable to the bankrupt and indorsed by him, but which was not given for his accommodation, and had not matured at the time of the filing of the petition against him, is not a provable debt against his estate.

In Bankruptcy. Question certified by referee.

Wm. U. Hensel, for trustee.

Wm. H. Roland, for creditor.

McPHERSON, District Judge. The question for decision arises upon the following certificate of the referee:

"The petition by creditors of Christian Schaefer, bankrupt, was filed in the office of the clerk of the district court of the United States on July 7, 1900. Christian Schaefer was adjudicated a bankrupt on August 4, 1900. At the first meeting of creditors, held September 20, 1900, a claim was presented by the Farmers' National Bank of Lancaster, Pa., against the estate of Christian Schaefer, on a note given by Frank Pfeiffer to the order of Christian Schaefer for \$300, and indorsed by said Christian Schaefer to the said Farmers' National Bank of Lancaster. Said note was dated June 27, 1900, and was payable fifteen days after date, on July 12, 1900. Said note consequently became due, and the indorser's liability became fixed, five days after the creditors' petition was filed, but several weeks prior to the adjudication of Christian Schaefer as a bankrupt. The petition of Miller & Hartman, of Lancaster, Pa., a creditor of the said Christian Schaefer, bankrupt, has been filed with the referee, asking for a re-examination of the said claim of the Farmers' National Bank of Lancaster, Pa.; and the parties have agreed that the above facts should be certified to your honorable court, and a decision asked upon the question whether the said claim of the Farmers' National Bank of Lancaster is or is not a debt provable in bankruptcy."

It thus appears that the claim of the Farmers' Bank against the bankrupt is based upon his contract of indorsement; and, since nothing appears to the contrary, I shall assume that the note was given for a debt of Pfeiffer, the maker, and not for the mere accom-

modation of Schaefer, the indorser. In such a state of facts, I am of opinion that the bank did not have a provable debt under section 63, cl. "a" (1), of the bankrupt act. That clause permits such debts of the bankrupt to be approved and allowed against his estate as are "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not * * *"; but it makes no provision for liabilities that are contingent only. It scarcely admits of argument, I think, that an indorser's liability is only contingent until the note becomes due, and the proper steps have been taken to charge him with notice of nonpayment. In re Loder, Fed. Cas. No. 8,457; In re Riker, Fed. Cas. No. 11,833. See, also, the discussion of the subject of fixed liability in Re Arnstein, 2 Nat. Bankr. N. 106, 101 Fed. 706; In re Chambers, 2 Nat. Bankr. N. 864; In re Dunnigan, 2 Nat. Bankr. N. 755.

The act of 1867 (Rev. St. 5069) permitted the creditor to prove a claim against a bankrupt indorser after the liability had become fixed, although the debt had not become absolute until after the adjudication in bankruptcy; but, so far as I am aware, there is no such provision in the present act.

The referee is accordingly directed to re-examine the claim of the Farmers' Bank, and to reject it, if no other facts appear than are stated in the foregoing certificate.

(January 7, 1901.) The within order is rescinded, and the referee is directed to allow the bank's claim.

In re ALBRECHT.

(District Court, E. D. Pennsylvania. December 1, 1900.)

No. 538.

BANKRUPTCY—OBJECTIONS TO DISCHARGE—TIME FOR FILING.

Specifications of objections to the discharge of a bankrupt, filed after the expiration of the time prescribed therefor by general order 32, without leave of court or valid excuse for the delay, will be dismissed on motion of the bankrupt.

In Bankruptcy. On motion to dismiss specifications of objections to discharge.

Julius C. Levi, for bankrupt.

Wm. A. Gray and Samuel Kirkpatrick, for objecting creditors.

McPHERSON, District Judge. On September 17th the bankrupt presented his petition to be discharged, and thereupon the court fixed October 8th as the day for the hearing, requiring the creditors to appear on that day, and show cause why the petition should not be granted. General order No. 32 provides that "a creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereon the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition, within ten days thereafter, unless the time shall be enlarged by special order of the judge." This order was not complied with, but on October

26th two of the creditors filed specifications of objections, and followed this action by filing additional specifications on November 1st and November 20th. No application was made to the court to permit these specifications to be filed, and the bankrupt now moves to dismiss them on the ground that they come too late. I think the motion must prevail. The only excuse offered for the delay is that counsel for the bankrupt agreed orally that the specifications need not be filed within the period named in general order No. 32; but, as this agreement is denied, I am unable to give it any weight.

The specifications must be dismissed.

IN RE ORIENTAL SOCIETY.

(District Court, E. D. Pennsylvania. December 1, 1900.)

No. 798.

BANKRUPTCY—CORPORATIONS SUBJECT TO ACT—THEATRICAL COMPANIES.

A corporation incorporated for the purpose of giving theatrical performances, and engaged solely in such business, is not one "engaged principally in trading or mercantile pursuits," and cannot be adjudged an involuntary bankrupt, under Bankr. Act 1898, § 4b.

In Bankruptcy. On rules to vacate restraining order and appointment of receiver.

Julius C. Levi, for petitioning creditors.

Adolph Eichol, for execution creditors.

McPHERSON, District Judge. A petition was recently filed asking for an adjudication against the Oriental Society, and at the same time a receiver was appointed, and an order granted restraining certain creditors from proceeding with executions against the society's personal property. These creditors now move to vacate the order and to set aside the appointment, on the ground that the society is "a corporation incorporated for the purpose of giving theatrical performances, and is engaged solely in said business." This averment is admitted to be true, and the question, therefore, to be decided is whether such a society falls within the provision of section 4. Is it a "corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits"? It seems to me that to ask this question is to answer it. A corporation engaged in giving theatrical performances is, of course, not engaged in manufacturing, printing, or publishing. In my opinion, also, it is clearly not trading or following mercantile pursuits, in the ordinary meaning of these words. A trader or merchant is one who either sells, or buys and sells, and a theatrical society does neither. It gives performances, of one kind or another, to which the public are attracted by the skill of the performers. But the skill is not sold; it is merely exhibited for hire. The fact that the society must buy scenery and stage appliances and furniture, which it may afterwards sell again,

is of no importance. This is a mere incident, and not the principal business of the bankrupt.

The rules are made absolute, the restraining order is vacated, and the appointment of the receiver is revoked.

In re STEUER.

(District Court, D. Massachusetts. November 24, 1900.)

No. 974.

1. **BANKRUPTCY—SUIT TO RECOVER PREFERENCE—JURISDICTION BY CONSENT.**

A district court may entertain a suit by a trustee to recover a preference by consent of the defendant, as provided in Bankr. Act 1898, § 23b; and where the defendant has appeared, given security to avoid an injunction, and contested the question on its merits, without objection to the jurisdiction, such action amounts to a consent, within the meaning of the statute.

2. **SAME—FORM OF PROCEEDING—WAIVER OF OBJECTIONS.**

While a district court is without jurisdiction as a court of bankruptcy and in the bankruptcy proceedings to set aside a preference, if seasonable objection is made, even though the defendant consents to the general jurisdiction of the court, but must, if he insists, proceed by plenary suit, yet where the trustee has filed a petition therefor, entitled in the bankruptcy proceedings, but which contains the essential features of a bill in equity, under which the defendant has been given as full opportunity to protect his rights as in a plenary suit, and he has appeared and contested the case before the referee without making any objection, either to the jurisdiction or to the form of proceeding, he cannot make such objection on a petition for review.

3. **SAME.**

Nor is it a fatal objection that such petition was filed before the referee in bankruptcy, and heard and determined by him in the first instance, but the judge on a petition for review of his proceedings has power to enter a decree which will be binding on the parties.

In Bankruptcy. On petition to review action of referee.

Arthur S. Davis, one of the trustees, for himself and other trustees.
Philip Tworoger, for bankrupt.

LOWELL, District Judge. In this case a petition was filed April 20, 1899, by the trustees against the bankrupt, his wife, and the firm of Pangbourn & Wilson, asking that they be enjoined from disposing of certain brick alleged to have been transferred by the bankrupt to Pangbourn & Wilson by way of preference voidable under the bankrupt act. The petition was filed with the referee, and thereupon the following proceedings were had: Besides the petition above mentioned, another petition was filed on the same date, praying that Pangbourn & Wilson and the bankrupt's wife might be made parties to the bankruptcy proceedings. This was allowed on the same date. Pursuant to the petition, an injunction was issued on the same date, with subpoenas to the several parties directing them to appear before the referee on May 8th. It is stated; and apparently is not contested, that service upon these subpoenas was waived. On June 7th an agreement was made be-

tween the trustees and counsel for the respondents that the injunction should be dissolved, "cash security having been given for the value of the brick mentioned in said injunction; the petition to proceed to a hearing upon the merits." Evidence was taken, and one or more hearings were had before the referee, at which counsel for the respondents argued their case without making any question of the referee's jurisdiction. On January 12, 1900, the referee rendered a decree declaring that the transfer of the brick was a voidable preference, "and that the trustees recover said property, or any cash security deposited upon the dissolution of the injunction, from the respondents Pangbourn & Wilson, as a part of said estate; and that the said respondents deliver the same to the trustee." The respondents thereupon seasonably filed a petition for review, alleging that "a decision was rendered in the said matter in favor of the petitioners; that the said decision is erroneous; wherefore they pray that the said matter may be certified for review to the district court, and that a summary of the evidence in the said case may be submitted to the said court." The parts of the referee's certificate material to the question of jurisdiction are as follows:

"I, James M. Olmstead, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the following question arose pertinent to the said proceedings, to wit: This was a petition under section 60b of the bankruptcy act, to recover seventy-five thousand building bricks transferred by the bankrupt to the respondents William E. Pangbourn and William W. Wilson by bill of sale dated March 3, 1899. The petition in bankruptcy was filed on the 28th day of March, 1899, and this intervening petition was filed on the 20th day of April, 1899. That a petition is the proper form of proceeding under which to recover a preference or fraudulent conveyance, where the respondents are creditors, and hence before the court as parties, is held in the cases of [citing cases]." The facts of the case are then set forth at some length. "I accordingly entered a decree that the prayer of the petition should be granted, that the bricks be declared a preference, and that the trustees recover the cash security which was deposited upon the dissolution of the injunction. And the said question is certified to the judge for his opinion thereon."

At the hearing before me the question of the referee's jurisdiction to make the order above stated was raised and discussed. The defendants object to the jurisdiction of the court on three grounds:

1. Because this court has no jurisdiction over suits brought by a trustee in bankruptcy to set aside a preference made before the institution of proceedings in bankruptcy by the bankrupt to third parties. That this contention of the defendants is well founded is settled by *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, unless in the case at bar the defendants have consented to the jurisdiction. With the defendants' consent, this court has jurisdiction; without consent, it has none. No case has been referred to in which the court has considered what kind and amount of consent on the defendants' part will give jurisdiction; but in any reasonable view of the requirement, the acts of the defendants in this case amount to the consent required by section 23b of the bankrupt act, and upon this ground the defendants' first objection above stated must be overruled.

2. The defendants further object that this court has no jurisdiction to set aside a preference, even by the defendants' consent, unless the proceedings are by way of plenary suit. In *Bardes v. Bank*, above cited, it was said at page 532, 178 U. S., page 1003, 20 Sup. Ct., and page 1180, 44 L. Ed.:

"It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the act of 1867; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend 'to the collection of all the assets of the bankrupt,' and 'to all acts, matters, and things to be done under and in virtue of the bankruptcy' until the close of the proceedings in bankruptcy. *Smith v. Mason* (1871) 14 Wall. 419, 20 L. Ed. 748; *Marshall v. Knox* (1872) 16 Wall. 551, 557, 21 L. Ed. 481; *Eyster v. Gaff* (1875) 91 U. S. 521, 525, 23 L. Ed. 403."

The above reaffirmance by the supreme court of the cases just cited must be held to overrule anything to the contrary found in certain decisions of that court later than *Smith v. Mason* and *Marshall v. Knox*, though considerably earlier than *Bardes v. Bank*. In *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50, a petition in bankruptcy was brought to determine the rights of one claiming a lien on property of the bankrupt. Mr. Justice Clifford said:

"Rights of property were claimed in these lands by the appellee, and the suit in this case was commenced in the district court contesting that claim, which is plainly a subject-matter cognizable under that provision; nor is it any argument against that theory that the first pleading in the district court is, in form, a petition, as suits at law and in equity, in many jurisdictions, are commenced in that form of pleading. Beyond all doubt the petition contains every requisite of a good bill in equity, whether the pleading is tested by the statement of the cause of action, or by the charging part of the bill, or by the prayer for relief; and if it be suggested that it contains no prayer for process, the answer to the objection is a plain one, to wit, that three of the parties respondent appeared and waived the issuing and service of process, and that the appellee voluntarily appeared and filed an answer." 23 Wall. 150, 23 L. Ed. 53.

The proceedings on the petition were, therefore, held to be a case in equity within sections 2 and 8 of the bankrupt act of 1867.

In *Milner v. Meek*, 95 U. S. 252, 256, 24 L. Ed. 446, it was said:

"The validity of the first objection to this appeal depends upon whether the proceeding in the district court is to be treated as a suit in equity or as part of the suit in bankruptcy. If the former, the appeal lies; but if the latter, it does not. The pleading filed by the assignee was appropriate in form for a petition in the bankrupt suit, but it was equally good in substance as a bill in equity. It contained a complete statement of a cause of action cognizable in equity, and a sufficient prayer for relief. There was no formal prayer for a subpoena, but process was issued and served. All the parties interested appeared, and presented their respective claims by answers, or answers and cross petitions, with appropriate prayers for relief. In *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50, the petition was in all its essential features like the one in this case. It was filed by an assignee in bankruptcy against lien creditors, entitled as of the bankrupt suit, and addressed to the district judge. Like that in the present case, it contained no formal prayer for subpoena; but there was a prayer for relief, much like the one here."

See, also, *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, for a statement of the relation borne by ancillary proceedings after bankruptcy or a receivership to "original bills."

So far as the decision in *Bardes v. Bank* is irreconcilable with that rendered in the cases last cited, the former must prevail. In interpreting the utterances of a superior court, however, an inferior court should not, I conceive, treat as overruled any decision not explicitly considered by the superior court, if it be possible to reconcile the earlier and later decisions. *Bardes v. Bank* must be taken to decide that a trustee cannot, by petition in bankruptcy, recover from a third party property alleged to belong to the bankrupt's estate, if objection is seasonably taken to the form of the proceedings. Even with the defendants' consent to the general jurisdiction of the court, the court must, if the defendant insists, proceed by plenary suit. But *Stickney v. Wilt*, *Milner v. Meek*, and perhaps *White v. Ewing* must still be taken to authorize a proceeding by way of petition where (1) the court has jurisdiction to proceed by way of plenary suit, (2) where no seasonable objection is taken to the form of procedure, and (3) where, under the form of a petition in bankruptcy, the rights of the respondent are secured as substantially as in a plenary suit. In the case at bar no objection was made to the form of proceeding until the argument before the district court, and, inasmuch as this court has, through the defendants' submission thereto, jurisdiction by way of plenary suit of the proceedings in question, the objection to the form of proceeding has come too late.

It remains to consider if, under the form of a petition in bankruptcy, the defendants' rights have been protected as substantially as if the suit had been plenary. In order that proceedings to recover property may be validly commenced by petition in bankruptcy, the petition must, as was suggested in *Milner v. Meek*, 95 U. S. 252, 257, 24 L. Ed. 444, contain a complete statement of the cause of action, and a sufficient prayer for relief. Upon such a petition process must be issued, and the parties must be given full opportunity to present evidence and arguments in their own behalf. In other words, though the formal requisites of a bill in equity may be wanting, yet the substantial requisites of equitable justice must be complied with as fully in a petition in bankruptcy as in a bill in equity. An injunction should not issue *ex parte*, unless in case of necessity. An order to show cause should precede the issuance unless the petitioner shows that delay will work irreparable injury. In this case it appears that all substantial requirements were met. Originally, it is true, an injunction was issued *ex parte*, but that may have been done because the referee deemed that irreparable injury would be wrought by delay. In any event, that preliminary injunction is not now in question. All parties were given full opportunity to introduce evidence and present arguments, and they seem to have availed themselves of the opportunity. One defect in the petition is so serious that it must be cured before the decree is issued, and amendment may be made at this stage, as the parties have gone into the merits of the case without objection. The petition, as it now stands, contains no prayer for a delivery of the goods, but only for an injunction. If the petitioning trustees now duly amend the prayer of their petition, the papers, even if slightly informal in some re-

spects, seem to be sufficient. The second objection of the defendants is, therefore, overruled.

3. The defendants further object to the jurisdiction that, even if the judge of the district court have jurisdiction of proceedings like those instituted in this case, yet such jurisdiction is limited to the judge alone, and is not shared by the referee. There are considerations of convenience which make for holding that the referee, where his authority is not objected to, has jurisdiction of proceedings like these, subject to review by the judge. The court of bankruptcy will thus be brought nearer to the residence of suitors, as there is a referee in every county. Again, general order 12, subd. 3 (32 C. C. A. xvi., 89 Fed. vii.), states:

"Applications for a discharge, or for the approval of a composition, or for an injunction to stay proceedings of a court or officer of the United States or of a state, shall be heard and decided by the judge."

By this last provision it is strongly implied that the referee has some jurisdiction to issue injunctions directed to any party not an officer of the United States or of a state, unless the injunction stays the proceedings of the court. I do not regard it necessary, however, to decide specifically the question just stated. Where a petition like that in the case at bar is filed before a referee, and the parties waive service upon subpoenas issued by his order, recognize his injunction by agreeing that it shall be dissolved on certain terms, and go to a hearing before him, at which evidence is taken and arguments are made, I do not think the judge is so far without jurisdiction that, upon a petition for review of the referee's decision, he cannot make a decree binding upon the parties. It is pertinent to inquire what would be the practical result if original jurisdiction in proceedings like these were held to reside in the judge alone. The judge, being too heavily burdened to hear the evidence, would refer the petition to the referee under general order 12, subd. 3, or by the analogy of that order. The referee would hear the evidence, and report it to the judge, with his conclusions thereupon. Such a proceeding, while quite different in form from that to be followed if the referee has original jurisdiction, yet does not greatly differ from the latter proceeding in practical result. For these reasons, though with great doubt, and with sincere regret that the subject has not been clearly and definitely dealt with under the existing act, either by the supreme court or by some circuit court of appeals, I am led to conclude that, upon the proceedings as they stand, the district court has jurisdiction to make the decree called for by the amended petition. Upon the facts I am disposed to agree with the referee, who heard the witnesses. If the amendment above suggested is made, there will be a decree in favor of the petitioners, which will issue as if made originally by the judge, and not simply as an affirmance of the decree of the referee.

In re HILTON.

(District Court, S. D. New York. November 24, 1900.)

BANKRUPTCY—PROVABLE DEBT—STAY OF SUIT ON UNLIQUIDATED CLAIM.

An unliquidated claim that might have been liquidated and proved against a bankrupt under the provisions of Bankr. Act 1898, § 63b, but which was voluntarily withheld until after the expiration of the time for proving claims, should be treated as a provable debt, from which the bankrupt will be released by a discharge under section 17; and he is entitled to an order staying a suit thereon subsequently brought in a state court, as provided in section 11, pending the determination of his application for a discharge.

In Bankruptcy. On motion to set aside an order staying proceedings in a state court.

Saunders, Webb & Worcester, for creditor.

James F. McNaboe, for bankrupt.

BROWN, District Judge. The principal question presented on this motion is whether an unliquidated claim that might have been liquidated and proved against the bankrupt, but which was voluntarily withheld for more than 15 months after adjudication and until the expiration of the period allowed by section 57(n) for proving claims, should be treated as a "provable debt" under section 17, so as to be barred by the bankrupt's discharge, and entitling the bankrupt to a stay on a pending suit thereon in the state court under section 11. In my judgment it should be so treated. The facts are as follows:

On November 1, 1895, G. W. Johnston made a written contract with the firm of Hilton, Hughes & Co., in which the bankrupt was a partner, whereby Johnston was agreed to be employed for five years from that day as clerk and superintendent at a salary of \$7,500 per year, payable monthly. Johnston continued in this employment until August 25, 1896, when the firm failed and made a general assignment to their creditors. Johnston was paid up to that date and discharged from further service. On the 4th of January, 1899, Mr. Hilton presented his voluntary petition in bankruptcy and was adjudicated a bankrupt on that day. On January 24th Johnston died, leaving a will under which his executors qualified in May following. In the bankrupt's schedules Johnston was named as a creditor for an unliquidated demand for breach of contract. The first meeting of creditors was held on February 9, 1899. No steps were taken by the executors to liquidate Johnston's claim to damages for the breach of his contract until June 3, 1900, when they commenced suit in the supreme court of the state, claiming \$10,000 damages. The bankrupt obtained in November, 1899, a stay of proceedings, which the executors now move to set aside, on the ground that the claim is not a "provable debt," and would not be barred by the defendant's discharge as a bankrupt. The question of his discharge has not yet been determined, the bankrupt's application therefor being still in litigation.

The contract and the breach of it, upon which the demand in suit is based, originated long before the bankruptcy proceedings. It is

stated, as I have said, in the schedules. It only remained to liquidate the amount of the damages arising out of the breach of the contract to make it provable like any other debt. Section 63(b) expressly provides for the proof of such claims, to be liquidated "in such manner as the court shall direct." Having made this provision, it is impossible to suppose that it was the intent of the act to allow a creditor voluntarily to withhold such a claim from liquidation and thereby preserve it as a claim against any subsequently acquired property, and thus practically defeat the object of the bankrupt act as respects the debtor, to free him from the load of former obligations. Section 17 provides that the discharge shall release the bankrupt from all his "provable debts," etc. A "provable debt" as here used means, in my judgment, any claim that the creditor may make provable through the means provided by section 63(b). See *Bump, Bankr.* (10th Ed.) 572; *Rankin v. Railroad Co.*, 1 N. B. R. 647, 651, Fed. Cas. No. 11,567. Section 1 (11) in defining terms declares: "Debt" shall include any debt, demand or claim provable in bankruptcy." I cannot doubt that the intent of these words, "claim provable in bankruptcy," was to include every claim that under the provisions of the bankrupt act might be made provable; and the definite provision of section 63(b) for making unliquidated claims provable is, I think, precisely what is intended to be included in those words as distinguished from the previous word "debt." In my judgment, therefore, this claim as a claim that could be made provable in the manner provided by the act, would be barred by the bankrupt's discharge.

Similarly, section 11, as respects the stay of suits, is not confined to technical debts or fixed liabilities, but includes "a suit which is founded upon a claim from which a discharge would be a release"; and in like manner general order 30 of the supreme court (18 Sup. Ct. viii.) extends to "claims" provable in bankruptcy. As the bankrupt is proceeding diligently for his discharge, the stay should, therefore, be continued until that question is determined. In *re Schwartz*, 15 N. B. R. 330, Fed. Cas. No. 12,502.

In re SHAFFER.

(District Court, E. D. North Carolina. November 15, 1900.)

BANKRUPTCY—SUPPLEMENTARY PROCEEDINGS—JURISDICTION AND RIGHTS OF CREDITORS.

Under Bankr. Act, § 2, subd. 8, a court of bankruptcy has jurisdiction to entertain a supplemental petition filed by a voluntary bankrupt after the estate has been closed and the bankrupt discharged, setting out additional schedules of property, with the reasons for their former omission, and the court may reopen the proceedings for the purpose of administering the new assets for the benefit of creditors who proved their claims in accordance with the statute in the original proceedings. But such supplementary proceedings cannot affect the discharge of the bankrupt, where more than a year has elapsed since it was granted, nor has a creditor who failed to prove his claim in the original proceedings any standing in such supplementary proceedings, or the right to examine the bankrupt therein.

In Bankruptcy. On certified proceedings asking for rule for contempt.

A. W. Shaffer, for bankrupt.

H. W. Norris, for creditors.

PURNELL, District Judge. On August 2, 1898, A. Webster Shaffer filed a petition asking to be adjudged a bankrupt; the cause being No. 1 on the bankruptcy docket of the court. He was duly adjudged a bankrupt, the cause referred, and on October 6, 1898, was granted a discharge. The proceeding seems to have been regular in all respects, and there is no suggestion of the contrary. On the 7th day of June, 1900, a petition was filed by the bankrupt setting forth: (1) That among the assets which should have been, but were not, scheduled and surrendered to the trustee in bankruptcy are judgments of the superior court in favor of petitioner against certain persons named in a schedule filed. (2) The reversionary interests in the homestead of certain bankrupts sold in proceedings under the act of 1867, and purchased by petitioner at assignees' sales, which interests are set forth in a schedule filed. The petition states the reason why the judgments were not scheduled was because "the judgment debtors were insolvent, and the judgments barred by the statute of limitations." (3) That the reason the reversionary interests were not scheduled was because they had never come into the possession of petitioner, and he had regarded them as worthless, which he is now advised is erroneous. The prayer of the petition is that the bankrupt be allowed to schedule the property named, and the deficiency of his personal property exemption of \$129.50 be allowed of the judgments. The petition and schedules were referred, and the referee made due advertisement.

On the day appointed for the hearing before the referee, R. L. Herndon, W. J. Beddingfield, and Fred. Saunders appeared with their attorney, and proceeded to examine the bankrupt as to his financial condition and other matters at the time the bankrupt signed the official bond of Charles D. Upchurch, clerk of the superior court of Wake county, N. C., on which bond the said creditors had obtained judgments at the spring term, 1892, against the bankrupt as surety, each for \$15,000, the penalty of the bond, to be discharged on the payment of the several amounts due each. There appears to be a balance due on all of these judgments. These debts were included in the original Schedule A(3). They were not proved in that proceeding, and no action seems to have been taken by the creditors named until the hearing on the supplemental petition and schedules, July and August, 1900. These debts were provable in bankruptcy. At an adjourned hearing before the referee on October 13, 1900, these creditors, through their attorney, propounded questions relating to the financial condition of the bankrupt at the time he signed the bond on which their judgments were obtained and matters anterior to the discharge in bankruptcy. These questions the bankrupt declined to answer, stating as reasons for such refusal: "(1) That the manifest purpose is to revive and reopen the late bankruptcy proceedings of the witness, the estate of

which has been settled, and the trustee and bankrupt discharged, more than two years ago. (2) As irrelevant to the matter on hearing before the court, to wit, the property described in the amended Schedule B, voluntarily filed upon the discovery by the witness: therefore incompetent and improper. (3) That the interrogators each failed to duly prove his alleged debt in the bankruptcy proceedings." The referee ordered the witness to answer, which order the witness declined to obey. A rule was asked for by the attorney for creditors, and the question certified to the judge.

A discharge releases all judgments provable in bankruptcy, except such as are judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; subject to these exceptions: Judgments entered prior to the filing of the petition, where granted on actions founded on tort or on contract, are discharged. The statute prescribes the form and time within which, and the grounds upon which, direct proceedings to revoke a discharge may be had. The remedy thus given is exclusive. The application must be made to the court which granted the discharge, and the order of discharge cannot be questioned or attacked collaterally in any court, either state or federal. *Bank v. Buckner*, 20 How. 108, 15 L. Ed. 862. The application must be filed within one year after the discharge has been granted, and by one who has not been guilty of undue laches. Section 15, Bankr. Act 1898. Where the petition is not filed within one year, it is absolutely barred by the statute. *Alexander H. Mall & Co. v. Ullrich* (D. C.) 37 Fed. 653; *Loveland*, Bankr. 640. A discharge may be revoked within one year, etc. Bankr. Act, § 15; *Id.* § 2, cl. 12.

What is the effect of the petition and supplemental schedules? Does it reopen the proceedings? If so, can it vacate or in any way affect the discharge? General order 11 (32 C. C. A. xiv., 89 Fed. vii.) provides: "The court may allow amendments to the petition and schedules on application of petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed;" and under this the court may reopen the estate, etc. The bankrupt cannot surrender or vacate his discharge. He can revive a debt by a new promise, or waive his discharge by failing to plead it when sued, but he cannot vacate the order of discharge. No one can do that except the court, in the way prescribed in the statute. The order discharging Shaffer therefore stands. No act of his can affect it. More than a year having elapsed, no creditor can attack it. As far as the bankrupt is concerned, therefore, these creditors are barred.

How do they stand in relation to the estate? Does the discharge of the bankrupt and trustee terminate the jurisdiction of the court over the estate? It does not necessarily. Section 2, subd. 8, provides the estate may be reopened, and by the filing of supplemental petition and schedules the bankrupt has done this for the benefit

of all creditors who proved their claims in the original proceedings. If there is benefit in the discovered assets, it must redound to the creditors who proved their claims according to the statute, and no others. Creditors who failed to so prove their claims are barred by the provisions of section 57n, and the claims of the creditors now seeking to make the examination appear to come within this section, and are not excepted. The language of the statute is more than a limitation; it is a prohibition,—“shall not be proved against a bankrupt estate subsequent to one year after the adjudication.” *Bray v. Cobb*, 3 Am. Bankr. Rep. 788, 100 Fed. 270; *Loveland*, Bankr. 247-251. The proof of the claims of the parties named was therefore unauthorized, and they have no standing in this court; hence no right to examine the bankrupt on any subject in these proceedings. If it is contended the discharge does not affect their claims for any reason, their remedy must be elsewhere, and not in the way here sought. The referee is therefore reversed, and the rule refused. The bankrupt, being an attorney, has the right to raise any question of law which could have been raised had he been represented by another. General order 4 (32 C. C. A. viii., 89 Fed. iv.) gives him the right to represent himself, and, the objection to the examination being bona fide and well founded, there was no contempt in declining to answer.

In re WARD.

(District Court, D. Massachusetts. November 7, 1900.)

No. 3,626.

BANKRUPTCY—JURISDICTION—INJUNCTION AGAINST THIRD PARTY.

Bankr. Act 1898 does not vest a court of bankruptcy with jurisdiction to take property alleged to belong to the bankrupt out of the possession of a third party, unless by his consent, either permanently, by a plenary suit, or temporarily and by summary process, pending adjudication on a petition filed, and, lacking such jurisdiction, it is without power to enjoin the third party from disposing of such property.

In Bankruptcy. On application by petitioning creditor for an injunction.

Charles W. Hodgdon, for petitioners.
J. Albert Brackett, for O'Donald.

LOWELL, District Judge. An involuntary petition in bankruptcy was filed in this court against Ward. Prior to adjudication, the petitioning creditor filed a separate petition seeking to enjoin one O'Donald, who was alleged to “hold in his hands and possession funds and credits due” Ward under a certain contract, “from making any transfer or disposition of the said funds and credits or any part thereof.” Thereupon an order of notice was issued requiring O'Donald to show cause why the injunction prayed for should not issue. He appeared by counsel, and, while not actively denying the jurisdiction of this court to issue the injunction prayed for, yet re-

frained from consenting to the jurisdiction. The court must determine if, in a case like this, it is given by the bankrupt act jurisdiction to enjoin a respondent who has not consented to its jurisdiction.

Prior to the decision of the supreme court in *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the jurisdiction was assumed and freely exercised by the courts of this and many other districts, and had been sustained by several circuit courts of appeal. See *In re Hammond* (D. C.) 98 Fed. 845. The decision of the supreme court has so gravely modified the theory of jurisdiction in bankruptcy previously held by all these courts that their practice prior to that decision affords little support for a continuance thereof. In the case above cited the supreme court actually decided that a district court has no jurisdiction, except by the defendant's consent, of a suit brought by a trustee in bankruptcy to set aside a fraudulent transfer made by the bankrupt to a third party before the institution of bankruptcy proceedings. This is not that case, but, as was said by this court in *Re Hammond* (D. C.) 98 Fed., at pages 851, 852, there is great difficulty in holding that a court can, before adjudication, deal temporarily with property alleged to belong to the bankrupt, and yet cannot take jurisdiction of a plenary suit by a trustee to recover the same property after adjudication. It is hard to believe, for example, that this court can, pending the appointment of a trustee, and acting by a marshal or receiver, take property alleged to belong to the bankrupt out of the hands of a third party, and yet be without jurisdiction to take like property out of the hands of a third party at the suit of a trustee after he is appointed. This difficulty apparently was felt by the supreme court, for in the case above cited, at page 538, 178 U. S., page 1006, 20 Sup. Ct., and page 1182, 44 L. Ed., Mr. Justice Gray said:

"The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant."

The case of *In re Hammond* is now completely overruled by the decision of the supreme court, but the reasoning in the opinion there rendered and in the extract just quoted from the opinion of the supreme court are both forcible to show that the jurisdiction of this court over plenary suits, and its jurisdiction by summary process and pending adjudication, to seize property in the hands of a third party and alleged to belong to the bankrupt, stand and fall together. In *Re Hammond* they were said to stand together. In *Bardes v. Bank* the opinion was expressed that they fall together. For these reasons, I think the district court is without jurisdiction to take property alleged to belong to the bankrupt out of the possession of a third party, as well temporarily and by summary process, as permanently and by plenary suit.

The present case does not involve the taking of property alleged to belong to the bankrupt's estate out of the hands of a third party,

but merely the enjoining a third party from dealing with the property. Doubtless there is a difference between the two acts proposed, but, if there is no jurisdiction to take the property, I cannot find jurisdiction to forbid its use. To take property out of a man's possession, and to restrain him from dealing with it as owner, appear to me but different acts of exercise of the same jurisdiction.

It is not necessary to deal at length with other reported cases. In *Re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337, the jurisdiction of the district court was sustained in a case like this, and was rested principally upon section 2 (15) of the bankrupt act. I find myself compelled to regard this case as overruled by *Bardes v. Bank*, as shown particularly in the language of the supreme court regarding that section, found at page 535, 178 U. S., pages 1004, 1005, 20 Sup. Ct., and page 1181, 44 L. Ed. *Bear v. Chase*, 40 C. C. A. 182, 99 Fed. 920, so far as it is unaffected by the decisions of the supreme court, has no application to the case at bar. The respondent is not an attaching creditor. In *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325, the circuit court of appeals for the Eighth circuit sustained the jurisdiction of the district court, saying: "We feel confident that congress did not intend by the recent bankrupt act to commit the administration of any insolvent estate to an assignee chosen by the bankrupt, who should be free from the control of the bankruptcy court having jurisdiction over the person of the bankrupt." This case, also, must be regarded as overruled. See, especially, the expression of opinion of the supreme court, on page 538, 178 U. S., page 1006, 20 Sup. Ct., and page 1182, 44 L. Ed., above cited. While the point discussed in that citation was not necessarily involved in the decision of the case, and so the opinion rendered does not bind the supreme court itself, yet I think a district court is ordinarily bound to prefer an unhesitating statement of law made obiter by the supreme court to a decision of a circuit court of appeals made prior thereto. In *re Baudouine & Co.*, 41 C. C. A. 318, 101 Fed. 574, and *Hall v. Kincell*, 42 C. C. A. 360, 102 Fed. 301, must be regarded as directly overruled by *Bardes v. Bank*. For the reasons stated in *Bardes v. Bank*, at page 535, 178 U. S., pages 1004, 1005, 20 Sup. Ct., and page 1181, 44 L. Ed., and in *Re Hammond* (D. C.) 98 Fed., at page 853, I think that clauses 6 and 15 of section 2 of the bankrupt act do not extend the jurisdiction of the court to cover this case. It was urged in argument that section 11a, empowering this court to stay suit in a state court against the bankrupt, gives this court authority to restrain one alleged to hold the bankrupt's property from disposing of the same; but that subsection appears to me not to apply to any aspect of this case.

Counsel for the petitioners urged that the supreme court passed only upon the jurisdiction of this court over plenary suits, and that the jurisdiction by summary process was left undisturbed. It would be strange, however, if a court be without jurisdiction to determine the title or to affect the control of property by a plenary suit, where all parties must be fully heard, and yet has jurisdiction on summary process, and without hearing, to take possession of the same property or to restrain its use. I do not understand that the supreme

court has held that the district court may do by summary process that which it is forbidden to do in a plenary suit. The case of *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, held only that, after property had once passed into the custody of a court of bankruptcy by the referee's taking possession of it, it was not open to seizure by a state court on writ of replevin, and, if so seized, could be retaken by the court of bankruptcy by summary process. The case has no application to property which has never been in the possession of a court of bankruptcy.

It is further urged that, if this court be without jurisdiction to keep from concealment or dissipation the property of the bankrupt in the hands of a third party pending adjudication, there will seldom be left much for the trustee to distribute among the creditors. This may be true, but the situation is created by congress, not by the court. It may be that the state courts, on petition by the creditors, would act in a case like this. See *In re Schrom* (D. C.) 97 Fed. 760.

It is greatly to be desired that a further exposition of the jurisdiction of the district court in bankruptcy should be made as speedily as possible by the supreme court, and, if counsel for the petitioners shall desire to take this case directly to the supreme court, as is provided by section 5 of the judiciary act of 1891 (26 Stat. 827), I will gladly facilitate proceedings to that end.

STUBBS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 14, 1900.)

No. 1,328.

PUBLIC LANDS—PROSECUTION FOR CUTTING TIMBER—INSTRUCTION BASED ON MISTAKE AS TO LAW IN FORCE.

Defendant was prosecuted by information charging him with cutting timber on nonmineral public lands situated in Colorado. The court tried the case upon the theory that the information was based on section 4 of Act June 3, 1878 (20 Stat. c. 151), which prohibits the cutting of timber for sale or export upon any of the public lands in certain designated states and territories, and instructed the jury that under the evidence it was immaterial whether the lands from which the cutting was done were mineral or nonmineral. Such statute in fact is not applicable to the state of Colorado, but under Act June 3, 1878 (20 Stat. c. 150), authorizing citizens and bona fide residents to cut timber for certain purposes from mineral lands in accordance with prescribed regulations, which is in force in that state, defendant was entitled to show as a defense that his cutting was in accordance with such act and the regulations made thereunder, and some evidence was introduced tending to sustain such defense. *Held*, that the court's instruction, having been based on a mistaken view of the law applicable to the case, and not upon the evidence, was erroneous, and required a reversal of the judgment, where no question as to the sufficiency of the evidence to warrant the submission of the issue to the jury was made by either party, and the record did not show that all the evidence was contained therein.

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Colorado.

Reese McCloskey, Charles Hartzell, and George P. Steele, for plaintiff in error.

Greeley W. Whitford, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The United States district attorney, by leave of the court, filed a criminal information against Frank W. Stubbs, the plaintiff in error, and others, for cutting timber on nonmineral public lands. The defendant Stubbs was convicted, and brought the case into this court by writ of error. In its charge the court said to the jury:

"I failed to instruct you that under the evidence in this case it is not important whether this land be mineral or nonmineral. If the defendant is guilty in one case, he is guilty in the other. If innocent in the one, he is innocent in the other. So you need not consider the mineral character of this land, as affecting the question."

Due exception was taken to this charge, and this is the only assignment of error we need consider.

This prosecution was in the state of Colorado, and the law relating to cutting timber on the public lands is exceptional in that and some other mining states. By the act of June 3, 1878, entitled "An act authorizing the citizens of Colorado, Nevada and the territories to fell and remove timber on the public domain for mining and domestic purposes" (20 Stat. 88, c. 150, § 1), it is provided:

"That all citizens of the United States and other persons, bona fide residents of the state of Colorado, or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

The act of March 3, 1891 (26 Stat. 1093, c. 559), provides that:

"In the states of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming and the district of Alaska, and the gold and silver regions of Nevada, and the territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such state or territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the secretary of the interior and has not been transported out of the same. * * * And it is expressly provided that "this act shall not operate to repeal the act of June 3, 1878, providing for the cutting of timber on mineral lands."

It is a curious circumstance that this act was, in substance, re-enacted the same day in another act, entitled "An act to repeal timber culture laws and for other purposes" (26 Stat. 1095, c. 561, § 8).

There was evidence introduced tending to show that the timber the defendant was charged with cutting was cut on mineral lands. The prosecuting officer of the government, who filed the information,

evidently supposed the act allowing timber to be cut on the public mineral lands was in force and applicable to this case, or he would not have alleged in his information, as he did, that the lands from which the timber was cut were nonmineral. Such an allegation would be surplusage in an information under section 2461 of the Revised Statutes.

The charge of the court makes no reference to the act of June 3, 1878, or to the regulations of the secretary of the interior thereunder; nor does it make any reference to the act of March 3, 1891, and the regulations of the secretary of the interior thereunder. It is not suggested here, and was not in the lower court, that the timber was cut in violation of the rules and regulations prescribed by the secretary of the interior under the acts mentioned, or either of them. The case seems to have been tried upon the assumption that section 4 of the act of June 3, 1878 (20 Stat. 90, c. 151), was, in the language of counsel for the government, "made applicable to the state of Colorado by section 8 of the act of March 3, 1891" (26 Stat. 1097, c. 561). But this is an error. The operation of section 4 of the act of June 3, 1878, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory" (20 Stat. 90, c. 151), is limited to the states and territories named in its title. The act reads as follows:

"That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said states and territory or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars."

It will be perceived that this section is by its terms limited to "said states and territories,"—meaning to the states and territories mentioned in the title and the body of the act, namely, California, Oregon, and Nevada, and Washington Territory.

There is no section or provision of the act of March 3, 1891, which makes section 4 of the act of June 3, 1878, which we have quoted, applicable to the state of Colorado. The act of March 3, 1877, entitled "An act to provide for the sale of desert lands in certain states and territories" (19 Stat. 377, c. 107), contains three sections. By the second section of the act of March 3, 1891 (26 Stat. 1095, c. 561), it was provided:

"That an act to provide for the sale of desert lands in certain states and territories, approved March 3, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections."

And, following this section 2, five sections were added accordingly, numbered from 4 to 8, all placed between inverted commas, as though copied from the original act. The added section numbered 8 provides:

"That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the state of Colorado,

as well as the states named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the state or territory in which the land sought to be entered is located.'"

The states and territories named in the act to provide for the sale of desert lands in certain states and territories, approved March 3, 1877, were California, Oregon, Nevada, and the territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota. The only effect of this section 8 was to add Colorado to the list of states to which that act applied. Neither that act, nor any amendment thereof, related to the cutting of timber on the public lands, but only to the sale of desert lands. The section of the act of March 3, 1891, numbered 8 has no reference whatever to the subject we are considering. Counsel for the government has cited us to no other act which it is claimed exempts the state of Colorado from the operation of the act authorizing the cutting of timber on mineral land in the states and territories named therein, and makes no claim that it is repealed. We assume that, if there was any such act, the counsel for the government would have brought it to our attention; but, not having done so, we conclude there is no such act. Counsel for the government, in his brief, says:

"The information was drawn under section 2461. The court was of the opinion that that section did not apply, but that the information was sufficient under section 4, c. 151, p. 167, Supp. Rev. St. (2d Ed.), and instructed the jury that it was not important whether the land in question be mineral or nonmineral. We think that this was correct."

And the only ground on which the judgment of the lower court is attempted to be sustained by the district attorney is that section 4 of the act of June 3, 1878, was in force in the state of Colorado. This contention, as we have shown, is erroneous. It results that the case was tried upon an erroneous theory of the state of the law, and that it was error to tell the jury that it was not important whether the land from which the timber was cut was mineral or nonmineral. The court should have told the jury that if the land was mineral land, and the defendant in cutting the timber had complied with the requirements of the act, and the rules and regulations prescribed by the secretary of the interior thereunder, he was not guilty. The burden of proving these facts rested on the defendant. *Railroad Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831, 40 L. Ed. 1002. Whether the defendant met and discharged this burden, we do not inquire, because the point is not raised either by the defendant or the government; and, moreover, the record does not affirmatively show that all the evidence is before us. The defendant may not be able to make out his defense either under the act of June 3, 1878 (20 Stat. 88, c. 150), or the act of March 3, 1891 (26 Stat. 1093, c. 559), but he is entitled to do so if he can.

It is worthy of remark that the sentence of the court in the case does not impose the punishment required upon a conviction under section 2461 of the Revised Statutes. The sentence was obviously imposed under section 4 of the act of June 3, 1878, which, as we have seen, is not in force in the state of Colorado. But the plaintiff in error is not complaining of this, as the punishment upon a convic-

tion under section 2461 of the Revised Statutes must have been greater than that which was imposed. That section imperatively requires that imprisonment shall be a part of the punishment. The defendant was tried, convicted, and sentenced under a statute having no application to the case, and for that reason the judgment of the district court is reversed, and the case remanded for a new trial.

SANBORN, Circuit Judge (dissenting). The charge of the trial court was that under the evidence in the case it was not important whether the land from which the timber was taken was mineral or nonmineral. This charge was right, unless the defendant had produced some evidence not only that the land was mineral, but also (1) that those who cut from it were citizens of the United States, or bona fide residents of the state of Colorado; (2) that the land was not subject to entry under existing laws of the United States; (3) that the timber was cut for building, agricultural, mining, or other domestic purposes; and (4) that this cutting was done in accordance with the rules and regulations prescribed by the secretary of the interior. Before it became material, under the evidence, whether the land was mineral or nonmineral, there must have been some testimony or evidence produced in support of each of these propositions. If there was no evidence in support of any one of them, then the defendant had not sustained his defense under the act of June 3, 1878, and the charge of the court was correct. The burden was on the defendant to produce this evidence. *U. S. v. Cook*, 19 Wall. 591, 22 L. Ed. 210; *Railroad Co. v. Lewis*, 162 U. S. 366, 376, 377, 16 Sup. Ct. 831, 40 L. Ed. 1002; *Gentry v. U. S.*, 41 C. C. A. 185, 101 Fed. 51, 53.

The plaintiff in error alleges in this court that the charge of the court below that it was immaterial, under the evidence, whether the land was mineral or nonmineral, was erroneous. The burden is on him to show that it was erroneous. The record which he presents to this court discloses no evidence whatever that he or the other parties who cut and removed the timber in controversy ever complied with the rules and regulations prescribed by the secretary of the interior under the act of June 3, 1878, or that the land was not subject to entry under laws existing when that act was passed; and there are other propositions essential to the maintenance of his defense, in support of which no substantial evidence can be found in this record. One who would successfully attack the charge of a court because there was evidence in the case which rendered it erroneous must produce that evidence in the appellate court, or the charge below must be sustained. The presumption is that the trial court correctly instructed the jury, and that the same absence of evidence to sustain the propositions essential to the defense of the plaintiff in error existed in the court below which is disclosed by the record which the plaintiff in error now presents. As the plaintiff in error has not shown by the record that the charge was wrong, or that it was material under the evidence whether the lands were mineral or nonmineral, the charge should be sustained, and the judgment below should be affirmed. *U. S. v. Patrick*, 73 Fed. 800, 806, 20 C. C. A. 11, 17, 36 U. S. App. 645, 656; *Railway Co. v. Price*, 97 Fed. 423, 434.

38 C. C. A. 239, 250; Taylor-Craig Corp. v. Hage, 69 Fed. 581, 583, 16 C. C. A. 339, 340, 32 U. S. App. 548, 552; Board v. Sutliff, 97 Fed. 270, 275, 38 C. C. A. 167, 172; Newman v. Iron Co., 25 C. C. A. 382, 80 Fed. 228; Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644.

COURIER LITHOGRAPHING CO. v. DONALDSON LITHOGRAPHING CO.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 819.

COPYRIGHT—PICTURES AND PRINTS—ARTISTIC VALUE.

A chromo, lithograph, or other print, engraving, or picture which has no other use than that of a mere advertisement, and no artistic or intrinsic value aside from such function, is not promotive of the useful arts, within the meaning of Const. art. 1, § 8, and is not within the protection of the copyright statute.

In Error to the Circuit Court of the United States for the District of Kentucky.

This was an action by the plaintiffs in error based upon section 4965 of the Revised Statutes of the United States as amended by the acts of March 3, 1891, and March 2, 1895, to recover the penalties prescribed for infringement of copyrights. The petition set forth three separate causes of action under that section, and alleged that the defendant had violated the plaintiffs' copyrights in three different lithograph prints, copyrighted under the following titles: (1) "Spectacular Ballet Design;" (2) "Stirk Family Design;" (3) "Statuary Act Design." The marshal seized, on the day the action was begun, 10,590 copies of the infringing publication in an eight-page form, 13,205 copies of a four-page form, and five metal electrotypes plates, found in the possession of the defendant. The copyrighted articles are in colors, and are properly chromo lithographs. The alleged infringements are smaller reproductions, not in colors, made from electrotypes plates. At the conclusion of the evidence for the plaintiffs the court instructed the jury to return a verdict for the defendant. There were some exceptions to the exclusion of evidence offered by the plaintiffs, but none of the errors assigned thereon are material, as the case must turn upon the questions involved in the instruction to find for the defendant. The plaintiffs sue as members of a joint-stock association under the law of New York, known as the "Courier Company," but doing a part of their business under the name of the "Courier Lithographing Company." Two of the copyrights in question were copyrighted in the name of the "Courier Company," and one in the name of the "Courier Lithographing Company,"—that known under the title of the "Statuary Act Design." The titles of the first two named were deposited with the librarian of congress, April 11, 1898. The last was deposited April 18, 1898, though it was in evidence that the application and title were deposited in the mail addressed to librarian of congress on April 15, 1898. A large number of prints of each of said designs were shipped April 11, 1898, by the plaintiff company from Buffalo, N. Y., to the agent of the Wallace Circus, at Peru, Ind., for circulation and distribution. The time of arrival at Peru is not shown. The evidence established that these prints were ordered by E. B. Wallace, proprietor of a circus known as the "Wallace Show," as advertising matter for the show. Plaintiffs' evidence tended to show that Mr. Wallace's order constituted what is styled an order for "special paper,"—that is, they were show bills designed especially for him, and which are sold only to the person making the order so long as he chooses to supply himself with them for his show. The witness said that "if he ceases to use that bill, say he does not do the 'Statuary Act' next year, we have the right to sell the design to other people who may want to use that sort of thing." Plaintiffs' evidence also tended to show that the "design" or "conception" was *that of an employé working under a salary for them, and that his "designs"*

were the property of the employer, and therefore copyrighted by them. The "Spectacular Ballet Design," as shown by the print itself, is a picture of a number of ballet dancers in the conventional dress,—short skirts, tights, bare shoulders and arms. The "Stirk Family Design" is a representation of fancy bicycle riding by male and female riders. The "Statuary Design" is a representation of the landing of Columbus and several other historic or classic events. All purport to be representations of acts to be done in the Wallace show, and all were made under a representation by Wallace that his show was going to do these things, and that he wished these acts represented on colored bills for exhibition in windows as advertisements for his show. All the bills contained reading matter indicating that these were acts to be done in Wallace's show, and included pictures of Mr. Wallace himself. The copies of the several publications, deposited as required by the statutes with the librarian of congress, included this reading matter and picture of Mr. Wallace. By comparing the copyrighted prints with those seized and put in evidence as proof of infringement, it is shown that the latter are also show bills for the Wallace show. Though diminished in size, and printed only in black ink, they appear to be substantially reproductions of the designs in the copyrighted publications. There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were "the creations of our employes." Evans, district judge, was strongly of opinion that none of the copyrighted prints were entitled to be copyrighted, and upon this and other grounds, unnecessary to be now considered, so instructed the jury.

Ansley Wilcox, for plaintiffs in error.

E. W. Kittredge and Orris P. Cobb, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The copyrighted chromos or prints were designed to be pictorial representations of acts done in the Wallace Circus. That they were designed and intended for advertising purposes only is indisputable. They may be "creations" in the sense that they are not exact reproductions of the acts they advertise. But that the arrangement, pose, color, grouping, or expression is new or original does not appear in the evidence, nor can we assume it from an examination of the prints themselves. Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value. But they are "chromos" or "prints," and chromos and prints are included in the list of productions which, under the statute, may be copyrighted. But are all chromos and prints unqualifiedly entitled to the protection of the copyright law? Must such a construction be given the statute? The power of congress in this respect is derived from that section of article 1 of the constitution which gives to it the power "to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries." In the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550, the court held that "while this word, 'writings,' may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original, and are founded in the creative powers of the mind." In *Lithographic Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, the court ap-

proved the definition of "author" by Lord Justice Cotton in *Notage v. Jackson*, 11 Q. B. Div. 627, where the distinguished judge said: "In my opinion, 'author' involves originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph." In the *Sarony Case*, just cited, the court reserved the question as to whether an ordinary photograph was the subject of a copyright, but sustained a copyright upon a finding of fact that it was "a useful, new, harmonious, graceful picture, and that plaintiff made the same entirely from his own original mental conception, to which he gave mental form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression." In other words, the court found that a photograph might be something more than a mere mechanical and chemical product, and might rise to the dignity of art, through the blending of the mechanical parts of the process with the original intellectual conceptions of an artist. Commenting upon the fact that, under our copyright law, it is only necessary to deposit the title and two copies of the publication to secure a copyright, and that no tribunal, as is the case in respect of an application for a patent, is provided for passing upon the originality of the matter offered for copyright, the court in the same case said:

"It is therefore much more important that, when the supposed author sues for a violation of his copyright, the existence of those facts of originality, of intellectual production, of thought and conception on the part of the author should be proved than in the case of a patent right."

In *Higgins v. Keuffel*, 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470, the court, referring to the constitutional power of congress over the subject of copyrights, said:

"It does not have any reference to labels, which simply designate or describe the articles to which they are attached, and which have no value separated from the articles, and no possible influence upon science or the useful arts. A label on a box of fruit, giving its name as 'grapes,' even with the addition of adjectives characterizing their quality as 'black' or 'white' or 'sweet,' or indicating the place of their growth, as Malaga or California, does not come within the object of the clause. The use of such labels upon those articles has no connection with the progress of science and the useful arts. So a label designating ink as 'black,' 'blue,' or 'red,' or 'indelible,' or 'insoluble,' or as possessing any other quality, has nothing to do with such progress. It cannot, therefore, be held, by any reasonable argument, that the protection of mere labels is within the purpose of the clause in question. To be entitled to a copyright, the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."

In *Baker v. Selden*, 101 U. S. 99, 106, 25 L. Ed. 844, the court quote with seeming approval from the case of *Cobbett v. Woodward*, L. R. 14 Eq. 407, where it was held that an illustrated catalogue of furniture was not the subject of copyright when it was designed "solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles

which any other person might sell as well as the first advertiser." The same ruling was made by Woodruff, circuit judge, in *Collender v. Griffith*, Fed. Cas. No. 3,000. *Cobbett v. Woodward* has since been overruled, but, as pointed out by Jenkins, circuit judge, in *Iron Works v. Clow*, 27 C. C. A. 250, 82 Fed. 320, the cases overruling it are to some extent due to the difference between the English statutes and our own, and therefore not pertinent. In *Iron Works v. Clow*, cited above, the court of appeals for the Seventh circuit reached the conclusion that "mere advertisements, whether by letter, press, or by pictures, are not within the protection of the copyright law." The exigencies of the case in hand do not require that we should express any opinion upon the broad subject. It may be that a picture, or lithograph, or engraving, though intended to be reproduced in prints and used as an advertisement, is entitled to the protection of the copyright law, notwithstanding the use for which it is designed. In *Yuengling v. Schile* (C. C.) 12 Fed. 97, 101, a chromo entitled "*Gambrinus and his Followers*," intended as a glorification of lager beer drinking, and designed and circulated as an advertisement of the publisher's business as a lager beer brewer, was regarded by Brown, district judge, as the proper subject of copyright. The learned judge distinguished the matter from the case of *Cobbett v. Woodward*, *Collender v. Griffith*, and *Ehret v. Pierce* (C. C.) 10 Fed. 553, upon the ground that the copyrighted articles in these cases were not works of art, and had no value as such, and were mere modes of advertising. The chromo of *Gambrinus* in question, he held, was "a work of the imagination, and has such obvious artistic qualities as in my judgment render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it." To the same effect is the case of *Schumacher v. Schwencke* (C. C.) 25 Fed. 466, and the case of *Lamb v. Furniture Co.* (C. C.) 39 Fed. 474.

What we hold is this: that if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the "author" in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.

We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wal-

lace's show. No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error.

Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already announced. The judgment must be affirmed.

DOYLE et al. v. PERFECT CIGAR-SHAPER CO.

(Circuit Court of Appeals, Third Circuit. November 26, 1900.)

No. 11.

PATENTS—INFRINGEMENT—CIGAR SHAPERS.

The Ogden patent, No. 530,749, for a cigar mold consisting of a body and a cap transversely joined, one part having a projecting flange serving to guide the other part into place, and to retain the same by friction thereupon, held valid and infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Geo. C. Hazelton, Jr., and John Stokes Adams, for appellants.
C. N. Butler and F. P. Prichard, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. Prior to the invention to which patent No. 530,749 relates, the devices which were generally used, when any mechanical means were employed, to shape cigars, were designed to be opened and closed longitudinally. This construction was objectionable because the joints between the two parts of the mold formed a rib or fin upon the opposite sides of the "binder." To overcome this objection the patentee provided that his mold should be joined transversely. Transverse joining, however, was not new, and this was expressly conceded in the specification, where it is said:

"I am aware that transversely divided cigar molds have before been proposed, and I therefore do not claim broadly a cigar mold composed of two tubular parts with transverse joint."

Neither, it may be added, was it new to effect a transverse attachment by means of a socket-like connection. Such a connection was shown, for instance, in the patent granted to Edward A. Metz on September 5, 1871. What Ogden did invent and claim, so far as concerns the present case, is a cigar shaper having not simply a socket joint, but one which was of peculiar and novel structure, in that it consists of "a projecting flange serving to guide the other part into place and to retain the same by friction thereupon." In our opinion, the patent was rightly issued for this specific construc-

tion, and the only question, therefore, is as to whether the appellants' mold includes any means for guiding its parts into place and retaining them by friction, which, upon a natural and reasonable understanding of that term, as it is used in the patent, should be regarded as a projecting flange. That the one part is inserted in the other, and is there retained by friction, is apparent; but it is insisted that a projecting flange is not present, and that the frictional adherence of the two parts is due to several slots which the appellants have made in the cap portion of their device, and which are not found in that of the appellees. We cannot sustain either branch of this contention. We think that the appellants' "flare," though different in form, is substantially identical with the flange of Ogden. It has not the abrupt shoulder of the latter, but the same increased circumference is produced at the large end of one part of the mold, and a slight interior ridge is formed where this increase in circumference begins, and by these means there is attained, in substantially the same way, the same object as is accomplished by the inner contour of the patented contrivance; and, though the added slots to which we have referred may possibly be of some advantage, it is quite plain that they are, at most, merely supplementary to, and not substitutes for, the retaining means provided by the patent in suit. The judgment is affirmed.

OADES et al. v. PFOHL et al.

(District Court, W. D. New York. November 16, 1900.)

No. 3,843.

SHIPPING—BREACH OF CHARTER—INABILITY TO INSURE CARGO.

It was a condition of a parol charter of a sailing vessel to carry a cargo on the Great Lakes that the charterers should be able to procure insurance on the cargo. Owing to delays, the vessel did not arrive at the port of loading until November 14th, some two weeks after the time her agent had stated she ought to arrive, and, by reason of the fact that navigation by vessels of her class was considered extrahazardous at that season of the year, the charterers were unable to insure her cargo, and they refused to load her. They applied to but a single agency in Buffalo for insurance, but such agency represented a number of companies, and did a large business in marine insurance. It appeared that the charterers acted in good faith, and they paid a higher rate of freight for the carrying of the cargo by a larger vessel, which enabled them to effect insurance thereon. *Held*, that they were not liable for damages for a breach of the charter.

In Admiralty. Suit for breach of charter.

Harvey L. Brown, for libelants.

Potter & Wright, for respondents.

HAZEL, District Judge. This case in personam is brought by the libelants, owners of the sailing vessel *Ganges*, to recover \$345.51, damages sustained by them on account of the breach of the charter party entered into by the libelants and respondents. The libelants contend that on or about October 24, 1898, the respondents chartered the schooner *Ganges* to carry a cargo of pig iron from the port of

Manistique, Mich., to the port of Buffalo, at the freight of one dollar per ton, free of expense to the vessel; that is, without expense to the vessel for loading or unloading her cargo. The contract of charter was made with one Boland, who had special authority to contract for the carriage by the *Ganges* of 620 tons, her carrying capacity, of pig iron, of which respondents were the owners. The respondents contend that the charter of affreightment was dependent (1) on the condition that the cargo of pig iron, if loaded on the vessel, could be insured; (2) that the respondents reserved the right to charter a boat to take 1,241 tons of pig iron, of which they were the owners, and which was on wharf at Manistique, if a vessel could be secured for that purpose, unless the chartering agent found another vessel to take the balance of the pig iron, which the *Ganges* could not load. The conditions of the charter party, testified to by one of respondents, are denied by the chartering agent, except that he admits there was talk in reference to insurance on the cargo. On that point, when his attention is called thereto, on cross-examination, he says, "Mr. Pfohl, as I remember, said he would take the vessel if he could get insurance;" and at another part of his cross-examination he says, in answer to a question in regard to the insurance, "I don't exactly recollect, but I recollect him [respondent] mentioning the fact that if he could get insurance he would take the boat." The concession by the broker of libelants that at some time during the negotiations for the charter there was talk about insurance, and the testimony of the witness Pfohl, that in the first conversation had on the subject of the charter he inquired of Boland whether the cargo on the *Ganges* would be insurable, and that Boland replied in the affirmative, are corroborative of respondents' testimony that the question of insurance on the cargo—whether it could be obtained, no limit of time being specified—was part of the conversation that led to making the charter party by parol. I therefore hold that a condition of the charter party was that insurance on the cargo could be obtained. The question of respondents' inability to obtain insurance on the shipment after November 1st is important. The question naturally arises, did the respondents make reasonable and timely effort to obtain insurance on the cargo to be shipped on the *Ganges* after November 1st? What duty in that regard, and in the light of all the circumstances, did the respondents owe to the libelants before they could be relieved of their obligations created by the contract? The charter party was entered into on or about October 24, 1898. The season of navigation on the Great Lakes closes on or about December 5th of each year. The *Ganges* was a sailing vessel, and her carrying capacity was 620 tons. She was rated in the Inland Lloyd's as class A2, and the insurance for that class of vessels ended on the 30th of November. It appears from the testimony of Mr. Davis that it is doubtful if any insurance agent in Buffalo would take the risk on the *Ganges* after November 1st. The evidence shows that respondents applied for insurance on the pig iron about the middle of October, and that afterwards the underwriter was informed that the vessel was on her way with the cargo. With that explanation the risk was accepted. Subsequently the underwriter was informed that the boat

was not loaded,—that she was not on the way,—and he then stated to respondents that he would not insure the cargo after November 1st; that the Ganges at that period of the year, because of her class and her value of \$4,000, was a transient and extrahazardous risk. No further effort was made by respondents to obtain insurance for the shipment, but on November 12th they procured a charter of the tow barge Scotia, a vessel of class A2, valued at \$22,000, a larger and better vessel than the Ganges. Insurance on the cargo of pig iron was obtained from the underwriters who had refused to take the risk of the Ganges' cargo. November 14th the Ganges arrived at Manistique, having been greatly delayed by boisterous weather and adverse winds, and by time consumed in repairing a broken masthead. She left Buffalo on October 20th, laden with coal to Harbor Springs, a port distant about 24 hours' sail from Manistique. She was sheltered at Long Point until the 28th, and arrived in Huron on the 29th. She reached Lake Huron on the evening of November 2d, and on the 3d sailed to Sand Beach. Left there on the morning of the 5th, and arrived at Harbor Springs on the 9th. Unloaded her cargo of coal, and left Harbor Springs for Manistique, the morning of the 13th, arriving at that port on November 14th.

It is not claimed that any part of the delay in the arrival of the vessel in Manistique was attributable to her fault, or that it was caused to any extent by her negligence. There is evidence in the case that the chartering agent, at the time charter party was made, in answer to an inquiry of respondents, said she ought to arrive at Manistique in about a week. It is not urged that this statement was a condition of the charter, or that the contract of affreightment depended upon the arrival at a specified time of the vessel at Manistique. The statement made by the agent Boland, that she ought to arrive in about a week, cannot be considered as a condition precedent, nor is it apparent from the evidence in this case that it was a substantive part of the contract. I am of the opinion, however, that the charter of the Ganges was dependent on the condition that insurance for the freight could be procured.

Proctor for libelants contends that no such diligence was used to procure insurance as will relieve respondents from their contractual obligations; that, it not being shown that respondents endeavored to procure insurance of any other insurance agent or broker, they are estopped from now urging their inability to obtain insurance as a reason for absolving them from liability for breach of the charter party. I am unable to satisfy myself of the soundness of this contention; nor can I, from the evidence in the case, draw any inference which will point to that conclusion. The inferences deducible from the evidence show, or, at least, indicate, such efforts to procure insurance on the pig iron by the respondents as were reasonably diligent, in the light of existing facts. The lengthy delay of the Ganges on her voyage to Manistique was unexplained at any period of time between October 24th, when she left Buffalo, and her arrival at her place of destination, on November 14th. Her return trip, at that late season of the year, was to be at a time when storms on the lakes are most frequent and severe. The underwriters to whom application

for insurance was made represented at least three marine insurance companies, and evidence is undisputed that they conducted an extensive marine insurance business in 1898,—as large, if not larger, than any other agent in the city of Buffalo. All of the parties concerned knew of the perils of lake navigation in the month of November. Respondents' frequent inquiry of Mr. Boland as to when the *Ganges* would arrive to take on the pig iron is strong evidence of their anxiety to have their property speedily brought to its objective point. It is clear that insurance was rejected on the cargo as an unsafe risk, and therefore respondents were justified in seeking other vessels to carry their merchandise. It was apparent to them that insurance was not obtainable, and it was not obligatory on them at that season of the year to do more than make application for insurance in good faith to a marine underwriter engaged in the business of accepting marine risks. But respondents did more. Repeated conversations were had with the underwriters, and it was only on the approach of November 1st, and when no reason was assigned for the vessel's delay, that insurance was refused. The prevailing general custom to decline transient and extrahazardous risks at that season of the year is well known to those who engage in the business of navigating the lakes, and owners of vessels accepting shipments on the Great Lakes must be presumed to have knowledge of the common custom of insurance companies regarding rates and increased risks towards the close of the navigable season. To require the charterer to load a vessel when no insurance is obtainable would be a hardship which these parties could not have contemplated when the charter party was signed. It was so held in *The Vesta* (D. C.) 6 Fed. 534.

The record does not show that the respondents were actuated by any other motives than to avoid the risk of loss through their inability to obtain insurance on the cargo; and it is not contended that the insurance underwriters had any motive for declining to accept this risk, other than the lateness of the season, and the added perils and hazards of navigation arising therefrom. It is held that "a vessel is not liable for breach of contract for declining to take upon herself those perils by reason of the obstruction and perils incident to later navigation." *Eddy v. Steamship Co.* (D. C.) 79 Fed. 364. Applying that rule to this case, in the light of the evidence, how can it be said that the respondents did not do all that ought to be required of them at that season of the year? The contract of affreightment must be construed in furtherance of the intention of the parties. I have no difficulty in finding that the conversation had between Boland and Pfohl on the subject of insurance was a substantial and material element of the contract. The letter in evidence, written by Boland to Pfohl, dated October 20, 1898, stating that he could give the schooner *Ganges* for cargo at \$1 per ton free, and making no reference to any conditions, does not disturb the impressions which I have of the facts. There were other conversations in regard to the charter, both before and after writing the letter. In the view I take of the case, any other alleged conditions of charter need not be discussed, except that the payment of \$1.25 per ton to the *Scotia* for transporting the merchandise, being 25 cents more than it was agreed should

be paid to the libelants, is strongly corroborative of respondents' anxiety to have the shipment speedily brought to its port of discharge. Respondents in their answer aver that they sustained damages by reason of the failure of libelants to perform the agreement of charter, and that they were put to great expense, and were compelled to charter another vessel to transport their property, at an increased rate of freight. No cross libel was filed, and I do not understand that any claim for damages is urged. In any event, no recovery will be decreed against the libelants. Decree dismissing libel may be entered.

PETTIT v. ONE STEEL LIGHTER.

(District Court, E. D. New York. August 6, 1900.)

ADMIRALTY—AMENDMENT OF DECREE—EXPIRATION OF TERM.

A court of admiralty has no power to amend a final decree on petition or motion for a rehearing filed after the expiration of the term at which the decree was enrolled, even though error in its findings is shown.

In Admiralty. On petition for supplemental decree.

George H. Pettit, for the United States.

William B. King, for the captors.

THOMAS, District Judge. The final decree herein was entered on May 7, 1900, at a term which expired on June 5th. A petition for a supplemental decree was filed July 24th. The statute provides that the terms of this court shall begin on the first Wednesday of every month. Hence the May and June terms have expired since the entry of the decree. The court has no power to disturb its own judgment upon motion for a rehearing after the expiration of the term at which the decree was enrolled (*Snow v. Edwards*, 2 Low. 273, Fed. Cas. No. 13,145), although a bill of review after the expiration of the term may be entertained for certain purposes (*Thompson v. McIntosh*, [D. C.] 100 Fed. 890). Hence the court may not amend the decree herein, even if error in the findings be proven. But the suggested evidence of error is insufficient. The court is advised of the report of the navy department to the effect that the finding of the court as to the status of Lieut. Com. Marix is not in accordance with the records of the bureau of navigation, and that the status of Lieut. J. L. Purcell, commanding the *Osceola*, was the same as that of Lieut. Com. Marix. If the court were permitted to open the judgment, it would be embarrassed in the adoption of this opinion by the fact that on July 2d, Lieut. Purcell reported the engagement of the *Osceola* off Manzanillo directly to the commanding officer of the United States ship *Scorpion*, which is persuasive evidence that Lieut. Com. Marix was Lieut. Purcell's superior officer in the undertaking. When the question of equality or superiority arises at this time, Lieut. Purcell's practical recognition at that time furnishes a valuable guide to the fact. This recognition seems to conform to Navy Regulations, c. 2, art. 18, par. 4:

"At all times and places not specifically provided for in these regulations, where the exercise of military authority for the purpose of co-operation or otherwise is necessary, of which the responsible officer must be the judge, the senior line officer on the spot shall assume command and direct the movements and efforts of all persons in the navy present, subject to the limitations of article 1066."

It is true that Lieut. Com. Marix and his vessel were under the command of Rear Admiral Sampson, as the commander in chief of the United States naval forces, North Atlantic station, who in his turn was under the command of his superior; but apparently Lieut. Com. Marix, within his sphere of action, was independent. He was sent by Rear Admiral Sampson "on June 29th, and arrived off Cape Cruz on June 30th, with orders to report to the senior officer off that station, and with additional verbal orders from the chief of the staff to try to capture or destroy the Spanish gunboats reported to be in Manzanillo." See the report of Lieut. Com. Marix, under date of September 29, 1898 (appendix to the report of the chief of the bureau of navigation, navy department, 1898). Such report also states:

"Further information from him made me expect to find the Manning, Hist, Hornet, and Wompatuck off that place to assist in the attack. None of the vessels were there, but when the Osceola arrived that same afternoon we received permission from the commanding officer of the St. Louis, who was there temporarily, to go up and see what we could do."

The Scorpion and Osceola did go off Manzanillo to see what they could do, and were endowed with discretion to take action; such action undoubtedly being in furtherance of the general purpose and orders of the rear admiral. But, so far as the court is advised, at the time of the capture the Scorpion was not "under the command of the commanding officer of a fleet or squadron, or a division of a fleet or squadron," in the sense intended by section 4631, Rev. St. U. S., but was acting independently of such officer, albeit the general purpose of the attacking vessel was to carry out the general command of such officer. The commanding officer was between 100 and 200 miles away, and in fact did and could give no definite direction to the vessels. Indeed, they received nothing more than permission from the commander of the St. Louis to see what they could do, and the St. Louis was remote from the place of capture. Even if the court had power to amend the judgment at the present time, it would be unable to defer to the conclusion of the navy department without a satisfactory statement of the grounds of such conclusion. Pursuant to the foregoing views, the relief sought by the petition must be denied.

MEMORANDUM DECISIONS.

AMERICAN LOAN & TRUST CO. et al. v. LOUISVILLE, E. & ST. L. R. CO. (Circuit Court of Appeals, Seventh Circuit, October 2, 1900.) No. 738. Appeal from the Circuit Court of the United States for the District of Indiana. Alex. P. Humphrey, for appellants. Docketed and dismissed, on motion of counsel for appellants.

ARNOLD v. SHINE, U. S. Marshal. (Circuit Court of Appeals, Ninth Circuit, October 16, 1900.) No. 650. Appeal from the District Court of the United States for the Northern District of California. Henry E. Highton and Bert Schlessinger, for appellant. T. E. K. Cormac and Alex. Baum, for appellee. Judgment affirmed.

CAMDEN & S. RY. CO. v. STETSON. (Circuit Court of Appeals, Third Circuit.) Questions of law certified to the supreme court. 20 Sup. Ct. 617, 177 U. S. 172, 44 L. Ed. 721. See 104 Fed. 651.

CAMPBELL et al. v. STRATTON et al. SAME v. HOUTAIN. (Circuit Court of Appeals, Second Circuit, November 14, 1900.) Nos. 53, 54. Appeal from the Circuit Court of the United States for the Eastern District of New York. C. W. Miles and E. M. Harman, for appellants. Clifton v. Edwards, for appellees. Decree of circuit court affirmed, with costs, on opinion of Judge Thomas. See 101 Fed. 123.

CHASE v. UNITED STATES. (Circuit Court of Appeals, First Circuit, October 11, 1900.) No. 347. In Error to the Circuit Court of the United States for the District of Massachusetts. Jesse M. Gove, for plaintiff in error. Boyd B. Jones, U. S. Atty., and John H. Casey, Asst. U. S. Atty. Writ of error dismissed, on agreement of counsel, without costs.

CINCINNATI, H. & D. R. CO. v. THIEBAUD. (Circuit Court of Appeals, Sixth Circuit.) Transferred to the supreme court of the United States by writ of error. See 20 Sup. Ct. 822, 177 U. S. 615, 44 L. Ed. 911.

CINCINNATI, H. & D. R. CO. v. THIEBAUD. (Circuit Court of Appeals, Sixth Circuit.) Questions of law certified to the supreme court of the United States. 20 Sup. Ct. 822, 177 U. S. 615, 44 L. Ed. 911.

CRAWFORD v. HUBBELL. (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. 20 Sup. Ct. 701, 177 U. S. 419, 44 L. Ed. 829. See 89 Fed. 961.

DESSAUBER et al. v. ULFELDER. (Circuit Court of Appeals, Ninth Circuit. October 12, 1900.) No. 616. Appeal from the District Court of the United States for the Northern District of California. Crandall & Bull, Geo. Lezynsky, and Edward Myers, for appellants. Upon motion of F. P. Bull, appeal dismissed.

FARRELLY v. WIRT. (Circuit Court of Appeals, Second Circuit. November 15, 1898.) No. 38. Appeal from the Circuit Court of the United States for the Southern District of New York. George S. Prindle, E. A. Carley, James M. Townsend, and Prindle & Russell, for appellants. Walter S. Logan and Demand & Harby, for appellee.

PER CURIAM. The decree of the circuit court is affirmed, with costs, on opinion of said court. 84 Fed. 891.

FRANKS, Internal Revenue Collector, v. ROBARDS TOBACCO CO. (Circuit Court of Appeals, Sixth Circuit. October 2, 1900.) No. 888. In Error to the Circuit Court of the United States for the District of Kentucky. R. D. Hill, U. S. Atty., for collector. J. D. Powers, for Robards Tobacco Co. Dismissed on stipulation. See 103 Fed. 276.

In re GREGORY. (Circuit Court of Appeals, First Circuit. November 15, 1900.) No. 357. Application of Charles A. Gregory for a writ of certiorari to the circuit court of the United States for the district of Massachusetts. Francis A. Brooks, for petitioner. Thomas H. Talbot, for respondent. Petition dismissed, on motion of petitioner, without costs.

HICKS v. KNOT. (Circuit Court of Appeals, Sixth Circuit. October 9, 1900.) No. 736. Appeal from the District Court of the United States for the Southern District of Ohio. M. H. Winkler and W. A. Hicks, for appellant. Frank M. Coppock, for appellee. No opinion. Judgment affirmed. See 94 Fed. 625.

HICKS v. KNOT. (Circuit Court of Appeals, Sixth Circuit.) Questions of law certified to the supreme court of the United States. See 20 Sup. Ct. 1006, 178 U. S. 541, 44 L. Ed. 1183.

INTERSTATE COMMERCE COMMISSION v. CINCINNATI, N. O. & T. P. RY. CO. et al. (Circuit Court of Appeals, Sixth Circuit. October 12, 1900.) No. 472. Appeal from the Circuit Court of the United States for the Southern District of Ohio. Harlan Cleveland, L. A. Shaver, and Geo. F. Edmunds, for appellant. Ed. Baxter, Harman, Colston, Goldsmith & Hoadly, and Maxwell & Ramsey, for appellees. No opinion. Judgment affirmed. See 76 Fed. 183.

IOWA & ILLINOIS COAL CO. v. ATLANTIC TRUST CO. et al. (Circuit Court of Appeals, Seventh Circuit. July 23, 1900.) No. 711. Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. Samuel P. Wheeler, for appellee. Docketed and dismissed, on motion of appellee.

KEYES v. UNITED INDURATED FIBRE CO. (Circuit Court of Appeals, Second Circuit. November 15, 1898.) No. 4. Appeal from the Circuit Court of the United States for the Northern District of New York. Tracy C. Becker and William Macomber, for appellant. Frederick P. Fish, W. K. Richardson, and John E. Pound, for appellee.

PER CURIAM. The decree of the circuit court is affirmed, with costs, on opinion of said court. 82 Fed. 32.

In re LEWENSOHN. In re ISELIN et al. (Circuit Court of Appeals, Second Circuit. November 14, 1900.) No. 14. Petition to Review Order of the District Court of the United States for the Southern District of New York. Alexander Blumensteil, for William Iselin and others. E. J. Myers, for bankrupt. Order of district court affirmed, on opinion below. See 99 Fed. 73.

LITTLEFIELD v. UNITED STATES. (Circuit Court of Appeals, First Circuit. October 9, 1900.) No. 338. Charles W. Bartlett and Elbridge R. Anderson, for plaintiff in error. Boyd B. Jones, U. S. Atty., and John H. Casey, Asst. U. S. Atty. Writ of error dismissed, on motion of plaintiff in error, without costs.

LOUISVILLE TRUST CO. v. LOUISVILLE, E. & ST. L. R. CO. (Circuit Court of Appeals, Seventh Circuit. October 2, 1900.) No. 736. Appeal from the Circuit Court of the United States for the District of Indiana. Alex. P. Humphrey and St. John Boyle, for appellant. Docketed and dismissed, on motion of appellant.

NEW YORK SECURITY & TRUST CO. v. LOUISVILLE, E. & ST. L. R. CO. (Circuit Court of Appeals, Seventh Circuit. October 2, 1900.) No. 737. Appeal from the Circuit Court of the United States for the District of Indiana. Alex. P. Humphrey, for appellant. Docketed and dismissed, on motion of counsel for appellant. See 97 Fed. 226.

NORTH AMERICAN TRANSPORTATION & TRADING CO. v. SMITH et al. (Circuit Court of Appeals, Ninth Circuit. September 10, 1900.) No. 491. Appeal from the District Court of the United States for the Northern Division of the District of Washington. Frederick Bausman, for appellant. N. B. Bosley and James Kiefer, for appellees. Appeal dismissed. See 93 Fed. 7.

SCHREIBER v. RIPON KNITTING CO. et al. (Circuit Court of Appeals, Ninth Circuit. September 10, 1900.) No. 613. Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Washington. F. M. Dudley, for petitioner and bankrupt. Stern, Hamblen & Lund, for respondent. Petition for revision denied. See 101 Fed. 810.

SECURITY TRUST CO. v. BLACK RIVER NAT. BANK OF LOWVILLE (Circuit Court of Appeals, Eighth Circuit. October 17, 1900.) No. 1,356. In Error to the Circuit Court of the United States for the District of Minnesota.

Edmund S. Durment (Albert E. Moore, on the brief), for plaintiff in error.
Edward C. Stringer (McNeil V. Seymour, on the brief), for defendant in error.

THAYER, Circuit Judge. This case involves the same questions which were considered and decided in the case of *Trust Co. v. Dent*, 104 Fed. 380. The judgment below is accordingly affirmed, on the authority of that case.

In re SHWEITZER. (Circuit Court of Appeals, Second Circuit. November 14, 1900.) Appeal from the District Court of the United States for the Southern District of New York. Motion for the allowance of an appeal. L. J. Morrison, for the motion. Joseph F. Peadue, opposed.

PER CURIAM. It seems to be entirely clear upon the conceded facts that no appeal from the judgment of the district court denying discharge was taken within the proper time. Section 25 of the bankruptcy act provides that "appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States: * * * (2) From a judgment granting or denying a discharge. * * * Such appeal shall be taken within ten days after the judgment appealed from has been rendered." Rule 36 of the general rules in bankruptcy (32 C. C. A. xxxvi.; 89 Fed. xiv.) is as follows: "Appeals from a court of bankruptcy to a circuit court of appeals, or to the supreme court of a territory, shall be allowed by a judge of the court appealed from or of the court appealed to, and shall be regulated, except as otherwise provided in the act, by the rules governing appeals in equity in the courts of the United States." It is elementary law that the time to appeal, thus limited by statute, cannot be extended by the court. Within the 10 days a notice of appeal in the form used in the state courts was served on the attorney for creditors and filed in court; but at no time within such 10 days was there any petition of appeal presented to the court or judge, or allowed, or filed, or any citation presented, or signed, or allowed, or filed, or any bond prepared, or presented, or approved, or filed, or any assignment of errors filed. Whatever may have been held as to the effect of a failure to take one or more of these steps, all of which are required by statute or rule, it is quite manifest that, where all of them are lacking, there has been no appeal.

SMITH v. WELLS, FARGO & CO. (Circuit Court of Appeals, Ninth Circuit. October 1, 1900.) No. 590. In Error to the Circuit Court of the United States for the Southern District of California. C. N. Sterry, for plaintiff in error. E. S. Pillsbury, for defendant in error. Upon motion of E. S. Pillsbury, cause dismissed. See 96 Fed. 375.

SOUTHWESTERN COAL & IMPROVEMENT CO. et al. v. McBRIDE et al. (Circuit Court of Appeals, Eighth Circuit. October 24, 1900.) No. 1386. Appeal from the United States Court of Appeals in the Indian Territory. Clifford L. Jackson and Joseph M. Bryson, for appellants. G. A. Pate, Yancey Lewis, and J. H. Gordon, for appellees.

CALDWELL, Circuit Judge. The only question in this case was decided by the court in the case of *Mining Co. v. Adams*, 104 Fed. 471; and on the authority of that case the judgment of the United States court of appeals for the Indian Territory, and the judgment of the United States court for the Central district of the Indian Territory, in this case, are affirmed.

WEST v. BARTH. (Circuit Court of Appeals, Sixth Circuit. November 28, 1898.) No. 662. In Error to the Circuit Court of United States for the

Western District of Michigan. George P. Wanty (Niram A. Fletcher, on the brief), for plaintiff in error. Willis B. Perkins (J. Byron Judkins, on the brief), for defendant in error. No opinion. Judgment affirmed.

WHALEN v. CHICAGO, M. & ST. P. RY. CO. (Circuit Court of Appeals, Seventh Circuit. July 23, 1900.) No. 712. In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. Charles B. Keeler, for defendant in error. Docketed and dismissed, on motion of counsel for defendant in error.

WHITE v. SCHLOERB. (Circuit Court of Appeals, Seventh Circuit.) Questions of law certified to the supreme court of the United States. See 20 Sup. Ct. 1007, 178 U. S. 542, 44 L. Ed. 1183.

WHITEBREAST FUEL CO. v. ATLANTIC TRUST CO. et al. (Circuit Court of Appeals, Seventh Circuit. July 23, 1900.) No. 710. Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. Samuel P. Wheeler, for appellees. Docketed and dismissed, on motion of appellees.

END OF CASES IN VOL. 104.